STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

ORDER FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA CODE OF JUDICIAL CONDUCT

IT IS HEREBY ORDERED that a hearing be had before this court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on May 26, 2004 at 2:00 p.m., to consider the report filed on April 15, 2004, by the Supreme Court Advisory Committee to Review the Minnesota Code of Judicial Conduct and Rules of the Board on Judicial Standards. The committee has proposed amending Canons 3 and 5 of the Code of Judicial Conduct. A copy of the report is annexed to this order.

IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King, Jr. Boulevard, St. Paul, Minnesota 55155, on or before May 19, 2004, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before May 19, 2004.

Dated: April 19, 2004

BY THE COURT:

OFFICE OF
APPELLATE COURTS
APR 19 2004
FILED

Kathleen A. Blatz
Chief Justice

REPORT OF THE ADVISORY COMMITTEE TO REVIEW THE MINNESOTA CODE OF JUDICIAL CONDUCT AND THE RULES OF THE BOARD ON JUDICIAL STANDARDS

C4-85-697

April 15, 2004

Professor E. Thomas Sullivan, Chair

Duane Benson
Honorable James Clark
Honorable Lawrence Collins
Christopher Dietzen
Judy Duffy
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Honorable John Holahan
Robert M.A. Johnson
Kenneth Jorgensen
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Honorable Vicki Landwehr
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Lawrence Redmond
M. Jacqueline Regis
Honorable Edward Toussaint

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Ex Officio Member

Hon. Alan Page
Supreme Court Liaison

Christopher Ruhl
Walter Burk
Staff

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ACKNOWLEDGEMENTS

The Minnesota Supreme Court Advisory Committee to Review the Minnesota Code of Judicial Conduct and the Rules of the Board on Judicial Standards ("the Committee") would like to thank each person who contributed to the efforts of the Committee and participated in the discussion of the many issues considered by the Committee. The Committee is particularly grateful to the following individuals for their insightful contributions to its deliberations on the issues connected to the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) ("*RPM*"), as well as the Eighth Circuit's recent (March 16, 2004) decision on remand in *RPM*:

- Alan Gilbert, Heins Mills & Olson, PLC (Solicitor General for the Minnesota Attorney General's Office at the time of *RPM*)
- Cynthia Gray, Director, Center for Judicial Ethics, American Judicature Society

The Committee is also grateful to the American Bar Association's ("ABA") Standing Committees on Judicial Independence and on Ethics and Professional Responsibility (Judicial Division) for their work on the August 2003 Revisions to the ABA Model Code of Judicial Conduct in response to the United States Supreme Court's decision in *RPM*.

The Committee would like to thank the citizens, lawyers and judges who submitted written comments on the Committee's Report, and who attended the Committee's April 2, 2004 public hearing, for providing comments and the public's perspective.

The Committee gratefully acknowledges the support provided by David S. Paull, Executive Secretary of the Board on Judicial Standards, and Chris Ruhl and Walter Burk, Committee Staff, from the Court Services Division of the State Court Administrator's Office. The Committee also acknowledges the additional assistance provided by the staff of the Court Services Division and the University of Minnesota Law School, including Jackie Geiger, Kim Wells and Rosemary Rogers.

Professor E. Thomas Sullivan, University of Minnesota Law School

Chair, Minnesota Supreme Court Advisory Committee to Review the Minnesota Code of Judicial Conduct and the Rules of the Board on Judicial Standards

April 15, 2004

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COMMITTEE BACKGROUND

The Committee was established by the Minnesota Supreme Court on December 9, 2003, to consider changes to the Rules of the Board on Judicial Standards ("the Board Rules") and the Code of Judicial Conduct ("the Code"). In particular, the Supreme Court directed the Committee to consider:

1. Expanding the jurisdiction of the Board over non-incumbent judicial candidates to promote and facilitate uniform enforcement of the Code;
2. Revising Canon 5 of the Code in light of recent legal developments (in particular the U.S. Supreme Court decision in *RPM*);
3. Options such as diversion for judges suffering from chemical dependency or mental illness;
4. Revising Canon 3A(8) of the Code to conform to its counterpart in the ABA Model Code of Judicial Conduct (Aug. 1990); and
5. The proposed changes to Canon 2C of the Code recommended by the Minnesota State Bar Association, and comments submitted to the Court in response thereto.

The Committee was given until April 15, 2004 to submit its report and recommendations to the Court. Given the short timeframe for completing its work, the Committee requested and was granted permission by the Court to prioritize Issues 1, 2 and 4 above relating to judicial election campaigns. This was deemed necessary in order for the Committee to complete its report on those recommendations by April 15, 2004 so as to enable the Court to adopt proposed Code and / or Board Rules changes in time for the 2004 judicial elections cycle. The Committee will then reconvene to consider Issues 3 and 5 above after April 15, 2004.

The full Committee met in December 2003, February 2004 and following the public hearing on the draft report in early April 2004. To expedite its work on judicial election campaign issues, the Committee divided into two subcommittees – one to address Issues 1 and 4 above and one to address Issue 2 above. In considering possible revisions to Canons 3 and 5 of the Code, both subcommittees considered: (1) the analogous 1990 ABA Model Code of Judicial Conduct provisions; (2) the August 2003 ABA amendments to the analogous Model Code provisions; and (3) recent amendments of analogous provisions in the judicial ethics codes of other states. Finally, the Committee has considered comments made by citizens, lawyers and judges who have attended Committee meetings and the public hearing, and / or have provided written materials. The Committee also solicited input from a variety of individuals, professionals, agencies, and groups having experience and/or an interest in judicial ethics and judicial elections.

REPORT FORMAT, DISTRIBUTION AND DISCUSSION

The Committee has recommended no changes to the Board Rules at this time. However, it has made recommendations concerning the relationship between the Board on Judicial Standards ("Board") and the Office of Lawyers Professional Responsibility ("OLPR") and the Lawyers Professional Responsibility Board ("LPRB"). Therefore this report will present the recommendations of the Committee in three main sections:

1. Recommendations concerning the jurisdiction of the Board and the relationship between the Board and OLPR / LPRB;
2. Recommendations for revisions to Canons 3 and 5 of the Code; and
3. New Advisory Committee Comments to Canons 3 and 5 of the Code.

During Committee and subcommittee discussions of Code restrictions concerning judge and judicial candidate speech and political activities, there was a difference of opinion among Committee members concerning several proposed Code revisions and / or new Comment language. In several cases this led to a vote by show of hands on specific proposals. The proposed recommendations for revisions to the Canons and for new Comments reflect the majority position on those proposals. The minority positions are noted in this report.

Consistent with the current structure and format of the Code, the Committee's proposed new Comment language is presented as a separate, new Comments section to be included at the end of the Code following the existing Comments of the 1994 / 1995 Advisory Committee. The Committee considered the alternative of proposing amendments to the Comments of the 1994 / 1995 Advisory Committee. However, in light of the status and nature of the existing Comments, the consensus of the Committee is that the better approach is to include its proposed Comments separately from those of the prior Advisory Committee.[1]

The following summary of Committee recommendations explains the areas of significant change and highlights the issues that generated the most debate by the Committee and/or significant comment from the public.

A draft of this report and its recommendations was circulated electronically to all state court judicial officers and to other individuals and groups who either have expressed interest or may be interested in the Committee's work, and was the subject of a public hearing on April 2, 2004. Two citizens testified at the public hearing, and the Committee received written comments from judges, lawyers and citizens. The Committee also received comments from judges and lawyers during the course of its deliberations, and received input from several lawyers who were either directly involved in the *RPM* case or have closely followed subsequent developments at the national level since the *RPM* decision.

[1] It is possible that the structure of the Code could be improved by transferring the existing definitions in the Comments to a Terminology section of the Code and by adopting official Comments to the Canons. However, the Committee believes that consideration of such structural changes would have been beyond the Committee's limited mandate.

RECOMMENDATIONS – BOARD JURISDICTION AND RELATIONSHIP BETWEEN THE BOARD AND OLPR / LPRB

The Supreme Court asked the Committee to consider expanding the jurisdiction of the Board over non-incumbent judicial candidates – in particular, attorney candidates for judicial office – in order to promote and facilitate uniform enforcement of the Code. Committee discussions around this issue stressed the different processes, resources and general ways of operating between the Board on the one hand, and OLPR / LPRB on the other. In particular, it was acknowledged that the Board currently lacks sufficient resources to take on prosecution of the complaints against attorney candidates for judicial office that would result from extending the jurisdiction of the Board to such candidates. Conversely, policy considerations militate against giving OLPR / LPRB authority to prosecute incumbent judicial candidates.

The Committee also considered the alternative of creating a hybrid body (including representatives from both the Board and OLPR / LPRB) that could respond promptly to complaints against all judicial candidates (both incumbents and non-incumbents). The Committee decided against this recommendation, primarily because of the lack of resources to create or maintain it, and particularly the lack of resources available to the Board to provide adequate representation on such an additional body. Additionally, creating a combined or hybrid board to process such complaints would require legislative change and approval.

The Committee also noted current legislative proposals to give the Campaign Finance Board authority for initially processing complaints arising from all types of election campaigns, including judicial campaigns. However, there was concern that the Campaign Finance Board, because of its composition and its primary focus on finance and disclosure issues, would not be a suitable body to address complaints arising from candidate conduct in non-partisan judicial campaigns. It was also suggested that the Supreme Court should not relinquish jurisdiction over complaints concerning judicial campaigns. Finally, even if approved, the current legislative proposal would not be implemented until the 2005 election cycle (2006 for judicial elections) at the earliest.

In light of the above considerations, the Committee unanimously agrees to the following recommendations:

(1) The OLPR should provide to the Board copies of its files on all judicial complaints and information on how those complaints were resolved. This would require revisions to the OLPR's current confidentiality rules.

(2) The OLPR and the Board, together with the LPRB, should meet and confer before each judicial election cycle to discuss possible judicial election issues and set up a process to provide for interfacing between the three bodies in addressing any complaints arising against judicial candidates (both incumbents and non-incumbents). Consultations among these three groups should also occur after

either the Board or the OLPR receives a complaint arising out of a judicial election.

(3) Both the OLPR and the Board should jointly participate in biennial seminars on judicial election ethics before each election cycle for incumbent and non-incumbent candidates.

Thus the Committee acknowledges that it reached no definitive resolution of the main issue identified by the Supreme Court concerning the jurisdiction of the Board. However, the Board and OLPR / LPRB will continue to work together within the existing legal framework to address the existing concerns (including concerns about consistent enforcement of the Code against incumbent and non-incumbent judicial candidates), and it is hoped that future changes in the law may open up the possibility for a more definitive solution.

RECOMMENDATIONS – REVISIONS TO CANONS 3 AND 5 OF THE CODE OF JUDICIAL CONDUCT

BACKGROUND

Following is a summary of the Committee's recommended revisions to Canons 3 and 5 of the Code of Judicial Conduct. At the end of this report, following the summary and the proposed new Comment language to Canons 3 and 5, is the text of the relevant portions of Canons 3 and 5, with new language indicated by underline and deletions by ~~strikeout~~. The revisions also include a technical amendment to the Application Section of the Code required by the proposed revision to Canon 3.

In considering changes to Canons 3 and 5, the Committee looked for guidance to the recent (August 2003) ABA amendments to Canons 3 and 5 of the ABA Model Code of Judicial Conduct ("Model Code") made in response to the U.S. Supreme Court's decision in *RPM*. In the Report accompanying the ABA amendments, the Standing Committees on Judicial Independence and Ethics and Professional Responsibility carefully analyzed the impact of *RPM* and explained how the amendments were crafted to ensure that the Model Code is in conformity with the *RPM* majority opinion.[2] The ABA amendments attempt to balance the interest of preserving judicial impartiality, integrity and independence with the First Amendment rights of judges and judicial candidates. The Report notes that in light of *RPM*, restrictions on judicial speech will most likely survive constitutional challenge if they are:

1. Supported by a definition of "impartiality" to be added to the Code of Judicial Conduct, that comports with the discussion of impartiality in the majority opinion in *RPM*;
2. Narrowly crafted to further the compelling state interest in judicial impartiality; and
3. Imposed on judges in connection with all of their judicial duties, in response to the *RPM* majority's criticism that Minnesota's "Announce Clause" restriction was underinclusive.[3]

CANON 3

I. Canon 3A

The Supreme Court asked the Committee to consider revising Canon 3A(8) of the Code of Judicial Conduct to conform to its counterpart in the ABA Model Code. The current Minnesota Canon needs to be revised primarily because of a concern that it is not sufficiently

[2] *See generally* American Bar Association, Standing Committees on Judicial Independence and Ethics and Professional Responsibility (Judicial Division), *Amendments to the Model Code of Judicial Conduct* (Aug. 2003), http://www.abanet.org/judind/judicialethics/amendmentsrevision.pdf.
[3] *See id.* at 10.

narrowly tailored to promote the primary interest at stake, which is to maintain both the appearance and reality of fair and impartial resolution of all cases that come before the courts.

The Committee unanimously recommends adoption of Canon 3B(9) of the ABA Model Code of Judicial Conduct (Aug. 1990) in place of Canon 3A(8) of the current Minnesota Code of Judicial Conduct. The Committee also recommends adoption of new Canon 3B(10) of the ABA Model Code as new Canon 3A(9) of the Minnesota Code, with the exception of omitting the word "commitments" from Canon 3B(10) of the Model Code. The Committee could not find sufficient difference in meaning between "commitments" and "pledges or promises" to justify retaining the word "commitments". Canon 3B(10) is new language adopted by the ABA in August 2003.[4] The new provisions would now read as follows:

A. Adjudicative Responsibilities.

…

> **(8) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's discretion and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This subsection does not apply to proceedings in which the judge is a litigant in a personal capacity.**
>
> **(9) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office.**

The Committee agrees that the proposed rule is less restrictive and more narrowly tailored to promote the interest at stake. The Committee also notes that this proposal permits an incumbent judicial candidate to comment on pending or impending cases, such as when a judge is attacked by an opposing candidate for his or her judicial decisions, and permits judges to comment on other judges, subject to the stated limitations.

In adding new Canon 3A(9), the Committee concurs with the assessment of the ABA Working Group in the Report to the August 2003 ABA amendments to the Model Code. The Report indicates that the ABA Working Group considered whether to amend Model Code Canon 3B(9) to include language more akin to the judicial candidate speech restrictions in Canon 5A(3)(d), but instead decided to add new Canon 3B(10). The Working Group felt that adding this new provision that mirrors the judicial candidate speech restrictions in Model Code Canon

[4] See the attached text of Canon 3 where the proposed changes to Canon 3A(8) and (9) are indicated by underline and ~~strikeout~~.

5A(3)(d), but applies to all sitting judges in carrying out their adjudicative responsibilities, would better serve the goal of preserving judicial independence, integrity and impartiality.[5]

The Committee also unanimously agrees to adopt the ABA Comment to Model Code Canons 3B(9) and (10) (with minor modifications so that the Comment precisely reflects the Committee's proposed amendments to these sections). The Comment defines the terms "pending" and "impending", and further clarifies the scope and application of these provisions. See **RECOMMENDATIONS – NEW COMMENTS To CANONS 3 And 5 Of The CODE Of JUDICIAL CONDUCT** below.

The Committee also considered whether it is more appropriate for the Supreme Court's Court Information Office to respond when a judge's opinions or decisions are publicly attacked rather than having the judge himself / herself respond to the attack. Though cognizant of this, the Committee believes that as a practical matter judges must have the latitude to respond directly and promptly, particularly when such attacks become the subject of news media coverage, given the generally brief duration of such coverage or interest.

II. Canon 3D

The Committee considered whether to recommend adoption of the new Disqualification provision approved by the ABA in August 2003. This provision would be added to the current Code as new Canon 3D(1)(e). The new ABA Model Code language reads as follows:

> **E. Disqualification.**
>
> **(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:**
>
> **. . .**
>
> **(f) the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to**
>
> **i. an issue in the proceeding; or**
> **ii. the controversy in the proceeding.**

The Committee unanimously recommends adoption of this provision, **but only after removing the phrase "or appears to commit"**. Although the Committee agrees that it is appropriate to disqualify a judge who appears to have committed himself or herself to an issue or

[5] *See* American Bar Association, Standing Committees on Judicial Independence and Ethics and Professional Responsibility (Judicial Division), *Amendments to the Model Code of Judicial Conduct* (Aug. 2003), http://www.abanet.org/judind/judicialethics/amendmentsrevision.pdf, at 11.

controversy in the proceeding, it believes that this policy should be accomplished by a party's motion for disqualification rather than by a requirement that the judge act *sua sponte* and under penalty of disciplinary action. Concern was also expressed that inclusion of the "appears to commit" language in the Canon would make it misconduct for a judge to fail to recuse himself or herself in a case in which a campaign statement "appears to commit" the judge with respect to an issue or the controversy. The Committee feels this is too vague a standard for discipline of a judge who fails to recuse. A party has other means to remove a judge who is thought to have given the appearance of a commitment.

