

*Special Committee on Judicial Election Campaign Intervention
2018 Judicial Elections*

2018-27 Opinion

The Special Committee received complaints against judicial candidates P and Q.

1. Required Statutory Language on Campaign Signs

The complaint against P alleges that his campaign signs do not have the language required by statute. In response, P's committee stated that the signs should have included the language but that oversight was inadvertent and that it will be corrected the next time campaign signs are printed.

Mississippi Code Annotated section 23-15-1025 requires "any material is distributed by a judicial candidate or his campaign committee . . . shall state that it is distributed by the candidate or that it is being distributed with the candidate's approval. All such material shall conspicuously identify who has prepared the material and who is distributing the material. The identifying language shall state whether or not the material has been submitted to and approved by the candidate. . . ." Section 23-15-897(2)(a) requires that "[n]o candidate, political committee or other person shall publish, or knowingly cause to be published, any campaign materials unless it contains the following information [t]he name of the candidate along with a statement that the message is approved by the candidate." *See* Opinion 2018-25.

Based on the photograph of the campaign signs provided, the Special Committee finds that P's signs are in violation of sections 23-15-897 and 23-15-1025. In Opinion 2018-01, the Special Committee ruled that such language was not required to be included on any such very small promotional item. Campaign yard signs should have the required disclaimer.

The Special Committee orders P and his committee to immediately place the required statutory language on all campaign signs or remove such signs from public view.

2. Sample Ballots and Democrat Newspaper Ad

The complaint against P alleges that his campaign is in violation of the restriction on partisan political campaigns. There are two similar allegations.

First, in the General Election, Democratic sample ballots were printed and distributed that show P as the preferred candidate. P was listed as the preferred candidate for Democrat voters, along with Mike Espy, David Baria, Michael Ted Evans, and others.

Second, a newspaper advertisement was placed in "The Enterprise Journal" that urged voters to "Remember to vote for the local Democratic candidates on Election Day." It included pictures of "Democratic" candidates: Mike Espy - US Senate; David Baria - US Senate, Michael

Ted Evans - Congress, and P. The advertisement stated that it was paid for by the “Pike County Democratic Party.”

Canon 5C(1) of the Code of Judicial Conduct provides that “Judges holding an office filled by public election between competing candidates . . . may, only insofar as permitted by law, . . . identify themselves as members of political parties” Further, Mississippi Code Annotated section 23-15-976 provides:

A judicial office is a nonpartisan office and a candidate for election thereto is prohibited from campaigning or qualifying for such an office based on party affiliation. [The rest of this statute was declared unconstitutional in *Mississippi Republican Party v. Musgrove*, 3:02CV1578WS (S.D. Miss. 2002)].

The United States Supreme Court and other federal courts have issued decisions on judicial elections.¹

Based on the information provided, the Special Committee does not find sufficient evidence to determine that P or his committee are in violation of the Code of Judicial Conduct or Mississippi election laws in the preparation and distribution of sample ballots, even though P was included as the preferred candidate. Nevertheless, the Special Committee orders judicial candidates, their committees and staff to cease and desist in the preparation or distribution of such sample ballots or newspaper advertisements if such includes candidates from a political party.

3. Campaign Finance Reporting - By P’s Committee

The complaint alleges P violated campaign finance reporting laws by the failure to report the expense of sample ballots and newspaper ad as an in-kind expenditure.

Mississippi Code Annotated section 23-15-805(a) requires that “[c]andidates . . . and every political committee, which makes reportable . . . expenditures in support of or in opposition to a candidate for any such office . . . shall file all reports required under this article with the Office of the Secretary of State. . . .”