The Committee also discussed whether the disqualification provision should be limited to campaign statements. One possible rationale for such a limitation is that this provision is primarily intended to remove the incentive to make campaign commitments because doing so would necessarily lead to subsequent disqualification, and thereby nullify the campaign commitment. However, the Committee feels that the provision should be framed broadly to address all situations in which a judge's impartiality might be questioned because of previous statements. Therefore the Committee recommends adoption of the proposed language including statements made **either** "**while a judge** or a candidate for judicial office" (emphasis added).

In adding new Canon 3D(1)(e), the Committee concurs with the assessment of the ABA Working Group in the Report to the August 2003 ABA amendments to the Model Code. The Report indicates that the Working Group determined that it was important to add a disqualification provision to Canon 3 that related directly to judicial campaign speech, and that the new provision is designed to make explicit the disqualification consequences of prohibited speech violations. The Report also notes that the language of this provision reflects the goals of Canon 5A(3)(d), and that in the wake of *RPM* a few states have revised their codes of judicial conduct to provide for disqualification as a remedy to preserve judicial impartiality.[6]

Similarly, the Committee agrees that proposed Comment language should be drafted in connection with this revision, in order to explain the Committee's decision to recommend a change to Canon 3 in addition to the revision of Canon 3A(8) explicitly mandated in the Supreme Court's Dec. 9, 2003 amended order establishing the Committee. In addition to the reasons enumerated by the ABA Working Group above, the Committee believes that the removal of the Announce Clause from Canon 5 calls for this addition to the non-exclusive list of grounds for disqualification that could give rise to a disciplinary action under Canon 3. See **RECOMMENDATIONS – NEW COMMENTS To CANONS 3 And 5 Of The CODE Of JUDICIAL CONDUCT** below.

III. New Canon 3F

Following the Supreme Court decision in *RPM*, the 2003 ABA amendments to the Model Code adopted a new definition of "impartiality". According to the ABA Report, the definition tracks the analysis of impartiality in the *RPM* majority opinion by being couched in terms of an absence of bias or prejudice towards individuals and maintaining an open mind on issues. The

[6] *Id.*

ABA Working Group followed the language of *RPM* in an effort to develop a definition that is "narrowly tailored yet encompasses the general concepts of judicial impartiality that are vital to the maintenance of an independent judiciary".[7] The Committee discussed the need to include this definition in the text of both Canons 3 and 5 in view of both the *RPM* decision and the other proposed revisions to those Canons.

The Committee unanimously recommends adoption of the ABA Model Code definition of "impartiality", to be included as new Canon 3F of the Minnesota Code. The language of the definition is as follows:

> **"Impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.**

See also section VII below under Canon 5.

CANON 5

I. Canon 5A(3)(d)(i) – "Announce" Clause

In *RPM*, the U.S. Supreme Court held this clause unconstitutional. Accordingly, the Committee unanimously recommends that it be removed from Canon 5A(3)(d)(i).

II. Canon 5A(3)(d)(i) – Substitution of "or" for "and"

The use of "and" rather than "or" at the end of Canon 5A(3)(d)(i) appears to be an error in the original drafting of the Code. Therefore the Committee unanimously recommends substituting "or" for "and".

III. Canon 5A(3)(d)(i) – "Pledges or Promises" Clause

The August 2003 ABA amendments to the Model Code revised the language of Canon 5A(3)(d)(i). The revised Model Code language is as follows:

> **(3) A candidate for a judicial office:**
>
> **. . .**
>
> **(d) shall not:**
>
> **(i) 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 adjudicative duties of the office.[8]**

[7] *Id.* at 10.
[8] *Id.* at 5.

The comparable language of the current Minnesota Code, after removing the "Announce" Clause, reads as follows:

> **(3) A candidate for a judicial office, including an incumbent judge:**
>
> **. . .**
>
> **(d) shall not:**
>
> **(i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;**
>
> **. . .**

The Committee discussed at length the relative merits of the revised ABA Model Code provision and the existing "Pledges or Promises" clause of the Minnesota Code, as well as whether to adopt the Model Code provision. The advantages of the Model Code approach are that it: (1) makes sense by tying the campaign speech restrictions to the Code's disqualification standards; (2) responds to the criticisms of the "Announce" Clause in the *RPM* majority opinion; (3) is consistent with the Committee's recommended revision of Canon 3A(8) and new Canon 3A(9); and (4) is consistent with Minnesota's tradition of following the ABA Model Code in the absence of strong reasons for a different approach.

The disadvantages of adopting the Model Code provision are that: (1) it is not entirely clear whether or how the 2003 ABA language would substantially add to the existing "Pledges or Promises" clause in Minnesota's Canon 5 after removing the "Announce" Clause, and thus whether this change would have any real impact on judicial candidate behavior; (2) it is not yet clear whether the 2003 ABA language is more constitutionally defensible than the existing "Pledges or Promises" clause; and (3) the ABA is currently undertaking a revision of the entire Model Code, which may also include further revisions to the language revised in 2003.

After carefully weighing the above advantages and disadvantages, the consensus of the Committee is that the 2003 ABA language is appropriate, primarily because it makes the language and standard in Canon 5A(3)(d)(i) consistent with that in newly adopted Canon 3(A)(9). The Committee found no compelling reasons for holding judges to different standards in Canons 3A(9) and 5A(3)(d)(i) depending on whether their conduct is in relation to their duties as judges or as incumbent judicial candidates. The language in Canon 3A(9) is preferred because it offers a clearer and more narrowly focused standard. Therefore the Committee unanimously recommends that the following be substituted for the current "Pledges or Promises" clause:

> **(3) A candidate for a judicial office, including an incumbent judge:**
>
> **. . .**
>
> **(d) shall not:**
>
> **(i) make pledges or promises with respect to cases, controversies or issues that are likely to come before the court, that are**

inconsistent with the impartial performance of the adjudicative duties of the office;
. . .[9]

In the Committee's view, this approach cures the problems identified by the Supreme Court in *RPM* by removing the "Announce" Clause, and still gives Minnesota the opportunity to revisit the "Pledges or Promises" language of Canon 5 when the ABA completes its current revision of the full Model Code (which is scheduled to be completed in 2005).

IV. Canon 5A(3)(d)(i) – "Misrepresent" Clause

The Committee devoted substantial discussion and consideration to the issue of whether to revise the "Misrepresent" clause in Canon 5A3(d)(i) to generally conform to its counterpart in the Model Code, but with the addition of a "reckless disregard" standard to the existing "knowingly" standard in the Model Code.

The language of the current Model Code provision is as follows:

(3) A candidate for a judicial office:
. . .
(d) shall not:
. . .
(ii) knowingly misrepresent the identity, qualifications, present position or other fact concerning the candidate or an opponent;[10]

The corresponding Minnesota Code provision currently reads as follows:

(3) A candidate for a judicial office, including an incumbent judge:
. . .
(d) shall not:

(i) . . .misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent;

The Committee unanimously agrees that adoption of a *scienter* requirement is necessary in order to avoid potential constitutional problems with the existing provision, and accordingly the Committee unanimously recommends adoption of the "knowingly" standard used in the Model Code. Committee discussion focused more on whether to add a "reckless disregard" in

[9] Consistent with its adoption of ABA Model Code Canon 3(B)(10), the Committee recommends that the word "commitments" be removed from the Model Code language. See section I under the recommendations concerning Canon 3 above.
[10] *Id.* at 5.

addition to the "knowingly" standard. The issue was also raised whether a standard less than "knowingly" (including a "reckless disregard" standard) would survive constitutional challenge.

The Committee unanimously recommends adding a "reckless disregard" standard, due to a concern that a "knowingly" standard alone is difficult to enforce. Recent examples were cited of lawyers who claimed to believe the truth of their statements about judges, but who were successfully disciplined because the statements were made with reckless disregard for the truth. It was noted that the statements in such cases are often conclusory in nature, and it is difficult to prove actual knowledge or subjective intent, even for statements that are outrageous and unfounded. A "reckless disregard" standard offers an objective basis for evaluating such conduct. Trial judges on the Committee also noted that, based on their experience, it is difficult to prove state of mind, and a "knowing" standard invites contrived defenses. Additionally, the "reckless disregard" standard currently exists in the corresponding rule of the Minnesota Rules of Professional Conduct (Rule 8.2); thus including this standard in the rules for judges and judicial candidates would make the Code provision consistent with the lawyer rules. Finally, the "reckless disregard" language has been included in recent revisions of judicial conduct rules in California and other states (including Alabama and Georgia). Recent federal decisions have also upheld this language, including *Weaver v. Bonner*, a case decided after *RPM* that involved judicial campaign speech. *See* 309 F.3d 1312, 1321 (11th Cir. 2002).

Several Committee members expressed concern that the current language prohibiting a judicial candidate from misrepresenting his or her "present position *or other fact*" (emphasis added) is too vague, and would permit discipline for misrepresentations that are inconsequential or irrelevant. It was proposed that the word "fact" be modified with "material" or "relevant to qualifications or experience." A majority of the Committee assumes that discretion in prosecution under this provision would be exercised, but is unwilling to incorporate a requirement of materiality or relevance. In support of the majority position, examples were offered of statements, such as one concerning a candidate's sexual orientation, that were irrelevant to judicial qualifications but were clearly intended to influence an election. However, it was noted that the language of the current Minnesota provision differs from that in the Model Code, which modifies "other fact" with "concerning the candidate or an opponent." The Committee agrees that the Model Code formulation of the clause is preferable to the current Minnesota formulation.

Accordingly, a majority of the Committee recommends adoption of the language of the "Misrepresent" clause in the ABA Model Code provision[11], but also adding the "reckless disregard" standard. The Committee also unanimously recommends substituting the word "expressed" for the word "present" in the Model Code. This change is recommended in order to avoid possible confusion about the meaning of the phrase "present position", by clarifying that the phrase refers to a candidate's expressed view(s) on an issue or issues and not to his or her form of employment. The revised Canon 5A(3)(d)(i) (including the changes recommended in sections I - III above) would now read as follows:

[11] The February 11, 2004 Committee Meeting Summary reflects that this issue was decided by a voice vote, with a minority opposed. The vote to recommend addition of the "reckless disregard" standard was unanimous.

(3) A candidate for a judicial office, including an incumbent judge:

. . .

(d) shall not:

(i) make pledges or promises with respect to cases, controversies or issues that are likely to come before the court, that are inconsistent with the impartial performance of the adjudicative duties of the office; or knowingly, or with reckless disregard for the truth, misrepresent the identity, qualifications, expressed position or other fact concerning the candidate or an opponent; or

. . .

A minority opposes this recommendation on the grounds that the "or other fact" language needs further refinement in order to avoid vagueness problems. See section VI below.

V. Canon 5A(3)(d)(i) – "Misrepresent" Clause – Comment Concerning Minn. Stat. § 211B.06

The Committee unanimously agrees to adopt the following Comment to Canon 5A(3)(d)(i): **"The misrepresent standard in Canon 5A(3)(d)(i) is consistent with Minn. Stat. § 211B.06, subd. 1 (2002) prohibiting false political and campaign material."** See **RECOMMENDATIONS – COMMENTS To CANONS 3 And 5 Of The CODE Of JUDICIAL CONDUCT** below.

VI. Canon 5A(3)(d)(i) – "Misrepresent" Clause – Comment Concerning the Phrase "or other fact"

As noted in section IV above, in discussing possible revisions to the "Misrepresent" clause, several Committee members expressed concern that the language prohibiting a judicial candidate from misrepresenting either his or her own or an opponent's "present position *or other fact*" (emphasis added)[12] is too vague, and would permit discipline for misrepresentations that are inconsequential or irrelevant. As such, they stressed that unless "other fact" is more precisely defined, the Canon (either as currently written or as proposed) would have a chilling effect on the exercise of First Amendment rights by candidates for judicial election.

As an alternative to modifying the text of the Canon itself, the Committee considered adding a clarifying Comment to address this concern. In particular, it was proposed that the following sentence be added as a Comment to Canon 5A(3)(d)(i): **"'Other fact' refers to a fact intended to influence voters."**

[12] This language is in both the current Minnesota canon and the corresponding ABA Model Code provision.

Proponents of this recommendation stressed that such comment language is necessary in order to clarify what is meant by the phrase "or other fact" and, as noted above, thereby prevent the otherwise chilling effect of this Code provision.

A majority of the Committee[13] disagrees with this recommendation for the following reasons: The Committee previously determined that the addition of the "reckless disregard" language is necessary for effective enforcement of the Canon. The Committee's justification for adding the "reckless disregard" language included: (1) prosecutorial difficulties in proving actual knowledge or subjective intent;[14] and (2) the absence of an objective basis for evaluating conduct under the Canon, which invites contrived defenses. The addition of comment language defining "*other fact"* as one that is "*intended to influence voters"* undermines the objective standard necessary for effective enforcement and reintroduces an element of subjectivity to the Canon. The "*intended to influence voters"* comment language, when juxtaposed with the black letter language of the Canon, implies that successful enforcement will require clear and convincing evidence that the candidate subjectively "intended" to influence voters by misrepresenting some "other fact" about an opponent knowingly, or with reckless disregard for the truth.

The opponents of the recommendation further argue that the addition of this comment language is unnecessary. The scope of the Canon's coverage is already limited to false statements about an opponent that are made knowingly, or with reckless disregard for the truth. Innocent or negligent false statements about an opponent do not fall within the Canon's prohibition and therefore would not subject a candidate to professional discipline.[15] The concern expressed about the potential for overzealous prosecution based upon a candidate's misrepresentation of a trivial or irrelevant fact is outweighed by both (1) the due process protections already afforded to lawyers and judges within their respective discipline systems; and (2) the public policy in prohibiting judicial candidates in public elections from making false statements about an opponent knowingly or with reckless disregard for the truth.

Following substantial discussion, a majority of the Committee agrees not to add the above Comment language to Canon 5A(3)(d)(i).

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[13] The April 2, 2004 Committee Meeting Summary reflects that this issue was decided by a voice vote, with a minority opposed.

[14] *See, e.g., In re Graham,* 453 N.W.2d 313, 322, 323 (Minn. 1990). Rule 8.2(a) of the Minnesota Rules of Professional Conduct prohibits lawyers from making statements about judges that are knowingly false or made with reckless disregard for the truth. Rule 8.2(a) applies to judicial election conduct and non-election conduct as well. In *Graham*, the lawyer argued that his false statements could not subject him to discipline because the judge in his discipline proceeding found that his *feelings* about the false statements *were genuine.* The Minnesota Supreme Court rejected this argument, holding that the reckless disregard standard is objective and not subjective.

[15] Innocent or negligent false statements that occur during judicial election campaigns are constitutionally protected. *See, e.g., Weaver v. Bonner,* 309 F.3d 1312, 1320 (11th Cir. 2002) (citing *Brown v. Hartlage,* 456 U.S. 45, 61, 102 S.Ct. 1523, 1533 (1982)).

VII. New Canon 5E

For the same reasons outlined in section III under Canon 3 above, the Committee unanimously recommends including the definition of "impartiality" as new Canon 5E.

VIII. Extending Canon 5 Speech Restrictions to Candidates for Judicial Appointment in Addition to Candidates for Judicial Election

The Committee discussed whether Canon 5 should be revised to extend the speech restrictions on judicial election candidates to candidates for judicial appointment as well. Based on the lack of evidence of any problems in this area in Minnesota, the Committee recommends no such changes to the Code at this time.

Political Activity Restrictions – Canon 5A and 5B

The Committee considered whether to recommend changes to any of the political activity restrictions in Canon 5A and 5B, which were also challenged by the plaintiffs in the initial *RPM* case. Those restrictions were challenged again in the plaintiffs' motion for reconsideration to the Eighth Circuit following the U.S. Supreme Court *RPM* decision. On March 16, 2004, the Eighth Circuit released its decision and opinion on remand in *RPM*. *See Republican Party of Minnesota v. White*, _F.3d_, 2004 WL 503674 (8th Cir. Mar. 16, 2004). The Eighth Circuit remanded the case to the U.S. District Court to determine whether the partisan political activity clauses withstand strict scrutiny in light of the U.S. Supreme Court's opinion in *RPM*. *Id.*, Slip Op. at 22. In light of the Eighth Circuit's decision, the Committee makes the following recommendations concerning the political activity restrictions in Canon 5A and 5B.

In the Committee's view, the Canon 5 restrictions on candidate partisan political activity are intended to promote the compelling state interests in judicial impartiality, judicial independence, and the appearance of judicial impartiality and independence.[16] The Committee considered in turn whether each of the restrictions at issue is narrowly tailored to further those interests.