Section 23-15-807(a) requires candidates and political committees to “file reports of contributions and disbursements in accordance with the provisions of this section. . . .” Subsection (b) requires “candidates . . . and political committees making expenditures to

¹ See *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002); *Caperton v. A.T. Massey Coal Co., Inc.*, 129 S.Ct. 2252, 2259, 173 L.Ed.2d 1208 (2009); and *Williams–Yulee v. Fla. Bar*, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015); *Carey v. Wolnitzek*, 614 F.3d 189 (6th Circuit 2010); *Winter v. Wolnitzek*, 834 F.3d 681, 689 (6th Cir. 2016); *Siefert v. Alexander*, 608 F.3d 974 (7th Circuit 2010), *cert. denied*, 131 S. Ct. 2872 (2011); and *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005), *cert. denied*, *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006).

influence or attempt to influence voters for or against the nomination for election of one or more candidates . . . shall file . . . reports.”² Subsection (d) provides:

Each report under this article shall disclose:

- (i) For the reporting period . . . the total amount of all expenditures of the candidate or reporting committee, including those required to be identified pursuant to paragraph (ii) of this subsection (d)
 - (ii) The identification of: . . .
 - 2. Each person or organization, candidate or political committee who receives an expenditure, payment or other transfer from the reporting candidate, political committee or its agent, employee, designee, contractor, consultant or other person or persons acting in its behalf during the reporting period when the expenditure, payment or other transfer to the person, organization, candidate or political committee within the calendar year have an aggregate value or amount in excess of Two Hundred Dollars (\$200.00) together with the date and amount of the expenditure;
 - (iv) In addition to the contents of reports specified in paragraphs (i), (ii) and (iii) of this subsection (d), each political party shall disclose: . . .
 - 1. Each person or political committee who makes a contribution to a political party during the reporting period and whose contribution or contributions to a political party within the calendar year have an aggregate amount or value in excess of Two Hundred Dollars (\$200.00), together with the date and amount of the contribution;
 - 2. Each person or organization who receives an expenditure or expenditures by a political party during the reporting period when the expenditure or expenditures to the person or organization within the calendar year have an aggregate value or amount in excess of Two Hundred Dollars (\$200.00), together with the date and amount of the expenditure;
- . . .

First, the complaint contends that P’s campaign failed to report the expenditures for the sample ballots and the newspaper advertisement as in-kind contributions. The Special Committee does not have sufficient evidence to determine that P or his committee had knowledge of the preparation and distribution of the sample ballots or the newspaper advertisement. As such, the Special Committee does not find P or his committee had a reporting requirement for such third-party expenditures.

² Section 23-15-801(f) defines expenditures to “include any purchase, payment, distribution, loan, advance, deposit, gift of money or anything of value, made by any person or political committee for the purpose of influencing any . . . election for elective office; and a written contract, promise, or agreement to make an expenditure.”

Second, the complaint contends that P's campaign failed to properly report expenditures for media purchases. Specifically, the complaint alleges that P's committee failed to report the expenditure of campaign funds on radio advertisements on WFFF-FM Columbia, MS and at WJKX-FM Laurel and Hattiesburg. P's committee provided the following response:

[P]'s campaign has not purchased radio ads. The strategy behind selecting radio stations and placing advertisements is well outside [P]'s expertise. His campaign paid a consultant, [R] Strategies, which created, placed, and paid for the ads. The cost of creation, design, and placement was then billed by the consultant to the campaign committee, which paid the consultant. The payments to the consultant were properly reported. Simply put, the campaign did not report expenditures it did not make. The campaign paid [R] Strategies and has reported those expenditures. That is all the law requires of the campaign: it reports its expenditures, not other people's expenditures."

Section 23-15-807 requires that committees report contributions and expenditures. This statute was recently amended to require additional information. Subsection (d) now requires:

Each report under this article shall disclose: . . .

- (ii) The identification of: . . .
 - 2. Each person or organization . . . or political committee who receives an expenditure, payment or other transfer from the reporting candidate, political committee or its agent, employee, designee, contractor, consultant or other person or persons acting in its behalf during the reporting period when the expenditure, payment or other transfer to the person, organization, candidate or political committee within the calendar year have an aggregate value or amount in excess of Two Hundred Dollars (\$200.00) together with the date and amount of the expenditure

Section 23-15-807 requires that P's committee not only report an expenditure to R Strategies. Indeed, R Strategies was the committee's "agent, . . . , contractor, consultant or other person acting on its behalf." Based on the response of P's committee, the Special Committee is of the opinion that section 23-15-807 requires the disclosure of each person or organization or political entity who "receive[d] an expenditure, payment or other transfer" from R Strategies. Thus, the Special Committee finds P's committee in violation of section 23-15-807(d)(ii)(2) and orders P's committee to file an accurate campaign finance report with the Secretary of State's office within twenty-four hours of the release of this opinion and to include such information in all subsequent reports. This report should comply with section 23-15-807(d)(ii)(2) and identify each and every person, organization or political entity who "receive[d] an expenditure, payment or other transfer" from R Strategies.