IX. Canon 5A(1)(a)

The Committee unanimously recommends retaining the first clause ("act as a leader or hold any office in a political organization"), and deleting the second clause ("identify themselves as members of a political organization, except as necessary to vote in an election"). The Committee recommends retaining the first clause because a candidate's leadership role in a political organization is an activity (not speech) that reflects an entrenched role in the political party organization and can result in an actual or apparent obligation to the party and its objectives. By contrast, the Committee views the second clause (identification as a party

[16] For a discussion of the difference between judicial impartiality, judicial independence, and the appearance of impartiality and independence, *see* J.J. Gass, "After *White*: Defending and Amending Canons of Judicial Ethics", Brennan Center for Justice – NYU School of Law (2004), at 5-9.

member) as a form of political speech that may not result in such an actual or apparent obligation to the party.[17] In other words, there is a distinction between restricting the kinds of support that judicial candidates should be permitted to seek from political parties (e.g. endorsements), and restricting what candidates should be permitted to say about their own political affiliations. In the Committee's view, the former pose the greater threat to preserving the non-partisan character of judicial elections, and thus also to judicial impartiality, independence and the appearance of impartiality and independence.

It was also agreed that the ultimate interest served by the restrictions in Canon 5A(1) (as well as by Canon 5B(1)(a)) is the preservation of an impartial and independent judiciary (and the appearance thereof), and that this interest is served by continuing to make judicial elections non-partisan. The Committee also agrees that in order to further this interest, the restrictions in 5A(1) need to apply equally to incumbent judges and non-incumbent candidates for judicial election. In other words, with respect to their political activity, candidates for judicial office should be expected and required to act like judges, and be subject to the same restrictions as incumbent judges.

X. Canon 5A(1)(c)

This Canon prohibits a judge or judicial candidate from making speeches on behalf of a political organization. The same concerns were expressed about this provision as about Canon 5A(1)(a). (See section IX and fn. 17 above.) However, the Committee unanimously agrees to retain this provision without change, because speeches on behalf of a political organization indicate an endorsement of the organization, its candidates or positions that is inappropriate for a judicial candidate.

XI. Canon 5A(1)(d)

In its current form, this Canon provides that a judge or judicial candidate shall not "attend political gatherings; or seek, accept or use endorsements from a political organization". As such, the same general concerns were expressed about this provision as about Canon 5A(1)(a) and 5A(1)(c). (See sections IX and X and fn. 17 above.) The Committee unanimously agrees to

[17] Several Committee members also expressed concern that Canon 5A(1)(a) (as well as 5A(1)(c) and (d), and 5B(1)(a)) is underinclusive because it only prohibits involvement by or in political party organizations or activities. Because Canon 5D narrowly defines "political organization" to include only political parties, the prohibitions in Canon 5A(1) and 5B(1)(a) do not reach special interest groups or other political organizations that do not have the status of a political party. Nor do they on their face prohibit identification of *former* political party affiliations and activities. Thus concern was expressed that the restrictions on political party speech and activities are both underinclusive in failing to address special interest and other political groups, and ineffective in promoting either judicial impartiality, judicial independence or the appearance of either impartiality or independence. However, the Committee as a whole acknowledges that it would be difficult to draft a workable rule to limit involvement by special interest or other political groups for a number of reasons. Additionally, Committee staff conducted research to determine whether the ABA or any other states have drafted provisions to attempt to restrict or regulate the activity of judges or judicial candidates involving special interest groups or other political organizations that are not political parties. That research turned up no evidence that either the ABA or any other states have attempted to undertake such a task.

delete the first clause ("attend political organization gatherings; or. . ."), and retain the remainder of the provision. It was noted that a judge or candidate might attend a political organization gathering for purposes unrelated to endorsement of judicial candidates, such as selection of delegates or endorsement of other candidates and positions. The Committee believes that a judicial candidate's mere presence at such a gathering does not make the candidate beholden to the party so as to undermine the compelling interests in judicial impartiality (defined as "open-mindedness" per J. Scalia's majority opinion in *RPM*), independence, or the appearance thereof, and the rule is not needed solely to prevent a candidate from seeking endorsement. The Committee does believe that a candidate's active pursuit, acceptance or use of a party endorsement would operate to inhibit his or her impartiality or independence as a judge (as well as the appearance thereof), and thus should not be permitted.

XII. Canon 5A(1)(e)

This Canon currently provides that a judge or judicial candidate shall not "solicit funds for or pay an assessment to or make a contribution to a political organization or candidate, or purchase tickets for political party dinners or other functions." The Committee unanimously recommends that the clause "or purchase tickets for political party dinners or other functions" be deleted. In the Committee's view, the prohibition against soliciting funds, paying assessments, or making contributions to a party or candidate is narrowly tailored to further the compelling interests in judicial impartiality, independence and the appearance thereof; whereas purchasing tickets for a political party dinner does not create the appearance or reality of making a judge or judicial candidate beholden to the party. However, the Committee unanimously agrees to add a Comment distinguishing between the actual cost of a dinner and the overage that takes the form of a political contribution. The Comment should clarify that the overage constitutes a political contribution, which remains prohibited by this provision. See **RECOMMENDATIONS – COMMENTS To CANONS 3 And 5 Of The CODE Of JUDICIAL CONDUCT** below.

XIII. Canon 5B(1)(a)

This provision currently prohibits a judge or judicial candidate from speaking to political organization gatherings. As such, the same general concerns were expressed about this provision as about the other political activity restrictions in Canon 5A(1). (See sections IX – XI and fn. 17 above.) The Committee unanimously agrees to delete the phrase "other than political organization gatherings," move the clause "on his or her behalf" to the end of the first clause, and add the following phrase: "except as prohibited by Canon 5A(1)(d)." The rationale for this change is the same as that for the proposed change to Canon 5A(1)(d) (see section XI above) – i.e., the compelling interests in judicial impartiality and independence (and the appearance thereof) are not undermined simply by permitting candidates to speak at political party gatherings, except when such speech is for the purpose of seeking a political party endorsement.

XIV. Canon 5B(2) – Personal Solicitation of Campaign Contributions

The first clause of this provision prohibits a candidate from personally soliciting or accepting campaign contributions. The Committee unanimously recommends no changes to this

clause. Personal solicitations of contributions by candidates are prohibited for compelling reasons – i.e., maintaining the impartiality and independence of the judiciary, as well as avoiding recusals – that are separate from the other restrictions on candidate political activity, and do not infringe on a candidate's rights of speech and association.

XV. Canon 5B(2) – Solicitation of Publicly Stated Support

The second clause of this provision prohibits a judicial candidate from soliciting "publicly stated support". The Committee unanimously agrees to delete the prohibition against soliciting publicly stated support. In making this recommendation, the Committee notes that although this provision was not challenged in the *RPM* litigation, the Committee wished to avoid the possibility that it might be challenged in the future as overbroad and too restrictive of protected speech.

The Committee also agrees to add new Comment language to Canon 5A(1) and 5B(1) and (2) to explain the rationale for the recommended changes in sections IX – XV above. The Comment should stress the compelling interest in preserving judicial impartiality, independence and the appearance thereof that is served by maintaining the non-partisan character of judicial elections. It should also articulate the justification for restricting political party activity while not restricting activities relating to special interest or other groups, particularly in light of the recent Eighth Circuit opinion in *RPM*. See **RECOMMENDATIONS – COMMENTS To CANONS 3 And 5 Of The CODE Of JUDICIAL CONDUCT** below.

XVI. New Canon 5F

The term "candidate" is currently defined in the Comments to the Code but not in the Code itself. The Committee unanimously recommends that the current definition of "candidate" in the Comments be incorporated into Canon 5 as new Canon 5F. The definition reads as follows:

> **Candidate. "Candidate" is a person seeking selection for or retention in judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election to non-judicial office.**

XVII. Canon 5D

Canon 5D currently defines "political organization" as "a political party organization". Concern was expressed that this definition is too imprecise.[18] There was general agreement that Canon 5D should more precisely define the term "political organization", and that the definition should follow that in the general statute governing elections, Minn. Stat. § 200.02, subd. 6. It

[18] The current definition also differs from the definition of "political organization" in the Comments to Canon 5.

was also agreed that the Comment to 5D should include a citation to the statute, but that the definition itself should not be explicitly tied to the statute so as to require revising it if the statute should subsequently be amended. The Committee thus unanimously recommends that the definition of "political organization" in Canon 5D be revised to read:

> **D. Political Organization. For purposes of Canon 5, the term "political organization" denotes an association of individuals under whose name candidates file for partisan office.**

XVIII. Canon 5G - Applicability

The first sentence of current Canon 5E (new Canon 5G) provides that "Canon 1, Canon 2(A), and Canon 5 generally applies to all incumbent judges and judicial candidates." The Committee unanimously recommends that this sentence be revised to read, **"Canon 5 applies to all judicial candidates."** The Committee recommends this change out of a concern that the language of Canons 1 and 2A is very broad, and if made to apply to all judicial candidates may potentially be subject to vagueness problems.

XIX. Application Section of the Code of Judicial Conduct

The addition of new Section 3A(9) requires a technical change to Section C(1)(a) of the Application Section of the Code, which refers to current Section 3A(9). The Committee recommends that the reference to "Section 3A(9)" be changed to "Section 3A(10)".

COMMENTS TO CANONS 3 AND 5 OF THE CODE OF JUDICIAL CONDUCT

As noted previously, the Committee recommends that, in keeping with the nature, status and structure of the existing Comments to the Code, the following new Advisory Committee Comments should be included at the end of the current Code as a separate Comments section following the existing Comments of the 1994 / 1995 Advisory Committee.

COMMENTARY TO THE MINNESOTA CODE OF JUDICIAL CONDUCT

Report of the Advisory Committee to Review the Minnesota Code of Judicial Conduct and the Rules of the Board on Judicial Standards

Adopted April 15, 2004

PREFACE

This Commentary explains certain changes and additions to the Code of Judicial Conduct adopted by the Minnesota Supreme Court effective <month><date>, 2004. These Comments represent the views of the Advisory Committee only and should not be viewed as official interpretations of the Minnesota Supreme Court. The Advisory Committee hopes that this Commentary will provide guidance with respect to the purpose and meaning of the Code of Judicial Conduct.

The Advisory Committee gratefully acknowledges the efforts of the American Bar Association in developing the 1990 Model Code of Judicial Conduct, including the recent revisions to the Model Code approved by the ABA in August 2003. Interpretations of the Model Code as adopted in other jurisdictions may also provide guidance with respect to the purpose and meaning of the Minnesota Code of Judicial Conduct.

COMMENTS – CANON 3

Section 3A(8) and (9). Sections 3A(8) and (9) restrictions on judicial speech are essential to the maintenance of the integrity, impartiality, and independence of the judiciary. A

pending proceeding is one that has begun but not yet reached final disposition. An impending proceeding is one that is anticipated but not yet begun. The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. Sections 3A(8) and (9) do not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but the Sections do apply in cases (such as a writ of mandamus) where the judge is a litigant in an official capacity. The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the Minnesota Rules of Professional Conduct.

These two sections are intended to restrict judicial speech within the constitutional limits outlined in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), while still enabling judges to comment when appropriate.

Section 3D(1)(e). This section is intended to add an explicit disqualification provision to Canon 3 that relates directly to judicial election campaign speech, and is designed to make the disqualification consequences of prohibited speech violations explicit. The language of this provision also reflects the goals of Canon 5A(3)(d), and provides for disqualification as a remedy to preserve judicial impartiality. Removal of the "Announce" Clause from Canon 5A(3)(d)(i) pursuant to the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) calls for this addition to the non-exclusive list of grounds for disqualification that could give rise to a disciplinary action under Canon 3.

Section 3F. This definition of "impartiality" comports with the discussion of impartiality in the majority opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

COMMENTS – CANON 5

Sections 5A(1) and 5B(1) and (2). Restrictions on the political activity of judges and candidates for judicial office serve the compelling interests of maintaining both the appearance and reality of judicial impartiality, independence and integrity. At the same time, the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), suggests that efforts to promote judicial impartiality (as well as judicial independence, and the appearance of impartiality and independence) through restrictions on the political activity of candidates for

judicial election should be closely analyzed to determine whether they are narrowly tailored so as not to run afoul of candidates' First Amendment rights. *See Republican Party of Minnesota v. White*, _F.3d_, 2004 WL 503674, Slip Op. at 19-22 (8th Cir. Mar. 16, 2004) (Supreme Court's analysis of the "Announce" Clause in *White* requires remand to district court to receive new evidence and to determine whether Canon 5's partisan activity clauses can survive strict scrutiny in light of the Supreme Court's opinion in *White*). In considering the need for restrictions on the political activity of judicial election candidates, the Advisory Committee is also cognizant of the experience of actual or perceived corruption of the judiciary in states that permit partisan judicial elections. In the Advisory Committee's view, that experience further underlines the need for such restrictions in order to maintain both the appearance and reality of judicial independence, integrity and impartiality. Therefore the revisions to Canon 5 maintain restrictions on the political activity of judicial candidates in order to preserve the non-partisan character of judicial elections in Minnesota.

In the Advisory Committee's view, the types of political activity that pose the greatest threat to judicial impartiality, independence and the appearance thereof are those that tend to make a judicial candidate beholden or obligated to a political party (such as holding a political party office or seeking, accepting or using party endorsements). At the same time, restrictions on such activity pose less danger of infringing First Amendment rights. Conversely, the types of political activity that pose the least threat of making candidates beholden to political parties (such as merely identifying oneself as a member of a political party or attending party gatherings) also tend to be closer to the core of First Amendment protection. In its earlier opinion in *White*, the Eighth Circuit acknowledged the threat to both judicial impartiality and independence posed by candidate political activity that tends to engender a sense of obligation to a party:

> Political parties specialize in the business of electing candidates and have a powerful machinery for achieving that end, including large membership and fund-raising organizations. Those parties are simply in a better position than other organizations to hold a candidate in thrall. Moreover, because political parties have comprehensive platforms, obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues. Finally, legislatures are bodies in which, for the most part, the members owe allegiance to a political party, not only for financial support and endorsement in their campaigns for office, but also for political support within the legislative process

> itself. No single legislator has the power to enact laws. Therefore, the sharing of common partisan affiliation plays an integral role in enactment of legislation. If the judiciary is then expected to review such legislation neutrally, a State may conclude that it is crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it.

Republican Party of Minnesota v. Kelly, 247 F.3d 854, 876 (8th Cir. 2001). Thus Sections 5A(1) and 5B(1) and (2) retain restrictions on those forms of political activity that are likely to make judicial candidates beholden to political parties, while removing restrictions on those forms of political activity that are not as likely to do so.

The political activity restrictions in Sections 5A(1) and 5B(1) and (2) are intended to strike the appropriate balance between preserving judicial impartiality, independence and the appearance thereof, and protecting First Amendment rights. They do so by restricting those political activities that tend to make candidates beholden to a political party. These restrictions also aim to further the interests in judicial impartiality, independence and the appearance thereof by maintaining the non-partisan character of judicial elections in Minnesota. As noted by the Eighth Circuit in *Kelly*, "The idea that judicial integrity is threatened by judges deploying political organizations in connection with campaigns for judicial office is neither novel nor implausible." 247 F.3d 854, 868 (8th Cir. 2001) (citing *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 563-64 (1973)).

> In *Letter Carriers*, the Supreme Court recognized that partisanship of governmental officials created a risk of corruption that justified the restraint of those officials' partisan activities. Although the Hatch Act applied to employees of the executive branch, the Court's reasoning could as well have been written about judges and in fact applies with even greater urgency to them.

Id. at 868-69. The restrictions on partisan political activity in sections 5A(1) and 5B(1) and (2) are equally applicable to judges and non-incumbent judicial candidates.

By their terms, the restrictions in Sections 5A(1) and 5B(1) and (2) apply to political party activity and not to activities involving special interest groups or other political organizations that do not have the status of a political party. Recently, in *McConnell v. Federal Election Comm'n*, in upholding the Campaign Reform Act of 2002, the U.S. Supreme Court rejected an equal protection challenge to legislation that was largely directed at political parties rather than special interest groups. In reaching this decision, the Court noted that:

> Congress is fully entitled to consider the real-world differences between political parties and interest groups when crafting a system of campaign finance regulation. *See National Right to Work*, 459 U.S., at 210, 103 S.Ct. 552. Interest groups do not select slates of candidates for elections. Interest groups do not determine who will serve on legislative committees, elect congressional leadership, or organize legislative caucuses. Political parties have influence and power in the legislature that vastly exceeds that of any interest group. As a result, it is hardly surprising that party affiliation is the primary way by which voters identify candidates, or that parties in turn have special access to and relationships with federal officeholders. Congress' efforts at campaign finance regulation may account for these salient differences.

McConnell, 124 S.Ct. 619, 686 (2003). This language is consistent with the Eighth Circuit's earlier determination in *RPM v. Kelly* that Canon 5 can properly regulate contact with political parties but exempt regulation of contact with special interest groups. *See Kelly*, 247 F.3d at 875-76.

On March 16, 2004, the Eighth Circuit released its decision on remand from the U.S. Supreme Court in *White*. The Eighth Circuit remanded the case to the District Court to receive new evidence and to determine whether the partisan activity restrictions in Canon 5 can survive strict scrutiny in light of *White*. *See Republican Party of Minnesota v. White*, _F.3d_, 2004 WL 503674, Slip Op. at 22 (8th Cir. Mar. 16, 2004). In doing so, it directed the district court on remand to receive evidence on the issue of whether the partisan activity clauses are fatally underinclusive. *Id.* at 16-22. However, in analyzing the issue of underinclusiveness, the court stressed that "underinclusiveness is not a ground in its own right for invalidating a law." *Id.* at 17. After analyzing the Supreme Court's recent treatment of the issue of underinclusiveness in *McConnell*, the Eighth Circuit noted that "*McConnell* thus confirms our earlier reasoning that the sort of underinclusiveness that is fatal in strict scrutiny is irrational underinclusiveness, not underinclusiveness that results from attempting to focus the restriction on only the severest form of the threat to a compelling governmental interest." *Id.* at 19.