4. Campaign Finance Reporting - by Others.

The complaint also alleges violation of campaign finance reporting laws by the individuals organizations or political parties' failure to report the expense of sample ballots and newspaper advertisement.

Mississippi Code Annotated section 23-15-803 provides:

- (1) Each political committee shall file a statement of organization which must be received by the Secretary of State no later than forty-eight (48) hours after . . . (b) Having made expenditures aggregating in excess of Two Hundred Dollars (\$200.00).
- (2) The content of the statement of organization of a political committee shall include: (a) The name, address, officers, and members of the committee; (b) The designation of a chair of the organization and a custodian of the financial books, records and accounts of the organization, who shall be designated treasurer; and (c) If the committee is authorized by a candidate, then the name, address, office sought and party affiliation of the candidate.
- ...
- (4) In addition to any other penalties provided by law, the Mississippi Ethics Commission may impose administrative penalties against any political committee that fails to comply with the requirements of this section in an amount not to exceed Five Thousand Dollars (\$5,000.00) per violation. The notice, hearing and appeals provisions of Section 23-15-813 shall apply to any action taken pursuant to this subsection (4). The Mississippi Ethics Commission may pursue judicial enforcement of any penalties issued pursuant to this section.

Also, Mississippi Code Annotated section 23-15-805(a) requires that “[c]andidates . . . and every political committee, which makes reportable . . . expenditures in support of or in opposition to a candidate for any such office . . . shall file all reports required under this article with the Office of the Secretary of State. . . .”

The complaint included copies of sample ballots paid for by “Espy for Senate,” “Friends of Bennie Thompson,” and “Jones County Democratic Executive Committee.” The newspaper advertisement indicated that it was paid for by “Pike County Democratic Party.” A review of the Mississippi Secretary of State’s website – Campaign Finance Filing Search does not indicate that any of these organizations or political committees have filed a required campaign finance report. The Special Committee has determined that such organizations and committees were required to file a report.

The Special Committee, by copy of this opinion, refers this matter to the Mississippi Ethics Commission to investigate and determine whether these organizations have expended more than \$200 for the benefit of judicial candidate P. If so, these organizations may be prosecuted for violation of section 23-15-803 and 805.

5. False and Misleading Statements about the Candidates

The Special Committee has also received complaints against Q and P alleging that each candidate has made and continues to make false and misleading statements about the other.

Canon 5(A)(3)(d)(iii) provides that a candidate for judicial office “shall not knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.”

There are allegations that each candidate has published or distributed false or misleading campaign material and social media posts.

The complaint against P’s campaign complains of a message that “Experience Matters.” The message then indicates that P has had 77 cases ruled on by the Mississippi Supreme Court and Court of Appeals, while Q has had 1 case ruled on by the courts. Other material argues that P has “more than 8 times the experience of” Q. Q’s campaign argues that these claims are simply false. Instead, Q has an extensive record of “cases ruled on by the Mississippi Supreme Court and Court of Appeals.” In fact, he claims “more than 119 cases.” The complaint asks that the Special Committee intervene and require P to accurately account for Q’s experience or to remove these erroneous references to appellate experience and refrain from misleading voters in a similar fashion going forward.

The complaint against Q’s campaign complains that he has a comparison chart that is “intentionally deceptive” and measures “apples to oranges” because it indicates:

	<u>Q</u>	<u>P</u>
Cases Decided on Appeal	119	75
Cases Affirmed	81.5%	22%

P’s campaign has submitted a graphic to the Special Committee that states:

Experience matters. Number of appeals litigated at the Mississippi Supreme Court and the Mississippi Court of Appeals.