In the Advisory Committee's view, there is ample support for Canon 5's current limitation of the political activity restrictions to political party activities, while leaving unregulated candidate activities relating to special interest or other groups that do not rise to the level of a political party. As noted above, *McConnell* itself clearly supports the validity of this

limitation in order to promote the compelling interests in judicial impartiality, independence, and the appearance of impartiality and independence.

Other U.S. Supreme Court cases further underline the unique role of political parties in influencing the behavior of successful candidates for elected office, including judges. Political parties differ from special interest groups in fundamental ways. A political party and its candidates collaborate in furthering a number of different interests, whereas a special interest group focuses on a single issue (or set of closely related issues) and promotes candidates, regardless of party affiliation, who agree with the group's view on that single issue or set of issues. Because a political party does not extend its support to more than one candidate per office (unlike special interest groups, which can support a number of candidates for a single office), a symbiosis arises between the political party and its candidates, where the success of one depends upon the success of the other:

> Political parties and their candidates are "inextricably intertwined" in the conduct of an election. A party nominates its candidate; a candidate often is identified by party affiliation throughout the election and on the ballot; and a party's public image is largely defined by what its candidates say and do. Most importantly, a party's success or failure depends in large part on whether its candidates get elected. Because of this unity of interest, it is natural for a party and its candidate to work together and consult with one another during the course of the election. Indeed, "it would be impractical and imprudent ... for a party to support its own candidates without some form of 'cooperation' or 'consultation.' " *See Colorado I*, 518 U.S., at 630 (KENNEDY, J., concurring in judgment and dissenting in part). "[C]andidates are necessary to make the party's message known and effective, and vice versa." *Id*. at 629.

Fed. Election Comm'n v. Colorado Republican Fed. Campaign Committee, 533 U.S. 431, 469-470 (2001) (citations omitted) (Thomas, J. dissenting, joined by J. Scalia, J. Kennedy and C. J. Rehnquist (in part)). This greater relationship of interdependence between a candidate and the political party that supports him or her creates a real, or at least perceived, obligation on the part of the candidate to make rulings in accord with the political party and its multi-interest platform.

A second difference between political parties and special interest groups lies in the unique role political parties play in the workings of the other branches of government. Unlike special

interest groups, which lack a direct, active role in the operation of government, political parties are intimately and inextricably involved in both the legislative and executive branches. *See McConnell*, 124 S.Ct. at 686. Political parties wield direct influence (and even control) over the operations of the executive and legislative branches of government in a way that special interest groups do not. In light of this qualitatively different relationship, the need for an impartial and independent judiciary, open-minded and free from actual or perceived obligation to political parties, becomes paramount; and this need justifies placing greater restrictions on judicial candidates' political party activities than on their activities involving other interest groups.

Finally, recusal alone is not a sufficient remedy for judicial involvement in partisan political activities. Recusal may depend on the ability of litigants to know of that judicial involvement and the ability of the judge to recognize when the involvement warrants recusal. Recusal can also result in delay to litigants and an administrative burden on the courts. In addition, the Supreme Court has recognized:

> While the problem of individual bias is usually cured through recusal, no such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy. The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship.

Mistretta v. U.S., 488 U.S. 361, 407 (1989) (finding judiciary involvement in Sentencing Commission constitutional).

Section 5A(1)(e). This section has been revised to remove the prohibition against purchasing tickets for political party dinners or other functions. In the Advisory Committee's view, the prohibition against soliciting funds, paying assessments, or making contributions to a party or candidate is narrowly tailored to further the compelling interests in judicial impartiality, independence, and the appearance thereof. By contrast, purchasing tickets for a political party dinner does not erode those interests by creating either the appearance or reality of making a judge or judicial candidate beholden to the party. However, there is a distinction between the actual cost of a dinner and the overage in the ticket price that takes the form of a political contribution. In the Advisory Committee's view, the difference between the actual cost of the dinner and the cost of the ticket constitutes a political contribution, which remains prohibited by this section.

Section 5A(3)(d)(i). The first half of this section has been revised to make the language of this standard consistent with that in new Canon 3A(9).

The "misrepresent" standard in the second half of this section is consistent with that in Minn. Stat. § 211B.06, subd. 1 (2002) prohibiting false political and campaign material. The *scienter* requirement in this section includes both a subjective ("knowingly") and objective ("with reckless disregard for the truth") standard, thereby permitting prosecution for misrepresentations under either standard. Inclusion of both standards is consistent with Rule 8.2 of the Minnesota Rules of Professional Conduct, the analogous ethics provision for lawyers.

Section 5D. This definition of "political organization" is taken from the definition of "political party" in Minn. Stat. § 200.02, subd. 6 (2002).

Section 5E. This definition of "impartiality" comports with the discussion of impartiality in the majority opinion in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

TEXT OF PROPOSED REVISIONS – CANONS 3 AND 5 OF THE CODE OF JUDICIAL CONDUCT

(New language is indicated by underline and deletions by ~~strikeout~~.)

Code of Judicial Conduct

Adopted by the Supreme Court February 20, 1974

Text revised by order of September 16, 1988

to accomplish gender neutrality

With amendments received through August 1, 2002

TABLE OF CANONS

. . . .

Canon 3. A Judge Shall Perform the Duties of the Office Impartially and Diligently.

The judicial duties of a judge take precedence over all other activities. Judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge shall hear and decide promptly, efficiently and fairly matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. He or she shall be unswayed by partisan interests, public clamor or fear of criticism.

(3) A judge shall require order and decorum in all proceedings before the judge.

(4) A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others dealt with in an official capacity, and shall require similar conduct of lawyers and of court personnel and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but

not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit court personnel and others subject to the judge's direction and control to do so.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, in relation to parties, witnesses, counsel or others. This Section 3A(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or person's lawyer, the right to be heard according to law. A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges and with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) ~~A judge shall abstain from public comment about a pending or impending proceeding in any court, and shall require similar abstention on the part of court personnel subject to the judge's direction and control.~~A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's discretion and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This subs~~S~~ection does not apply to proceedings in which the judge is a litigant in a personal capacity.

(9) A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of the office.

~~(9)~~(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

~~(10)~~(11) Except in the Supreme Court and the Court of Appeals, a judge shall prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recess between sessions. A judge may, however, authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record or for other purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investitive, ceremonial or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to be depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

~~(11)~~(12) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

. . . .

D. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(c) the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, significant other, parent or child wherever residing, or any other member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or has any other interest that could be substantially affected by the proceeding.

(d) the judge or the judge's spouse or significant other or a person within the third degree of relationship to any of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(e) the judge, while a judge or a candidate for judicial office, has made a public statement that commits the judge with respect to

(i) an issue in the proceeding; or

(ii) the controversy in the proceeding.

(2) A judge shall keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the personal economic interests of the judge's spouse, significant other and minor children wherever residing.

E. Remittal of Disqualification. A judge disqualified by the terms of Section 3D may disclose on the record the basis of the judge's disqualification, and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree that the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceedings. The agreement shall be incorporated in the record of the proceeding.

F. Impartiality. "Impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

. . . .

Canon 5. A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office.

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06 Subd 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; ~~identify themselves as members of a political organization, except as necessary to vote in an election;~~

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) ~~attend political gatherings; or~~ seek, accept or use endorsements from a political organization; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate~~, or purchase tickets for political party dinners or other functions~~.

(2) A judge shall resign the judicial office on becoming a candidate either in a primary or in a general election for a non-judicial office, except that a judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if the judge is otherwise permitted by law to do so.

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to the candidate;

(b) shall prohibit employees who serve at the pleasure of the candidate, and shall discourage other employees and officials subject to the candidate's direction and control from doing on the candidate's behalf what the candidate is prohibited from doing under the Sections of this Canon;

(c) except to the extent permitted by Section 5B(2), shall not authorize or knowingly permit any other person to do for the candidate what the candidate is prohibited from doing under the Sections of this Canon;

(d) shall not:

(i) make pledges or promises with respect to cases, controversies or issues that are likely to come before the court, that are inconsistent with~~of conduct in office other than~~ the ~~faithful and~~ impartial performance of the adjudicative duties of the office; ~~announce his or her views on disputed legal or political issues;~~ or knowingly, or with reckless disregard for the truth, misrepresent the~~his or her~~ identity, qualifications, expressed~~present~~ position or other fact concerning the candidate~~,~~ or ~~those of the~~ an opponent; ~~and~~ or

(ii) by words or conduct manifest bias or prejudice inappropriate to judicial office.

(e) may respond to statements made during a campaign for judicial office within the limitations of Section 5A(3)(d).

B. Judges and Candidates For Public Election.

(1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings~~, other than political organization gatherings,~~ on his or her own behalf, except as prohibited by Canon 5A(1)(d);

(b) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

(2) A candidate shall not personally solicit or accept campaign contributions ~~or solicit publicly stated support~~. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings, candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

C. Incumbent Judges. A judge shall not engage in any political activity except (1) as authorized under any other Section of this Code, (2) on behalf of measures to improve the law, the legal system or the administration of justice, or (3) as expressly authorized by law.

D. Political Organization. For purposes of Canon 5, the term "political organization" denotes an association of individuals under whose name candidates file for partisan office ~~the term political organization denotes a political party organization~~.

E. Impartiality. "Impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

F. Candidate. "Candidate" is a person seeking selection for or retention in judicial office by election. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election authority, or authorizes solicitation or acceptance of contributions or support. The term "candidate" has the same meaning when applied to a judge seeking election to non-judicial office.

GE. Applicability. ~~Canon 1, Canon 2(A), and~~ Canon 5 ~~generally~~ applies to all ~~incumbent judges and~~ judicial candidates. A successful candidate, whether or not an incumbent, is subject to judicial discipline for his or her campaign conduct; an unsuccessful candidate who is a lawyer is subject to lawyer discipline for his or her campaign conduct. A lawyer who is a candidate for judicial office is subject to Rule 8.2 of the Minnesota Rules of Professional Conduct.

. . . .

APPLICATION OF THE CODE OF JUDICIAL CONDUCT

. . . .

C. Part-Time Judge. A part-time judge:

(1) is not required to comply

(a) except while serving as a judge, with Section 3A(~~9~~10);

. . . .

MDJA MINNESOTA DISTRICT JUDGES ASSOCIATION

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May 19, 2004

Re: Proposed Amendments to the Minnesota Code of Judicial Conduct

To the Honorable Justices of Minnesota Supreme Court:

The Minnesota District Judges Association commends the Advisory Committee for its work on revisions to the Code of Judicial Conduct and the Rules of the Board on Judicial Standards. The Association appreciates the leadership of Dean Sullivan and the hard work and dedication of the committee members. The recommendations and report provide excellent responses and appropriate revisions to the codes in conformity with the Supreme Court decision in Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) insofar as the constitutionally flawed, underinclusive "announce clause" is concerned.

The Minnesota District Judges Association respectfully urges the Court to reject recommendations of the committee to revise Canons 5A(1) and 5B (partisan political activity provisions) which were not before the Supreme Court and have been remanded to federal district court. We respectfully request that the Court defer any action on these provisions until the federal district court has had an opportunity to receive further evidence pursuant to the Eighth Circuit remand, see Republican Party of Minnesota v. White, 361 F.3d 1035, 1048 (8th Cir. 2004), and thoughtfully consider the important issues raised relating to these provisions in light of the Supreme Court decision in White.

Enclosed are a resolution of the Board of Directors of the Minnesota District Judges Association supporting no revision to the partisan political activity provisions of Canons 5A(1) and 5B, supporting memorandum, and a request to appear at the public hearing on May 26.

On behalf of the Minnesota District Judges Association, thank you for your consideration.

Sincerely,

Catherine L. Anderson
President, MDJA

MDJA MINNESOTA DISTRICT JUDGES ASSOCIATION

I, Catherine L. Anderson, do represent to this Court that I am a District Court Judge of the Fourth Judicial District and that I have been authorized by the Minnesota District Judges Association, as its President, to speak on behalf of the Association regarding the proposed revisions to the current version of Canon 5 of the Code of Judicial Conduct at the court hearing scheduled on May 26, 2004, and I have attached written copies of the material to be presented.

WHEREFORE, I pray that this request for oral presentation to be granted.

Catherine L. Anderson
Judge of District Court
Fourth Judicial District
12-C Government Center
300 South Sixth Street
Minneapolis, MN 55487

WHEREAS, the April 15, 2004 Report of the Minnesota Supreme Court Advisory Committee to Review the Code of Judicial Conduct and the Rules of the Board on Judicial Standards recommends revisions to Canon 5A(1) and 5B of the Code of Judicial Conduct (partisan political activity restrictions) as set forth in the attached pages; and

WHEREAS, the Minnesota District Judges Association, representing the 274 district court judges of Minnesota, is dedicated to preserving the integrity, impartiality, and independence of our trial court, as well as the appearance of impartiality and independence; and

WHEREAS, the Minnesota District Judges Association has consistently opposed partisan judicial selection and has consistently supported non-partisan judicial elections; and

WHEREAS, non-partisan judicial elections of Minnesota's trial court judges have been recognized as an important foundation essential to preserving the goals of impartiality and independence in the judiciary of this state since 1912; and

WHEREAS, the Minnesota State Bar Association created a task force of lawyers, judges, legislators, and citizens to study judicial elections post Republican Party of Minnesota **V.** White and make recommendations in light of the Supreme Court's ruling; and

WHEREAS,the Minnesota State Bar Association has proposed revisions to the Code of Judicial Conduct consistent with the Supreme Court opinion in Republican Party of Minnesota v. White which do not include similar revisions to Canon 5A(l) and 5B and were supported by the Minnesota District Judges Association; and

WHEREAS, the Minnesota District Judges Association continues to support the Minnesota State Bar Association's recommendations; and

WHEREAS, in Republican Party of Minnesota v. White, the United States District Court and the Eighth Circuit Court of Appeals have previously found the partisan activity restrictions to be constitutional and the United States Supreme Court did not accept certiorari with respect to the constitutionality of those restrictions and did not address those restrictions in its decision; and

WHEREAS, the Eighth Circuit Court of Appeals has remanded Republican Party of Minnesota v. White to the district court in Minnesota for reconsideration of several of the partisan political activity restrictions of the Code of Judicial Conduct challenged by the plaintiffs in that case; and

WHEREAS, on remand, the State will assert that the restrictions on partisan political activity contained in

the current version of Canon 5 are narrowly tailored to meet the State's compelling interest in an impartial and independent judiciary and should survive First Amendment strict scrutiny in light of the Supreme Court decision in Republican Party of Minnesota v. White; and

WHEREAS, the district court will have an opportunity to take testimony and to fully examine and evaluate these issues; and

WHEREAS, it is premature to act on the Advisory Committee's recommendations related to partisan political activity before hearings in the district court have been scheduled and until after final resolution of Republican Party of Minnesota v. White; now

BE IT RESOLVED that the Minnesota District Judges Association opposes any effort to revise the partisan political activity restrictions of the Minnesota Code of Judicial Conduct as recommended in the April 15 Advisory Committee report until after final resolution of Republican Party of Minnesota v. White in the courts.

Canon 5. A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office.

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06 Subd 6.

(I) Except as authorized in Section 5B(l), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; ~~identify themselves as members of a political organization, except as necessary to vote in an election;~~

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) ~~attend political gatherings; or~~ seek, accept or use endorsements from a political organization; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate~~, or purchase tickets for political party dinners or other functions.~~

B. Judges and Candidates For Public Election.

(I) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings~~, other than political organization gatherings~~, on his or her own behalf, except as prohibited by Canon 5A(l)(d);

(b) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

(2) A candidate shall not personally solicit or accept campaign contributions ~~or solicit publicly stated support~~. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings,

candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

IN RE PROPOSED AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

MEMORANDUM IN SUPPORT OF THE RESOLUTION OF THE MINNESOTA DISTRICT JUDGES ASSOCIATION

I. The Recommended Revisions to the Political Activity Restrictions Are Unnecessary, Premature, and Unwise.

The recommended revisions to the political activity restrictions contained in Canon 5 are unnecessary, premature, and unwise. The revisions are unnecessary because the political activity restrictions thereby abolished were not at issue in Republican Party of Minnesota v. White, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (2002) [hereinafter White I]. The revisions are premature because the constitutionality of the abolished restrictions is currently on remand to the United States District Court for the District of Minnesota. See Republican Party of Minnesota v. White, 361 F.3d 1035, 1048 (8th Cir. 2004) [hereinafter White II]. The revisions are unwise because partisan activity by judges will inevitably erode public confidence in an independent and impartial judiciary.

II. The Political Activity Restrictions in Canon 5 Are Not Unconstitutional Under the Supreme Court's Decision in *White I.*

In White I, the only issue before the Court was the constitutionality of the "announce clause" contained in Canon 5 of the Minnesota Code of Judicial Conduct. See 536 U.S. at 768 (defining the question presented). In fact, the Court limited its grant of

certiorari to exclude the question of whether the political activity restrictions in Canon 5 are constitutional, see White II, 361 F.3d at 1040, as the Eighth Circuit had previously concluded in Republican Party of Minnesota v. Kelly, 247 F.3d 854, 868-76 (8th Cir. 2001). Since White I did not invalidate the political activity restrictions in Canon 5, the Advisory Committee must be recommending revision of the restrictions based on an anticipated disposition of the issues on remand in White II. See Report of the Advisory Committee to Review the Minnesota Code of Judicial Conduct and the Rules of the Board on Judicial Standards at 17 (April 15, 2004) [hereinafter "Report of the Advisory Committee"] (noting the Committee's belief that a judicial candidate's "mere presence" at a political gathering "does not make the candidate beholden to the party so as to undermine the compelling interests in judicial impartiality . . ., independence, or the appearance thereof").

However, the announce clause cannot be equated with the political activity restrictions in Canon 5. While both are designed to advance the state's interest in an impartial judiciary, the political activity restrictions serve the added function of advancing the state's interest in an independent judiciary. The state's interest in an independent judiciary may be intertwined with its interest in an impartial judiciary, but it is nevertheless a distinct interest with an explicit basis in the Minnesota Constitution. See Minn. Const. Art. III, § 1 ("The powers of government shall be divided into three distinct departments: legislative, executive, and judicial."). Chief Justice Rehnquist has described the independence of the judiciary as "one of the crown jewels of our system of government today." J.J. Gass, After *White*: Defending and Amending: Canons of Judicial Ethics, Brennan Center for Justice – NYU School of Law (2004), at 9 (quoting William

H. Rehnquist, Keynote Address at the Washington College of Law Centennial Celebration, 46 Am. U. L. Rev. 263, 274 (1996)).

The state's interest in an independent judiciary is discussed extensively in Kelly, where the Eighth Circuit quoted Justice Loring's concurring opinion in Moon v. Halverson, 206 Minn. 331, 288 N.W 579 (Minn. 1939). Justice Loring's opinion highlights the importance of the political activity restrictions:

> When candidates for [judicial] offices were placed on a non-partisan ballot it was, it seems to me, the purpose of the legislature to lift the judgeships above sordid political influence and to free the candidates from obligation to a political party so that if elected they might render judicial instead of partisan political decisions on matters where party programs, party interests or even prominent party leaders might be involved. The abuse and accusations of party treason which have been heaped upon some judges in the recent past because of decisions thought to be contrary to the interests of an indorsing party ought to be evidence enough of the impropriety of party indorsements and of their purpose to induce partisan political rather than impartial judicial decisions. Judges are or should be elected to interpret the law as they find it without fear or favor. It poisons the very fount of democracy if they do not do so. Nothing so shakes the confidence of the people in their courts and arouses contempt for their government, as politically minded judges. There can be no propriety in any influence which tends, consciously or otherwise, to prevent impartiality or which tends to create a feeling of party obligation.

Id. at 581-82 (Loring, J., concurring).

Since the political activity restrictions in Canon 5 serve the added function of advancing the state's interest in an independent judiciary, the Court's decision in White I is of limited use in determining the constitutionality of those restrictions. In applying strict scrutiny to the announce clause in White I, the Court weighed only the state's interest in "preserving the impartiality of the state judiciary and preserving the appearance of the impartiality of the state judiciary." White I, 536 U.S. at 775. It is entirely logical that White I did not address the state's interest in an independent judiciary

because the announce clause is not concerned with the principle of separation of powers. In fact, the Court implicitly acknowledged the distinct character of the state's interest in an independent judiciary by noting that both the Eighth Circuit and respondents appeared to use the term "independent" as interchangeable with "impartial." Id. at 775 n.6. The state's interest in an independent judiciary is intertwined but not interchangeable with its interest in an impartial judiciary.

The distinction between the state's interest in an independent judiciary and its interest in an impartial judiciary is particularly relevant to the issue of whether the political activity restrictions are underinclusive. Several members of the Advisory Committee expressed concern that the political activity restrictions in Canon 5 are underinclusive because the restrictions apply only to activity within political parties and not to activity within other political groups. See Report of the Advisory Committee at 16 n.17. The distinction between political parties and other political groups is arguably suspect if the political activity restrictions are viewed as limited to advancing the state's interest in an impartial judiciary and the appearance of impartiality. However, the state's interest in an independent judiciary – more precisely, the principle of separation of powers – justifies the distinction because, as discussed by the Eighth Circuit in Kelly, political parties play a singular role within the political process:

> Political parties specialize in the business of electing candidates and have a powerful machinery for achieving that end, including large membership and fund-raising organizations. Those parties are simply in a better position than other organizations to hold a candidate in thrall. Moreover, because political parties have comprehensive platforms, obligation to a party has a great likelihood of compromising a judge's independence on a wide array of issues. Finally, legislatures are bodies in which, for the most part, the members owe allegiance to a political party, not only for financial support and endorsement in their campaigns for office, but also for political support within the legislative process itself. No single legislator

> has the power to enact laws. Therefore, the sharing of common partisan affiliation plays an integral role in enactment of legislation. If the judiciary is then expected to review such legislation neutrally, a State may conclude that it is crucial that the judges not be beholden to a party responsible for enactment of the legislation, or to one that opposed it.

Kelly, 247 F.3d at 876; see also McConnell v. Federal Election Comm'n, ___ U.S. ___, ___, 124 S.Ct. 619, 686 (2003) (noting that "Congress is fully entitled to consider real-world differences between political parties and interest groups when crafting a system of campaign finance regulation"); Report of the Advisory Committee at 24 ("In the Advisory Committee's view, there is ample support for Canon 5's current limitation of the political activity restrictions to political party activities, while leaving unregulated candidate activities relating to special interest or other groups that do not rise to the level of a political party.").

Since political parties play such an instrumental role within the electoral and legislative process, there is a valid basis for distinguishing political activity within a political party from political activity outside of a political party. From district court to the supreme court, Minnesota jurists regularly engage in statutory interpretation, an endeavor which requires the jurist to ascertain and effect the intent of the whole legislature, not just the legislators on one side of the aisle. If the legislative history of an ambiguous statute indicates that the Republican Party intended one construction of the statute and the Democratic Party another, and the judge construes the statute in accord with the construction intended by the party with which the judge affiliates, the aggrieved party and the public are likely to perceive judicial bias no matter how sound the reasoning which led to the judge's interpretation. This hypothetical illustrates the practical need for the existing political activity restrictions in Canon 5.

III. Revising the Political Activity Restrictions Would Be Premature in Light of the Issues Currently Pending Before the United States District Court.

Even if some revision to the political activity restrictions is required by final disposition of Republican Party of Minnesota v. White, revision at this time would be premature because the constitutionality of the restrictions is currently on remand to the United States District Court, which must decide whether "the partisan activity clauses can survive strict scrutiny in light of the Supreme Court opinions." White II, 361 F.3d at 108. Moreover, even if the recommended revisions are adopted, further revision may be necessary because the constitutionality of the restriction against party endorsements will remain an issue on remand to the district court. Piecemeal revision of our code of judicial conduct can only undermine public confidence in the judiciary.

Not only is revision premature, the "short timeframe" given the Advisory Committee to complete its work is not commensurate with the import of its endeavor. See Report of the Advisory Committee at 1 (referring to the "short timeframe" as the basis for a chosen procedure). It's worth noting that two of the three meetings of the full Advisory Committee were held before the Eighth Circuit issued its decision in White II, and the public hearing on the Advisory Committee's draft report was held barely two weeks after White II was decided.

In fact, the Advisory Committee completed its draft report prior to the Eighth Circuit's decision in White II. Interestingly, according to the draft report, a majority of the Advisory Committee recommended no change to the restriction against party identification, a majority of the Advisory Committee recommended retention with clarification of the restriction against speaking at political gatherings, and the Advisory Committee was unanimous in recommending retention of the restriction against personal

solicitation of publicly stated support. See Draft Report of the Advisory Committee to Review the Minnesota Code of Judicial Conduct and the Rules of the Board on Judicial Standards at 16-17 (March 4, 2004). If White II, in remanding issues to the district court, required drastic revision of the Advisory Committee's recommendations, one can only wonder what sort of revision may be necessary when the issues on remand are actually decided.

The abbreviated time frame for the work of the Advisory Committee may explain an apparent discrepancy between the Report of the Advisory Committee and the Code of Judicial Conduct. In discussing its recommendation that the supreme court abolish the restriction against "attend[ing] political gatherings" contained in Canon 5(A)(1)(d), the Advisory Committee explains: "It was noted that a judge or candidate might attend a political organization gathering for purposes unrelated to endorsement of judicial candidates, such as selection of delegates or *endorsement of other candidates* and positions." Report of the Advisory Committee at 17 (emphasis added). However, the Advisory Committee recommends no revisions to Canon 5(A)(1)(b), which explicitly prohibits judges and judicial candidates from publicly endorsing "another candidate for public office."

The abbreviated time frame may also explain two additional pitfalls in the recommended revisions. The Advisory Committee recommends retention of the Canon 5(A)(1)(e) restriction against "mak[ing] a contribution to a political organization or candidate" while recommending abolition of the Canon 5(A)(1)(e) restriction against "purchas[ing] tickets for political party dinners or other functions." Recognizing that

tickets to a political party dinner ordinarily exceed the cost of the meal, the Advisory Committee acknowledges a possible conflict:

> [T]here is a distinction between the actual cost of the dinner and the overage in the ticket price that takes the form of a political contribution. In the Advisory Committee's view, the difference between the actual cost of the dinner and the cost of the ticket constitutes a political contribution, which remains prohibited by this section.

Report of the Advisory Committee at 17. However, the Advisory Committee offers neither a means of assessing the disparity between the price of the ticket and cost of the dinner nor a mechanism for enforcing the restriction against paying the contribution component of the ticket price. Cf. White I, 536 U.S. at 770 ("There are, however, some limitations that the Minnesota Supreme Court has placed upon the scope of the announce clause that are not (to put it politely) immediately apparent from its text.")

The second pitfall arises from the recommended revision to Canon 5(B)(2), which currently restricts a judicial candidate from "solicit[ing] publicly stated support." Under Canon 5(B)(2), a judicial candidate may establish a campaign committee to solicit publicly stated support on his behalf, but the committee "shall not disclose to the candidate the identity of those who were solicited for . . . public support and refused such solicitation." The Advisory Committee recommends abolishing the restriction against "solicit[ing] publicly stated support" but recommends no revision to the restriction against the campaign committee's disclosure of the identity of those who refused a solicitation for publicly stated support. One is hard-pressed to conceive of a legitimate justification for restricting such disclosure by the campaign committee when the candidate himself may bypass the committee and directly solicit the person's support.

IV. Abolishing the Political Activity Restrictions Would Erode Public Confidence in an Impartial and Independent Judiciary.

Not only are the recommended revisions to the political activity restrictions unnecessary under White I and premature in light of White II, the revisions will erode public confidence in an impartial and independent judiciary by compromising the nonpartisan character of the Minnesota judiciary. It's important to note that the appearance of impartiality is no less important than actual impartiality because an impartial judiciary does not exist solely for its own sake but also as a means of maintaining public confidence in the judiciary. See White I, 536 U.S. at 793 (Kennedy, J., concurring) ("The citizen's respect for judgments depends in turn upon the issuing court's absolute probity."); White I, 536 U.S. (Stevens, J., dissenting) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); Raab v. State Comm'n on Judicial Conduct, 793 N.E.2d 1287, 1291 (N.Y. 2003) ("Of equal import is the prevention of the appearance of corruption stemming from public awareness of the opportunities for abuse.").

Given the importance of the appearance of impartiality, it is necessary to consider whether the distinction between party endorsement and party affiliation is a distinction discernible to the public or to parties before the court. Returning to the earlier hypothetical, if a judge identifying herself as Repulican, who regularly attends meetings of the Republican Party and dinners benefiting Republican candidates, construes an ambiguous statute in accordance with the intent of Republican legislators but contrary to the intent of Democratic legislators, will the aggrieved party take comfort in the Advisory Committee's conclusion that party identification is "a form of political speech that *may*

not result in . . . an actual or apparent obligation to the party." Report of the Advisory Committee at 16 (emphasis added).

To the extent that the recommended revisions to the political activity restrictions are motivated by a desire to negate the issues on remand in White II and thus minimize attorney fees, those concerns should have no influence on such critical policy decisions, especially ones which may undermine the vitally important interest of preserving the public's confidence in an independent and impartial judiciary by compromising the nonpartisan character of our judicial elections.

V. The Political Activity Restrictions Should Not Be Irretrievably Abolished Based Solely on Anticipated Events.

By act of the legislature, Minnesota's judicial races have been nonpartisan for almost a century. See, e.g., White I, 536 U.S. at 768. The recommended revisions to the political activity restrictions would imperil the longstanding nonpartisan character of our judicial elections by inviting, if not encouraging, partisan political activity by candidates for judicial office. We must not cross the rubicon and irretrievably abolish the means of preserving an independent and impartial judiciary based solely on anticipated events.

JCLA

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

MOTION FOR PERMISSION TO SUBMIT POST-DEADLINE COMMENT FOR HEARING TO CONSIDER PROPOSED AMENDMENTS TO THE MINNESOTA CODE OF JUDICIAL CONDUCT

Movant, a resident of the District of Columbia, member of the New York Bar and professor of law, respectfully requests permission to submit the attached comment.

This is submitted after the Court's May 19 deadline for these reasons:

1) The May 19 comment filed by the Minnesota State Bar Association, makes clear that a diversity of views exists and that an additional comment may be useful.

2) Nineteen other States have nonpartisan judicial elections. Therefore, your Court's action in this matter, and the pending federal court suit about your Code of Judicial Conduct provisions limiting partisanship in judicial elections, are matters of national interest. Movant believes that no other comment has been received from outside Minnesota.

3) Movant was out of the country until May 24.

Respectfully submitted,

Roy A. Schotland

May 25, 2004

GEORGETOWN UNIVERSITY LAW CENTER

Roy A. Schotland
Professor of Law

May 25, 2004

To: The Honorable Justices of the Minnesota Supreme Court

RE: April 15, 2004 Report of the Supreme Court Advisory Committee to Review the Code of Judicial Conduct
CA-85-697

This brief comment is submitted to express views that are only my own; identifying information, and my consultation about this with others, are set forth below.[1]

First, two easy but notable points:

a) A program to educate judicial candidates is recommended by both the Advisory Committee and the MSBA. In support of the MSBA's urging "that attendance at these courses be mandatory for all judicial candidates", note that the Ohio Supreme Court, since 1995, requires exactly that; also, their "candidates are encouraged to bring campaign committee members and other volunteers." Florida has the best materials (so far as I know) for such a course, in a program begun in 1998 and conducted jointly by their Bar and their judicial districts' presiding judges.

b) MSBA recommends providing "educational materials to the public, specifically, publication of a 'voter's guide' to judicial elections and candidates." That step was recommended by 17 Chief Justices (including Chief Justice Kathleen Blatz) after their December 2000 conference on judicial elections.[2]

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[1] Having studied and written about judicial elections for 19 years, I am a senior consultant to the National Center for State Courts. I co-authored an amicus brief supporting Minnesota in *Republican Party of Minnesota v. White* (that brief was cited by Justice Ginsburg in her dissent); I organized another amicus brief supporting Minnesota signed by (among others) A.M. (Sandy) Keith, Wendell Anderson and Arne Carlson; and I participated in mooting Minnesota's Solicitor General. In December 2001, I addressed the Minnesota State Bar's conference on judicial elections.

Although the views expressed here are solely mine, I consulted about this with four lawyers who are very familiar with judicial elections in their own States (three with nonpartisan judicial elections and one with partisan elections); three of them have litigated cases about judicial elections.

[2] "Call To Action", 34 Loyola (L.A.) L.Rev. 1353, 1357 (2001).

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Last, about the provisions limiting partisan activity in judicial elections:

Unlike the "announce clause", these provisions are a national norm (i.e., found in almost every one of the 20 States with nonpartisan judicial elections). Even before *Republican Party of Minnesota v. White,* such provisions raised not only constitutional questions, but also questions of effectiveness in operation. However, such provisions are so widespread precisely because the goal is so clear and so crucial, the compelling interest so great.[3]

MSBA focuses on what seems to me the key question when they express concern about whether the Committee's "line drawing is arbitrary". However, to call the line drawing "arbitrary" seems to me inaccurate, even unfair. There is no escaping some line drawing. (Indeed, the MSBA considers "arbitrary" a distinction that seems deep and obvious: not allowing judicial candidates to hold office in a political organization.)