77 appeals	1 appeal
P	Opponent

Each candidate has decided how to use data and information to establish their claim to be “most qualified.” In fact, the two candidates have a different type of experience – P advocates that he has had more cases on appeal, and Q advocates he has had more success on appeal. The Special Committee is of the opinion that the candidates have a First Amendment right to select their message to the voters. Further, the Special Committee lacks sufficient information to determine the truth or falsity of such claims. Therefore, the Special Committee declines to take action on either of these allegations.

6. Improper Statements by the Candidates

The complaint against Q alleges that there were improper statement in recent Facebook posts. The complaint asserts that it was improper for the Q campaign to use the following terms:

- “The Choice: Conservative or Liberal on November 27th.”
- P “opposes 2nd Amendment rights.”
- Q is “Conservative” and is:
 1. Endorsed by business and conservatives,
 2. Former Republican Councilman,
 3. Pro Family, and
 4. Avid Hunter and Outdoorsman.
- This is contrasted P who is listed as “Liberal” and he:
 1. Supported Barack Obama,
 2. Supported Hillary Clinton,
 3. Abortion Defender, and
 4. Attacked and opposed 2nd Amendment Rights.

The complaint argues that this post is intentionally misleading and deceptive in violation of Canon 5A(3)(d)(iii). As to the statement that P “opposes 2nd Amendment rights,” the complaint alleges it is an unsupported falsehood and it violates Canon 5(C)(3)(d)(iii). Yet, the complaint provided no information from P that would support the complaint.

The complaint also contends that Q’s statements that he is “Conservative,” is endorsed by business and conservatives, a former Republican Councilman, Pro Family, and an avid hunter and outdoorsman, as contrasted by P who is listed as “Liberal”, “Supported Barack Obama,” “Supported Hillary Clinton,” an “Abortion Defender,” and “attacked and opposed 2nd Amendment right, violates the non-partisan requirement of judicial elections and appears to commit Q to a position regarding a case or issue that is likely to come before the Mississippi Court of Appeals.

Canon 5C(3)(d) provides that a candidate for judicial office shall not: “(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office(ii) 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; or (iii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent.” The Commentary adds:

Section 5A(3)(d)(i) prohibits a candidate for judicial office making pledges or promises to decide cases in any particular way and statements committing the candidate with respect to cases, controversies or issues likely to come before the court on which the candidate will serve if elected. This section does not prohibit or limit a candidate’s freedom to announce the candidate’s current views on issues so long as the announcement does not bind the candidate to maintain those views after election. See *Republican Party of Minn. v. White*, 536 U.S. 765 (2002)

(declaring unconstitutional restrictions in the Minnesota Code of Judicial Conduct on the announcement of views on legal and political issues.) The comparable offending language, referred to as the “announce clause”, formerly appeared in our Code of Judicial Conduct, but was removed with the revision of the code on April 4, 2002. . . .

Section 5A(3)(d)(ii) prohibits a candidate for judicial office making statements that appear to commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate's duty to uphold the law regardless of the candidate's personal views. . . .

Section 5A(3)(d) applies to any statement made in the process of securing judicial office . . . See also Rule 8.2 of the Mississippi Rules of Professional Conduct. Phrases such as “tough on crime,” “soft on crime,” “pro-business,” “anti-business,” “pro-life,” “pro-choice,” or in any similar characterizations suggesting personal views on issues which may come before the courts, when applied to the candidate or an opponent, may be considered to be prohibited by Section 5A(3)(d) only when used in a context which contain a pledge or promise to decide cases in a particular manner.

The Special Committee is of the opinion that the claims made in the Facebook post are protected speech under the First Amendment. Further, the Special Committee is of the opinion that the issues relating to abortion and the 2nd Amendment are not pledges or promises to decide cases in any particular way or statements committing the candidate with respect to cases, controversies or issues likely to come before the Court of Appeals.

As to the statement that Q claims to be a “Republican” Councilman, the Special Committee issued Opinion 2018-10 where the Special Committee determined that it was a true and accurate statement of a position that the Candidate previously held. Here, the statement is allowed under Opinion 2018-10.

This opinion is limited to the scope and authority of the Special Committee under the Mississippi Code of Judicial Conduct.

Any questions should be in writing and directed to:

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