But concern about line drawing makes me conclude that what so many States have done so long, to preserve the kind of judiciary they deem necessary, should not be diluted or confused. For example: the Advisory Committee recommended that although candidates should be able to attend party events, they should still be not permitted to "seek, accept or use endorsements from a political organization". Query whether that will work: consider the difficulty of monitoring what the candidate says, and to whom. Another example: If a candidate can identify herself as a member of X or Y party, and can attend and speak at party events, then the candidate's ads may say "Active R" or "Dedicated D"; consider the effect of having such ads, which often will be adjacent to ads by the parties endorsing the candidate.[4]

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[3] That judicial elections are different, because the judiciary's job is different, is undeniable. The constitutions of the 39 States in which judges face elections of some type have an array of provisions, unique to the judiciary, that would be unthinkable for other elected officials in the legislative and executive branches. In all 39 States (except Nebraska), judges' terms are longer than any other elective officials'. In 37 of these States, only judges are subject to both impeachment and special disciplinary process. In 33, judges are the only elective state officials subject to requirements of training and/or experience (except that in ten of those, the attorney general is subject to similar requirements). In 25, a judge's pay cannot be reduced during her term. In 23, only judges are subject to mandatory age retirement. In 21, only judicial nominations go through nominating commissions; in six, this applies even to interim appointments. Last, in 18, only judges cannot run for a nonjudicial office without first resigning.

[4] Making more of partisan identification in judicial elections is misleading: it suggests that the candidate will "deliver" in line with party positions. It is established that party labels are the most potent "cue" for voters. But that is a "miscue" when it

If the lines drawn are likely to be ineffective and to lead to confusion, are those lines defensible?

Therefore, I urge the Court, as does MSBA, to adhere to the long-standing policies and provisions that aim at protecting the judiciary –and thus litigants' due process rights to impartial judges, and the public's interest in a judiciary independent enough to perform its rule in the system of checks and balanceds– from any "increase [in] the politicization of judicial elections in Minnesota and ero[sion of] the non-partisan nature of the process."

Respectfully submitted,

Roy A. Schotland

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comes to judges, whose job is so rarely to do anything beyond finding facts and applying law.

"Does it make sense to bar a candidate from identifying her party affiliation even though she may have been known for years as an active member of X party, indeed may have served in various offices for which all elections are partisan?" I recently put that question in my article To The Endangered Species List, Add: Nonpartisan Judicial Elections, 39 Willam.L.Rev. 1397, 1417 (2003). The answer is this: the more we make of party labels, the more we will mislead voters into thinking that the judges' job is not to render impartial justice but to "deliver", just as voters expect of nonjudicial candidates.

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Testimony of Esther M. Tomljanovich
On Proposed Amendment to
The Code of Judicial Conduct
Canons 5A(1) and 5B

May 26, 2004
Minnesota Supreme Court

I speak as a concerned citizen and attorney whose views have been shaped by 13 years as a District Court Judge and eight years as an Associate Justice of the Minnesota Supreme Court.

We all want to insure not only an Impartial, but an Independent, Judiciary while assuring that the First Amendment constitutional rights of judges and candidates for judge remain secure. The only issue is how best to do that.

I adopt the position and the arguments of the Conference of Chief Judges and that of the District Judges Association in their entirety. In the interest of time, I will not repeat them. While I join them in their constitutional and legal arguments, I have some practical concerns as well.

We cannot ignore the intense partisan political interest in cases of statutory and constitutional construction. A litigant or an attorney pursuing a medical malpractice case, for example, might be uneasy taking her case before a judge who has identified herself with a political party seeking tort reform that would result in limitation of damages in such a case, or even appearing before a judge who had attended a partisan political gathering where that subject was discussed. The appearance of an independent, impartial judge would surely be compromised. Political parties take positions on many such issues that come before the courts and judges who are identified with those parties, might be expected to adopt those positions.

This court deals with the interpretation of many statutes where political parties are intimately involved. Again the appearance of an independent, impartial review of those issues would be a concern.

In addition to the many cases that deal with politically sensitive issues there is the occasional case where the political parties themselves are active participants. I have looked back many times at the first test of my independence when I came to this court and we were presented with the case of Clark v Growe, 461 N.W.2nd 385 (1990).

The ruling in that case had an incredible, many say decisive, impact on the 1990 political race for Governor, the political parties followed it with great care. Would the ruling have been the same if the members of the Court had been publicly identified as members of one or the other of the concerned Political Parties? If the members of the Court were scheduled to attend future political gatherings and perhaps speak at those meetings? I hope so.

Would the political activity of the Judges have an impact on the many similar cases that come before the courts? I hope we never have to find out. If political considerations affect only one case, it will be one case too many.

These amendments to Canons 5A(1) and 5B are sweeping and premature because the case Republican Party of Minnesota v. White did not address the partisan political activity provisions of the Code of Judicial Conduct.

Any argument that the present restrictions are narrowly tailored and should survive first amendment scrutiny will be undermined if the Minnesota Supreme Court has anticipated an adverse ruling and removed many of the prohibitions on political activity.

The state's interest in an independent judiciary surely outweighs this minimal intrusion into a judicial candidate's right to participate in partisan politics. These premature amendments will open the door to all sorts of mischief that will put our independent judiciary in peril.

I, Esther Tomljanovich, do represent to this Court that I am a former Justice of the Minnesota Supreme Court and a concerned member of the bar, and I request an opportunity to appear before the Court and discuss the proposed revisions to the current version of Canon 5 of the Code of Judicial Conduct at the hearing to be held on May 26, 2004. I am also requesting permission to bring and distribute written materials on the day of the hearing.

WHEREFORE, I pray that this request for oral presentation to be granted.

Esther Tomljanovich /KDK

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5-18-2004

OFFICE OF
APPELLATE COURTS

MAY 18 2004

FILED

Mr. Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center,
25 Rev. Dr. Martin Luther King Blvd.
St Paul, Mn 55155

Re: Proposed Amendments to the Code of Judicial Conduct
File No. C4-85-679

Dear Mr. Grittner:

Please treat this letter as my request to make an oral presentation on this matter.
Attached are 12 copies of the materials to be presented.

Yours Truly,

Greg Wersal

Attorney at Law

STATE OF MINNESOTA

IN THE SUPREME COURT

C4-85-697

Comments on the Proposed Amendments to the Minnesota Code of Judicial Conduct

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A. The Court's Task

The Court's task is not simply to review the proposed changes to the Code of Judicial Conduct. The Court's task is much more broad -- the task is to give life to our Constitution. First in our minds must be the clear constitutional directive that judges in Minnesota are to be elected. Second, the Declaration of Independence and the Constitutions, both state and federal, are a product of a sovereign people who only delegate authority to the branches of government through informed consent. Third, the U. S. Constitution and the Minnesota Constitution explicitly protect free speech, especially speech in elections. Finally, the Minnesota Constitution contains an explicit directive for the Legislature, not the Courts, to determine that manner in which judicial elections are to be conducted. The Court's task is to give life to these concepts.

The Minnesota Constitution mandates judicial elections. Minn. Const. Art. 6, Sec. 7. Elections are the means by which the voters choose between competing ideas of public policy. Elections are not simply a means to choose between competing candidates. Real elections must provide voters not only a choice between candidates, but also a choice of policy positions.

Whether we like it or not, the clear implication of the Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (hereinafter RPM) on the future of judicial elections is that the public, through elections, will select between competing ideas of public policy. Justice Scalia's opinion clearly rejects as a compelling state interest the "lack of preconception in favor or against a particular legal view." RPM at 777. To the extent we create rules, which hinder the public's ability to select between competing ideas of public policy, we infringe on the voters constitutional right to elections.

Second, the very foundations of our government are based on the concept that people have inalienable rights given to them by God and that the people are the sovereign. The people of Minnesota could have constructed a government any way they wished. It is only through the consent of the people that the judicial branch can claim any authority to act. It is antithetical to the notion of sovereignty to believe that an agent of the people, such as a judge or judicial candidate, can or should withhold information from the sovereign. When you analyze the basis of the arguments brought by opponents to free and open judicial elections, frequently you will find that they are based on a distrust of the voters. This makes no sense. The voters and people of the State of Minnesota are the sovereign. And the purpose of elections is to allow a sovereign people to make informed decisions. On the contrary, if we are to distrust anything, we should distrust any proposal that turns this concept of

sovereignty on its head.

The election rules contained in the Code of Judicial Conduct frequently turn sovereignty on its head. What people, upon agreeing in their most sacred documents to select their judges in elections, would create rules that would prevent the candidates from discussing their views on the very issues the people want discussed? History shows that the people of Minnesota had much different expectations for judicial elections. Minnesota history shows that for decades after our inception as a state, judicial candidates discussed their views on legal issues, sought and used political party endorsements, identified themselves as members of political parties. All of these activities were seen by our founders as positive elements, allowing a sovereign people to make informed decisions in elections.

The idea of sovereignty is reflect in another provision of the Minnesota Constitution. Article 6, Section 7, of the Minnesota Constitution states that judges are to be elected in the "manner provided by law." The "manner provided by law" means as determined by the Legislature in statute. The people reserved to themselves as sovereigns the ability to control judicial elections. If the Legislature wanted to create partisan judicial elections, it has the power to do so. If the Legislature wanted to limit contributions to judicial election campaigns, it has the power to do so. The Legislature currently does require judicial candidates to follow certain campaign finance regulations and the Legislature could impose other restrictions if it chose to do so. The Court should recognize that these powers lie with the Legislature and no where else.

In the past, proponents of election restrictions have argued that these rules are necessary for ethical behavior. But that simply is not true. If the Legislature decided to

pass a law that said judicial candidates can attend and speak at a political party convention, then surely to attend and speak at such a partisan gathering would not be unethical. If the Legislature passed a law that said judicial candidates could personally solicit campaign funds up to $50.00, surely no one could argue there is a compelling state interest to prevent such behavior. The Legislature is the correct forum for determining the state interest and is the forum the Minnesota Constitution explicitly names to determine the state interest in judicial elections.

Finally, the U. S. Constitution and the Minnesota Constitution protect free speech, especially speech in elections. Free speech can only be limited if the state can show a compelling state interest. The proposed rules state that they are narrowly crafted to further a compelling state interest of "judicial impartiality." However, the recent decision of the 8th Circuit (dated 3-16-2004) notes that Justice Scalia found that most meanings of "impartiality" were not a compelling state interest. As noted earlier, the majority opinion in RPM rejects as a compelling state interest the "lack of preconception in favor or against a particular legal view." RPM at 777. The Eighth Circuit noted that one possible meaning of impartiality that was not rejected in RPM was open-mindedness, but "Justice Scalia reserved judgment on whether this sort of impartiality was desirable (not to mention compelling) because he considered the announce clause to be so ineffective a way to achieve 'open-mindedness' that this could not have been the state's purpose in adopting the clause." Nonetheless, the Committee used this concept of impartiality in its proposed rules as if the U. S. Supreme Court had stated it was a compelling state interest. This may lead to more litigation and yet more adverse decisions on the constitutionality of the Minnesota Code. This Court should carefully consider whether to adopt any proposed rule which relies on the existence of such a compelling state interest.

What follows are comments on some of the various provisions which are proposed.

1. The continued separation of the duties of enforcement of the proposed rules between the OLPR and the Board is problematic -- fraught with due process and equal protection problems.

2. Canon 5A(3): The "Pledge and Promise Clause" proposed is vague and likely unconstitutional. "Pledge" and "promise" are not defined. And the rule prohibits pledges and promises "with respect to cases, controversies or issues that are likely to come before the court, that are inconsistent with the impartial performance of the adjudicative duties of the office." In light of the majority opinion in RPM which rejected as a compelling state interest the "lack of preconception in favor or against a particular legal view, it is unlikely that this proposed rule which applies to statements about issues will be constitutional. In fact, RPM clearly stands for the proposition that statements about issues are not inconsistent with the impartial performance of a judicial office. In addition, the proposed rule suffers from the defect of vagueness. What is "inconsistent" with the impartial performance of judicial office? Is this an objective standard of a subjective standard? Or is it so vague that it is not a standard at all?

Consider how the rule might be applied in the real world. Consider the following hypothetical statements and see if you can tell when the judicial candidate has crossed the line and violated the proposed rule that prohibits promises inconsistent with "impartial performance" of judicial duties.

a. "I promise I will follow the law."

b. "I promise I will faithfully protect each citizen's constitutional rights."

c. "I promise I will follow the constitutional law as set out in the majority opinion of Roe v Wade."

d. "I promise I will protect a woman's access to abortion as a fundamental right of privacy."

e. "I believe in abortion rights."

Which of these statements is permitted or prohibited by the proposed rule? Statements a, b,c, and d are all promises that arguably are not inconsistent with the impartial performance of judicial office. And if some of these statements are not permitted where is there a bright line so that a candidate will know what he can or cannot say -- otherwise the rule will surely chill speech which should be permitted. The last sentence does not contain the word "promise" at all. It is simply a statement of a candidate's opinion on a legal or political issue. The last statement is clearly permissible under RPM. What is to be gained by allowing candidates to state they believe in abortion rights and not allowing them to state that they promise to protect a citizen's constitutional rights to abortion? Can anyone make a logical argument for this distinction that can justify the limitation of free speech?

3. Proposed Canon 3D (E) which disqualifies judges may be both over-inclusive and under-inclusive. Not every "issue" in a proceeding is really an issue. Some are settled law. It would seem reasonable that a judicial candidate should be able to state settled law when running for office and still hear cases when he is in office on the same issue. Again, RPM rejected the notion that there is a compelling state interest in the "lack of preconception in favor or against a particular legal issue" -- so no compelling state interest exists to justify the limitation of free speech contained in

the proposed canon.

The rule may be under-inclusive as it applies only to public statements made during an election campaign. Why not public statements made in a legal treatise or in a judge's dissenting opinion? Why not private statements such as those made to the Governor when seeking appointment to office? Even accepting hypothetically the concept of open-mindedness as a compelling state interest, Justice Scalia found that the announce clause was under-inclusive because it did not take into account many other statements made outside of an election. The Eighth Circuit also uses this analysis. "This type of underinclusiveness looks at whether banning certain communications within one time frame but not another is arbitrary." Republican Party of Minnesota v. White, filed March 16,2004. In like respect, this proposed rule does not take into account statements made outside of an election.

On the other hand, there may be state interests that are present inside the courtroom and as a judge performs his official duties that would justify disqualification. The court room is not the public square. Nor are a judges official duties those of a candidate for office. The Court should get out of the business of regulating the free speech of candidates in the public square and focus its attention on the conduct inside the courtrooms themselves. Inside the courtroom, the parties before the court have rights to procedural and substantive due process, as well as equal protection of the law. This is not the same as saying the parties have a right to an impartial judge. And these are state interests that are truly compelling because they are based in the Constitution itself. A rule requiring disqualification that was carefully crafted with these interests in mind (as opposed to the proposed rule that only attacks campaign election statements) could pass constitutional muster.

4. The definition of "impartiality" contained in proposed Canon 3F may be unconstitutional -- specifically the language "as well as maintaining an open mind in considering issues that may come before the judge." Justice Scalia questioned whether open-mindedness was even desirable, let alone whether it was a compelling state interest. There are numerous examples that one could think of to question the desirability of such a rule. Does a judge who believes that the Constitution is superior to a statute lack "open-mindedness"? In fact, there are many issues that are so clear that we actually sanction attorneys for raising them as frivolous. How is it possible that, on the one hand, we would sanction an attorney for bringing a frivolous claim, and, on the other hand, sanction the judge for not being open- minded to the same silly idea?

5. Extending Canon 5 to Candidates for Judicial Appointment

The proposed rules do not extend Canon 5 to candidates for judicial appointment. When we know that over 90% of judges are initially appointed to their positions yet excluded from the provisions of Canon 5, one might reasonably question whether any compelling state interest exists at all for Canon 5. The rules should be the same for all judicial candidates, whether they are candidates for appointment or candidates for election.

6. Canon 5B(2) -- Prohibition on Personal Solicitation of Campaign Funds

The Committee suggests that it is necessary to protect the impartiality and independence of the judiciary to prohibit all "personal solicitation." There are several problems with this analysis:

a. The argument assumes that the character of candidates for judicial office is so low, that even one dollar is a threat to impartiality. This is ridiculous.

Surely, if we were concerned about impartiality, we would limit the amount that can be contributed, not the mere solicitation. As it is now, people can contribute thousands of dollars to a judicial candidate and the candidate has easy access to this public information.

b. The Canon is overbroad in its application. Currently even a letter signed by a candidate is considered a "personal solicitation." But surely a letter can be easily thrown away and does not create the same feelings of obligation that exist in direct person to person contact. Several years ago, the Minnesota State Bar Association suggested that this Canon be changed to specifically allow the candidate to sign letters soliciting campaign funds.

c. The problem with the rule is that it prohibits all personal solicitation. To effectively campaign for office, you need two candidates. One candidate who runs for the office. And another surrogate candidate, who goes everywhere the candidate goes to utter the magic words that the real candidate can not say -- "We need money." The surrogate candidate role is frequently taken over by members of a "campaign committee". But why should anyone who wants to run for a public office be forced to have a campaign committee. As a practical matter the "campaign committee" frequently consists solely of the candidate's spouse. Do we really believe that the candidate does not know who is being solicited for money, has not read and approved the letter of solicitation, or seen the contribution paperwork filed with the Campaign Finance Board?

In other public offices, the tension created by personally soliciting campaign money is overcome by limiting the amount of contributions any one person can give. Why would this not be effective in judicial campaigns?

7. Canon 5A(1)(d) -- Seek Use And Accept Political Party Endorsements

Canon 5A(1)(d) prohibits a candidate from seeking, using or accepting a political party endorsement. The Committee failed to state how any of these acts would affect, let alone undermine, the compelling interest in judicial impartiality they define as "open-mindedness."

In no way does RPM stand for the proposition that "open-mindedness" is a compelling state interest. In fact,the majority opinion in RPM questioned whether open-mindedness was even desirable, let alone whether it was a compelling state interest. None the less, even assuming "open-mindedness" was a compelling state interest, how does the act of simply using an endorsement from a political party undermine "open-mindedness" where the endorsement has not been sought. The Republican Party of Minnesota has established a committee to make recommendations to the State Conventions that has already resulted in a judicial candidate being endorsed, even though the candidate did not seek the endorsement. What possible harm can there be in simply using an endorsement that was freely given and not sought?

Compare the situation of political party endorsement to how Canon 5 handles single issue advocacy groups. Canon 5 allows judicial candidates, through their campaign committees, to seek, accept and use the endorsement of a single issue advocacy group such as NARAL, the NRA, or a police union. This makes no sense. With no limits on the amounts that can be contributed and no limit on the candidates preventing them from stating their views on legal issues, these single issue advocacy groups will soon dominate judicial elections.

Finally, the Court needs to recognize that the implications of RPM are that these rules can not withstand constitutional challenge. Here is what the Eighth Circuit said on remand from the U. S. Supreme Court:

> [O]ur conclusion that the Minnesota Supreme Court was justified in regulating candidate speech concerning political parties, while leaving unregulated comparable speech concerning single issue advocacy groups depended in part in the existence of the announce clause. 247 F.3d at 876 ("At the Minnesota Supreme Court's 1997 hearing on amending Canon 5, Depaul Willette, Executive Secretary of the Judicial Board, testified that the danger of judicial candidates affiliating with single issue interest groups was adequately addressed by the provision of canon 5 prohibiting announcement of the candidates's views on disputed legal or political issues.). Therefore, the evidence supporting Minnesota's distinction between political and other organizations must be reevaluated in light of the demise of the announce clause. _ Republican Party of Minnesota v. White, Eighth Circuit, filed March 16, 2004.

The implications of RPM affects not only using a political party endorsement, but also seeking the endorsement. The Code currently allows judicial candidates to seek campaign contributions through their campaign committees. The Committee's recommendations state that the campaign committee separates the candidates from the corrosive effects of money and serves the compelling state interest of preserving "openmindedness." Why the campaign committee would not preserve a candidate's "openmindedness" when seeking a political party endorsement is a mystery. If the compelling state interest is "openmindedness," it is difficult to comprehend how the campaign committee's action in seeking a political party endorsement in any way affects the candidate's "openmindedness." In addition, the proposed Code allows campaign committees to seek endorsement from single issue advocacy groups. How the state can support the different treatment of political parties from single issue advocacy groups is unknown. As the Eighth Circuit stated, "[T]he evidence supporting

Minnesota's distinction between political and other organizations must be reevaluated in light of the demise of the announce clause." Id.

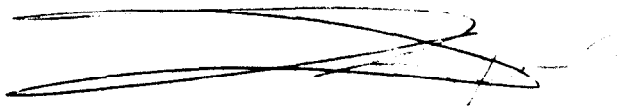
These arguments only address the legal ability of the Minnesota Supreme Court to limit free speech under the First Amendment, not the desirability of limiting free speech. Even if this Court can legally limit free speech and election conduct under the First Amendment, it should not do so. The duty of the Court is to uphold the Minnesota Constitution which calls for elections. Minnesotans, in adopting this constitutional provision, did not create any limitations on judicial elections; they did not create any of the limitations found in Canon 5. From its inception as a state, Minnesota enjoyed judicial elections that were free, open and rigorous, including candidates stating their views on legal issues and seeking political party endorsement, etc. 1 Hiram F. Stevens, The History of the Bench and Bar of Minnesota 66 (1904). There is no historical evidence that judicial elections were seen as different from, or treated as different from, other elections for public office. Id. We need to return to our historical and constitutional roots.

Does that mean that candidate's will say "too much -- that there will be too much free speech? Yes, that possibility exists, but the problem is not ours to solve. The problem must be solved by the people. In a democracy, the people are the sovereign and can reject candidates who do not show proper judicial temperament. Furthermore, the Minnesota Constitution reserves to the people, through the Legislature, the power to create laws regulating the form and manner of judicial elections.

Conclusion

Rather than continuing down a path that will lead to many more constitutional challenges, the Court should should give life to the constitutional provisions that call for judicial elections. The Court should seriously consider getting out of the business of regulating judicial elections altogether. Running for a judicial office is not the practice of law. While the Court has a unique interest in what happens inside of its courtrooms, it does not have the same interest in what happens in the public square. Elections happen in the public square and the people have reserved to themselves the power to regulate election activity in the public square. The public understands that the judicial election system currently does not make sense every time they go to vote and the information they need to make an informed decision is not available to them. In limiting free speech and free association, we inevitably bring disrepute on the Court as voters legitimately question the authority of judges elected in such a system to act in their name. We should get out of the business of regulating election conduct in the public square and leave it to the Legislature to determine and protect the state's interest.

Respectfully submitted,



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5-28-04

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St Paul, Mn 55155

Re: Proposed Amendments to the Code of Judicial Conduct
File No. C4-85-679

Dear Mr. Grittner:

At the hearing on this matter, Justice Blatz indicated that the record would remain open for one week for further submissions, especially to respond to the action of the Eighth Circuit. Enclosed are my Supplemental Comments on the Propsosed Amendments to the Minnesota Code of Judicial Conduct. Please file the same.

Yours Truly,

Greg Wersal

Attorney at Law

STATE OF MINNESOTA

IN THE SUPREME COURT

C4-85-697

The Impact of the Eighth Circuit's Grant of En Banc Review:
Supplemental Comments on Proposed Amendments
to Minnesota Code of Judicial Conduct

On May 25, 2004, the Eighth Circuit Court of Appeals granted en banc review and vacated the opinion and judgment of March 16, 2004. (See attachment.) This supplement will discuss the impact of this action by the Eighth Circuit.

A. Personal Solicitation of Campaign Funds

The Eighth Circuit not only granted en banc review, it vacated the opinion and judgment of March 16, 2004. This is action the Eighth Circuit did not have to take in granting en banc review. The panel had entered judgment for plaintiffs on the announce clause and to enter judgment for the defendants on the solicitation clause. All other issues (the partisan activities clauses) were sent back to the district court for further consideration. In so far as the U.S. Supreme Court has already determined the plaintiffs should be granted judgment on the announce clause, the only real effect of the Eighth Circuit's action in vacating the judgment of March 16. 2004, is to vacate the judgment in favor of the defendants on the personal solicitation clause.

This action also means that at the current time, the only federal court to review the personal solicitation clause and grant judgment is the 11th Circuit Court of Appeals. In Weaver v. Bonner, 309 F. 3d 1312 (11th Cir. 2002), the 11th Circuit struck down the solicitation clause. If there was a conflict between the 11th Circuit and the Eighth Circuit, the conflict no longer exists. The Minnesota Supreme Court should now amend Canon 5 to conform with the clear federal precedent that the personal solicitation clause is unconstitutional.

In addition, the Minnesota Supreme Court should look at RPM, especially the concurring opinion of Justice O'Connor. Justice O'Connor provided the critical fifth vote for the majority opinion. She clearly discusses the solicitation of money in her concurrence and its potential effect on impartiality.

> Moreover, contested elections generally entail campaigning. And campaigning for a judicial post today can require substantial funds. . . . Unless the pool of judicial candidates is limited to those wealthy enough to independently fund their campaigns, a limitation unrelated to judicial skill, the cost of campaigning requires judicial candidates to engage in fund raising. Yet relying on campaign donations may leave judges feeling indebted to certain parties or interest groups. Republican Party of Minn. v. White, 536 U.S. ____ (2002).

Despite the possible impact on impartiality, Justice O'Connor recognizes that fund raising by candidates, like statements announcing candidates views, must be permitted.

> Minnesota has chosen to select its judges through contested popular elections.... In doing so the State has voluntarily taken on

> the risks to judicial bias described above. As a result, the State's claim that it needs to protect judicial impartiality is particularly troubling. If the State has a problem with judicial impartiality, it is largely one the State brought upon itself by continuing the practice of popularly electing judges. Republican Party of Minn. v. White, 536 U.S. ____ (2002).

Justice O'Connor is saying that elections carry with them certain aspects that make them elections. Aspects that can not be divorced from the election process, such as candidates who state their opinions on issues and candidates that raise money for their campaigns. Minnesota can not choose to elect its judges and at the same time prevent the judicial candidate from engaging in campaign election activity such as soliciting campaign funds.

As Justice O'Connor has already considered the personal solicitation of money, the Minnesota Supreme Court should amend Canon 5 by eliminating the personal solicitation clause.

B. The State's Compelling State Interest

To justify any restriction on speech, the state must have a compelling state interest. The state has alleged that such an interest exists in the independence and impartiality of the judiciary. The Advisory Committee in their report also argue for such a compelling state interest relying on the Eighth Circuit panel decision of March 16, 2004. That opinion and judgment have now been vacated.

The U.S. Supreme Court rejected the state's claim of a compelling state interest

in an impartial and independent judiciary. The majority opinion in RPM carefully considers every possible meaning of impartiality and rejects each as a compelling state interest, with one possible exception. The exception is that Justice Scalia left open the possibility of impartiality defined as "openmindedness". However Justice Scalia reserved judgment on whether "openmindedness" was desirable, let alone compelling, because he considered the announce clause such an ineffective way to achieve "openmindedness." On remand, the Eighth Circuit panel adopted "openmindedness" as both desirable and compelling. Based on the existence of this compelling state interest, the Eighth Circuit panel determined that the personal solicitation clause was not an unconstitutional infringement of the speech. The grant of en banc review and the order vacating the judgment of March 16, 2004 also eliminates the finding of any federal court that the state in fact has a compelling state interest. Without some compelling state interest, the state can not justify any restriction on free speech. Without some compelling state interest, the Minnesota Supreme Court must amend Canon 5 and eliminate all of the provisions limiting free speech.

Again when the issue was considered in Weaver v. Bonner, 309 F. 3d 1312 (11th Cir. 2002), the 11th Circuit determined that the state did not have a compelling state interest.

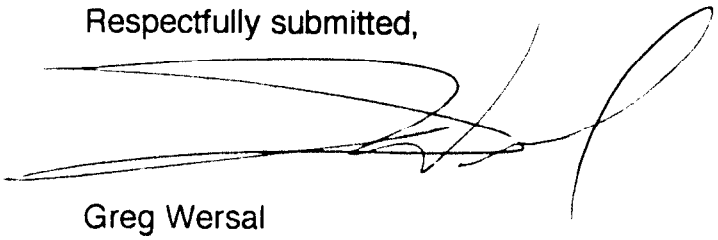
> And since avoiding judicial preconceptions in legal issues is neither possible nor desirable, pretending otherwise by attempting to preserve the appearance of that type of impartiality can hardly be a compelling state interest either. 536 U.S. at _____.

The implications of RPM and the action of the Eighth Circuit are clear, the State does not have a compelling state interest to justify the limitation of free speech in judicial elections.

C. Conclusion

The Minnesota Supreme Court has duty to provide the citizens free and open elections. As Justice O'Connor has stated, Minnesota can not choose to elect its judges and at the same time prevent the judicial candidate from engaging in campaign election activity. Elections are elections are elections.

Respectfully submitted,



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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-4021/4025/4029

Republican Party of Minnesota, et al.,	*	
Appellants,	*	Appeal from the United States District Court for the
v.	*	District of Minnesota.
Verna Kelly, etc., et al.,	*	
Appellees.	*	

The pending petitions for rehearing en banc are granted, and the court's March 16, 2004, opinion and judgment are vacated. The clerk is directed to set the matter for oral argument before the court en banc during the week of October 18-22, 2004, in St. Paul, Minnesota. The clerk will notify counsel of the date and time of argument when the October calendar is established.

The parties are directed to forward to the clerk twenty-five copies of the supplemental briefs filed pursuant to court's order of October 8, 2002. (5369-010199)

May 25, 2004

Order Entered at the Direction of the Court

Clerk, U.S. Court of Appeals, Eighth Circuit

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

JUDGE PHILIP D. BUSH
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487
(612) 348-6360

May 19, 2004

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Boulevard
St. Paul, Minnesota 55155

RE: COMMENTS ON THE PROPOSED AMENDMENTS TO THE MINNESOTA CODE OF JUDICIAL CONDUCT

To the Justices of the Minnesota Supreme Court:

I am writing to comment on the Report of the Advisory Committee to Review the Minnesota Code of Judicial Conduct. Specifically I will focus on the proposed changes to Canon 5.

When I chose public service as a Minnesota judge 15 years ago, I understood that it meant giving up some important things. Being a judge involves giving up a certain amount of privacy and personal independence. Joining the Minnesota judiciary, the nonpartisan third branch of government, also involved giving up any partisan political activity. However, common sense and case law tells us that judges do not lose all personal constitutional freedoms. I agree that the goal is to find "the appropriate balance between preserving judicial impartiality, independence and the appearance thereof and protecting the First Amendment."(Report p. 23). I believe the Advisory Committee has failed to find the appropriate balance and their proposal harms the judiciary.

When I start a jury trial it is necessary to instruct the jurors about their conduct during their time of service in the justice system. We are asking private citizens to temporarily take on a new role. I tell them that they cannot talk to anyone involved in the case during the trial, the parties, the lawyers and the witnesses. I explain that there are two equally important reasons for this. The first and obvious reason is the need for the jury to be impartial and to decide the case based solely on the law and the evidence presented. Therefore, they cannot talk to anyone about the content of the case. I also explain that there is a second equally important but less obvious reason. There is the important need to protect the appearance of an impartial jury. I explain that if they are talking with someone from one side of the case during a break about a matter totally unconnected to the issues in the trial it still may create the appearance of partiality to the other side. Both are reasons equally important. This is even truer with judges.

Unfortunately the Advisory Report fails to give meaningful attention to the importance of the appearance of judicial impartiality. When analyzing the "beholden or obligated to a political party" standard it is important to keep in mind the question of whether the judicial conduct, if permitted, would harm the necessary and important appearance of neutrally, independence, nonpartisanship and impartiality. I believe that the proposed changes to Canon 5 should be rejected.

In addition to the Canon 3 "Announce Clause" changes these additional proposed changes would allow a judge or candidate for this nonpartisan office (Minn. Stat. §204B.06 Subd. 6) to do the following which are now not permitted:

- to identify themselves as a member of a political party (Canon 5 A.(1)(a))
- to attend political gatherings (Canon 5 A.(1)(d))
- purchase tickets for political dinners or other functions (Canon 5 A.(1)(e))
- speak at gatherings of political organizations (Canon 5 B.(1)(a)), and
- solicit publicly stated support (Canon 5 B.(2)).

Taken together I believe that these changes would do needless and serious harm to the necessary and important goal of the appearance of judicial impartiality, nonpartisanship and independence. A prospective candidate can, under the proposed changes, do all of the above before the July filing period when the party political gatherings (local, district and state conventions) occur. A judge who is up for election does not know until the July filing period (after the party conventions) whether he or she will have an opponent. This would put a lot of pressure on all sitting judges (whether opposed in an election or not) to be active in partisan political politics on a regular basis before any possible contested election.

A judge still can not "seek, accept or use" a political party endorsement (Canon 5 A.(1)(d)). However, identifying party membership, attending and speaking at partisan gatherings and soliciting support ('hoping for but not seeking endorsement') will be seen as a distinction without a difference by the public. This will certainly create the undesirable public appearance of judicial partisanship for all judges. If these proposed changes are adopted the entire judiciary, not just judges who are up for election or judges who may be involved in a contested election, will be and will be seen as being more involved in partisan politics. This will hurt the people of this state and diminish public trust in the courts.

The proposed changes to Cannon 5 are not needed or required. They will needlessly harm the important state interest of both the reality and the appearance of nonpartisanship and neutrality for both judges and judicial candidates. I urge you to reject the proposed changes to Canon 5.

Sincerely,

Philip D. Bush
District Court Judge

Eric Lipman
State Representative
District 56A
Washington County

Minnesota House of Representatives

COMMITTEES: VICE-CHAIR, GOVERNMENTAL OPERATIONS AND VETERANS AFFAIRS POLICY;
CIVIL LAW; JUDICIARY POLICY AND FINANCE;
LEGISLATIVE COMMISSION ON METROPOLITAN GOVERNMENT

May 19, 2004

Minnesota Supreme Court
Attention: Honorable Francis K. Grittner
Minnesota Judicial Center Suite 300
25 Rev. Dr. Martin Luther King, Jr. Boulevard
Saint Paul, Minnesota 55155

Re: May 26, 2004 Hearing on Minnesota Code of Judicial Conduct
Oral Presentation Requested

Dear Chief Justice Blatz and Members of the Court:

I write today with both congratulations and concern.

First, if I may, the congratulations. In my judgment, the Advisory Committee's proposed reforms of the "Announce Clause," "Identification Clause" and the "Attend and Speak Clause" of Canon 5 appear to be in close accord with the decision of the United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). By applying the U.S. Supreme Court's instruction in each of these three areas, the Advisory Committee's Final Report, does a valuable service to the Court, the First Amendment and the rule of law.

I continue on further – regrettably at some length, below – because I earnestly believe that the Advisory Committee's work is incomplete. I believe that if the Minnesota Supreme Court opens the Minnesota Code of Judicial Conduct to repair the "Announce Clause," "Identification Clause" and the "Attend and Speak Clauses," but does not likewise affect changes in the Solicitation Clauses of the Code, the state courts will be lead into further error, expense and embarrassment. In good faith, and as a legislator, member of the Judiciary Policy and Finance Committee and Officer of the Court, I urge the Court to consider the comments submitted below as to reform of the Solicitation Clause.

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567 State Office Building, 100 Rev Dr Martin Luther King Jr Blvd, St. Paul, Minnesota 55155-1298 (651) 296-4244
FAX: (651) 296-2080 TTY: (651) 296-9896 Email: rep.eric.lipman@house.mn

FACTUAL BACKGROUND

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the United States Supreme Court reversed the grant of summary judgment against Gregory Wersal and the other plaintiffs in the suit on their claim that the "Announce Clause" of Canon 5 of the Minnesota Code of Judicial Conduct violated their First Amendment rights. As the Court is aware, prior to the Supreme Court mandate that struck down the "Announce Clause," Canon 5 prohibited candidates for judicial office from announcing their views on disputed legal and political issues.

With respect to Wersal's challenges to other proscriptions of Canon 5 – namely, the prohibitions on judicial candidates engaging in specific partisan political activities, and from personally soliciting campaign contributions – the U.S. Supreme Court remanded to the U.S. Court of Appeals for the Eighth Circuit for proceedings consistent with its opinion. *Id.*, at 788.

On remand, a majority of the three-judge panel concluded that "the Supreme Court's opinion requires us to remand to the district court for entry of judgment in favor of Wersal and the other plaintiffs on their 'announce' clause claim," a remand to the District Court for "consideration of whether its disposition of the plaintiffs' claims based on restriction of partisan activities is consistent with the Supreme Court's opinion," and a "remand to the district court for entry of judgment in favor of Suzanne White and the other defendants on plaintiffs' personal solicitation clause claim." *See, Republican Party of Minnesota v. White*, 2004 WL 503674 (8th Cir. 2004), Slip op. at 1 (hereafter "Slip op.").

Yet, the state of the law remains very fluid. The *White* plaintiffs have filed a Petition for Rehearing and a Suggestion for Rehearing *En Banc*, and the Court has taken the further, extraordinary step of ordering that the *En Banc* petition be briefed by state officials. *Cf.* Fed. R. App. P. 35 (a) and (e). Further, given the fact that the Eighth Circuit decision on March 16 prompts an inter-circuit conflict (*compare, e.g., Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002)), and the First Amendment questions involve truly weighty interests, *En Banc* review of this decision may be granted.

LEGAL ANALYSIS AND ARGUMENT

I. The Legal Principles Set Forth in *White* Apply with Equal Force to the Solicitation Clause as they do to the Announce Clause.

With respect to the "Announce Clause" of Canon 5, the U.S. Supreme Court held that, under the First Amendment, Minnesota's state courts could not prohibit judicial candidates from engaging in campaign speech that was truthful, non-promissory and relevant to the voters. As Justice Scalia wrote:

> The notion that the special context of electioneering justifies an abridgment of the right to speak out on disputed issues sets our First Amendment jurisprudence on its head. '[D]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges. 'The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance.' 'It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign.' We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election.
>
> ....
>
> "[T]he greater power to dispense with elections altogether does not include the lesser power to conduct elections under conditions of state-imposed voter ignorance. If the State chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process ... the First Amendment rights that attach to their roles."

White, 536 U.S. at 781-82 and 788 (citations and footnotes omitted).

A similar analysis applies to the proscription against judicial candidates signing fundraising solicitations to their supporters.[1] Because fundraising solicitations signed by the candidate can be truthful, non-promissory and relevant to the voters, the First Amendment prevents this speech from being banned outright by the Judicial Canons. *See, White*, 536 U.S. at 782 ("'It is simply not the function of government to select which issues are worth discussing ... in the course of a political campaign.' We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election").

Notwithstanding the instruction in *White*, the Advisory Committee's Report carries forward the ban on judicial candidates signing of fundraising letters. This ban should be reconsidered by the Court because it does not serve a compelling state interest nor is it narrowly tailored. A few points deserve special emphasis.

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[1] Minnesota's Code of Judicial Conduct prohibits judges or judicial candidate from signing fundraising solicitations. *See,* Minnesota Code of Judicial Conduct, Canon 5B(2).

First, the ban on judicial candidates signing their own fundraising letters is so "woefully underinclusive"[2] that it "points to two other defects that are fatal: underinclusiveness may show that the government's interest is not truly compelling, since the government has chosen to leave unchecked a threat to that interest; or else it may show that the government is discriminating on the basis of content, suppressing disfavored speech, while allowing other, favored speech even though it ought to be subject to the same objection as the prohibited speech." *Compare,* Slip op. at 17; *see also, Republican Party of Minnesota v. White*, 536 U.S. at 780 ("[A] law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (citing *Florida Star v. B. J. F.*, 491 U. S. 524 (1989) (Scalia, J., concurring in judgment)).

Because judicial candidates are prohibited by Canon 5B from personally signing a fundraising solicitation, the familiar practice is for judges to create campaign committees – frequently headed by members of the local Bar – to undertake fundraising on behalf of the judicial candidates. Indeed, the Canons specifically authorize this kind of lawyer-to-lawyer fundraising for judicial campaigns. *See,* Canon 5B(2). Therefore, in order to avoid the appearance that the judicial candidate is not "incur[ring] obligations" "indebtedness" or "dependence" to contributors, the current system encourages judicial candidates to become quite dependent upon the lawyers who form the campaign and fundraising operations of the candidate's committee. The Judicial Canons do not, for instance, prevent a judicial candidate from knowing who is serving on the candidate's campaign committee or who is undertaking fundraising solicitations on the candidate's behalf. *Id.*

The Court might well ask then which alternative is more threatening to judicial impartiality or the appearance of impartiality: (a) a judicial candidate signing his or her own fundraising letters, with a reply envelope that is addressed to the judicial candidate's committee; or (b) the judicial candidate recruiting local members of the Bar to serve on a campaign committee and asking these lawyers to undertake fundraising chores on the candidates behalf? Clearly, the latter system – our current system – appears more likely to incur a set of "obligations" than the one that is urged by the First Amendment.

This conclusion is confirmed by the fact that the finances of so many of the campaign committees for Minnesota's incumbent appellate judges are managed by the same attorney in private practice.[3] The current system gives the unfortunate impression that a very small group of "connected" lawyers, with close ties to the campaign committees of incumbent judges, have special access to judges that is not afforded to other litigants. The ban on candidates signing

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[2] *Compare,* White, 579 U.S., at 779 (the Announce Clause of Canon 5 was "so woefully underinclusive as to render belief in [the state's claimed] purpose a challenge to the credulous").

[3] *See, generally,* http://www.cfboard.state.mn.us/campfin/ (Judicial Office Candidates).

their own fundraising letters cannot serve a compelling state interest when the system it maintains is worse, and potentially more threatening to judicial independence, than the one it displaces.

A rule that would be both effective and constitutional would be to permit a judicial candidate to sign his or her own fundraising letters, but to forbid the candidate's committee from accepting a contribution from the contributor at any time during that election cycle if the contributor, *in violation of the Canons*, sent the contribution directly to the candidate. Under such a rule, the campaigns would be encouraged to ensure compliance with the Code of Judicial Conduct, and shielding candidates from knowing who made the replies, because mistakes would come at the expense of any fundraising appeals.

Further, the ban on judicial candidates signing fundraising letters is not narrowly tailored. The Canons do not appear to require that the attorney members of the judicial candidate's campaign committee either resign or suspend fundraising, if and when those attorneys have a case before the judicial candidate.

More puzzling still, the Advisory Committee Report proposes to forbid a judicial candidate from making a written request for a $10 campaign contribution, but will not proscribe the same candidate personally soliciting endorsements from well-known lawyers in town. If the object of the Canons is to prevent the appearance or actuality of "incurred obligations" by judicial candidates, the Court might well ask, what is more greatly prized by the candidate: a $10 contribution or the public support of a high-profile practitioner, whose professional reputation and name-identification has been built over decades? To state the proposition is to know the answer. As a method of combating the appearance or actuality of judicial "indebtedness," the fundraising rules are so woefully underinclusive that they strain credulity.

Lastly, because the proposed fundraising rules have the "look and feel" of a content-based restriction, I fear that they could be a public relations disaster for the Court. Because it cannot be doubted that incumbent judges will have plenty of lawyers who are willing to serve on campaign committees, and to publicly undertake fundraising chores for them, and yet challengers will not, the rule preventing judicial candidates from signing their own fundraising letters appears to "stack the deck" in favor of incumbents. I am concerned that to the extent that Court members appear to be regulating more harshly the kinds of speech that would be used by their opponents, rather than themselves, the result invites peril for the Court.

Among the tensions of a system in which members of the Minnesota Supreme Court promulgate rules for campaign activity by judicial candidates is that the members of the Court are both the regulators and the regulated parties. This "self-regulation," if you will, involves considerable dangers – not least among them, the potential impression that Court members would write campaign rules to burden and crimp their competitors. In terms of the reputation and esteem of the Court, few fates would be worse than if the public believed that members of the Court wrote the judicial campaign rules so as to favor their own re-election bids.

To my mind, the only practical way to avoid this peril is to give the widest reach possible to the First Amendment. Under the First Amendment, Judicial candidates should be permitted to sign their own fundraising letters, provided that they do not know the replies to the solicitations.

CONCLUSION

I am grateful for the chance to share my views and analysis with this Honorable Court. While the Advisory Committee has done a very fine job in addressing the infirmities of the "Announce Clause," "Identification Clause" and the "Attend and Speak Clauses," I have deep concerns about the decision to carry forward, without change, the Solicitation Clause.

A rule that would be both effective and constitutional would be to permit a judicial candidate to sign his or her own fundraising letters, but to forbid the candidate's committee from accepting a contribution from the contributor at any time during that election cycle if the contribution was sent directly to the candidate

Very truly yours,

Eric Lipman
State Representative
Member, Committee on Judiciary Policy and Finance

I, J. Thomas Mott, do represent to this Court that I am a District Court Judge of the Second Judicial District and that I have been authorized by the Conference of Chief Judges, as its Chairperson, to speak on behalf of the Conference regarding the proposed revisions to the current version of Canon 5 of the Code of Judicial Conduct at the court hearing scheduled on May 26, 2004, and I have attached written copies of the material to be presented.

WHEREFORE, I pray that this request for oral presentation to be granted.

/s/ J. Thomas Mott

J. Thomas Mott
Chief Judge
Second Judicial District
1010 Ramsey County Courthouse
15 West Kellogg Boulevard
St. Paul, MN 55102

RESOLUTION OF THE
CONFERENCE OF CHIEF JUDGES
ON PROPOSED AMENDMENT TO THE
CODE OF JUDICIAL CONDUCT
CANONS 5A(1) AND 5B

WHEREAS, the April 15, 2004 Report of the Minnesota Supreme Court Advisory Committee to Review the Code of Judicial Conduct and the Rules of the Board on Judicial Standards makes recommendations regarding amendment of Canon 5A(1) and 5B of the Code (partisan political activities provisions) as set forth in the attached pages; and

WHEREAS, the Minnesota State Bar Association created a task force of lawyers, judges, legislators, and citizens to study judicial elections post Republican Party of Minnesota v. White and make recommendations in light of the Supreme Court's ruling; and

WHEREAS, the Minnesota State Bar Association has proposed amendments to the Code of Judicial Conduct consistent with the Supreme Court opinion in Republican Party of Minnesota v. White which do not include similar amendments to 5A(1) and 5B; and

WHEREAS, the Conference of Chief Judges has previously supported the Minnesota State Bar Association's recommendations on amendments to the Code of Judicial Conduct in light of Republican Party of Minnesota v. White which do not include amendments to 5A(1) and 5B; and

WHEREAS, the Conference of Chief Judges is in agreement with both the Minnesota State Bar Association and the Minnesota District Judges Association that the proposed amendments to 5A(1) and 5B (partisan political activity) are neither mandated by the Supreme Court's opinion, nor by the Eighth Circuit or Federal District Court

which have previously upheld the constitutionality of these provisions; and

WHEREAS, the amendments at this time to 5A(1) and 5B would be premature in the on-going legal process and perhaps compromise the State's position on remand; and

WHEREAS, the Conference of Chief Judges is further concerned that the proposed recommendations for partisan political activity do not serve the State's compelling interest in the integrity, impartiality, and independence of the Minnesota trial court judges or the intent of the Minnesota legislature in adopting non-partisan judicial elections; and

WHEREAS, the Federal District Court has been asked to conduct evidentiary hearings to evaluate these provisions in light of the Supreme Court's decision and will have an opportunity to thoughtfully review and opine thereon; now

BE IT RESOLVED that the Conference of Chief Judges opposes any effort to amend the partisan political activity provisions of the Minnesota Code of Judicial Conduct as recommended in the April 15 Advisory Committee report until after final resolution of Republican Party of Minnesota v. White in the courts.

Canon 5. A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office.

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06 Subd 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; ~~identify themselves as members of a political organization, except as necessary to vote in an election;~~

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) ~~attend political gatherings; or~~ seek, accept or use endorsements from a political organization; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate~~, or purchase tickets for political party dinners or other functions~~.

....

B. Judges and Candidates For Public Election.

(1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings~~, other than political organization gatherings,~~ on his or her own behalf, except as prohibited by Canon 5A(1)(d);

(b) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

(2) A candidate shall not personally solicit or accept campaign contributions ~~or solicit publicly stated support~~. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings,

candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

IN RE PROPOSED AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

MEMORANDUM IN SUPPORT OF THE RESOLUTION OF THE CONFERENCE OF CHIEF JUDGES

Under the Minnesota Constitution, judges are to be elected "in the manner provided by law." Minn. Const. Art. VI, § 7. Since 1912, Minnesota has provided by legislative act that judicial elections be nonpartisan. See Minn. Stat. § 204B.06, subd. 6. The proposed amendments to Canon 5A and 5B, while purporting to reconcile Canon 5 with the Supreme Court decision in Republican Party of Minnesota v. White, 536 U.S. 765 (2002) (hereafter RPM), effectively destroy the nonpartisan character of judicial elections by allowing judicial candidates to become actively involved in party politics.

The Code of Judicial Conduct calls upon judges to protect the integrity and independence of the judiciary (Canon 1), to avoid even the appearance of impropriety (Canon 2), and to perform the duties of the office impartially (Canon 3). Minnesota has a compelling interest in maintaining these high standards as they are necessary to the fair and impartial administration of justice and to maintaining public faith in the judiciary. While it is essential to strike a proper balance between First Amendment rights and Minnesota's interest in an independent and impartial judiciary, the proposed amendments to Canon 5A and 5B, being in conflict with principles espoused in Canons 1, 2, and 3, will frustrate Minnesota's election laws and undermine its compelling interest in

maintaining public faith in the judiciary. The proposed amendments are a hasty reaction to RPM, and while pursuing the laudable goal of clarifying the boundaries of judicial conduct in advance of the next election cycle, the proposed amendments are a preemptive maneuver made in anticipation of the uncertain disposition of RPM.

In deciding RPM, the Supreme Court focused on the meaning of "impartial" in the context of the "announce clause," the sole issue on which it granted certiorari. The Court did not consider, nor does its analysis of "impartiality" necessarily encompass, the principle of "judicial independence"; in fact, the Court noted with some concern that the parties used the terms interchangeably. Though one cannot draw any conclusion from the Supreme Court's refusal to grant certiorari on the other issues raised in RPM, the Court's affirmation of political activity restrictions imposed by the Hatch Act strongly suggests that different principles would apply. Indeed, in its initial decision, the Eighth Circuit referred to Minnesota's compelling interest in an "independent" judiciary while noting the political activity restrictions imposed by the Hatch Act. See Republican Party of Minnesota v. Kelly, 247 F.3d 854, 866-69 (8th Cir. 2001). Thus, in deciding whether to adopt the proposed amendments to Canon 5, this Court should consider whether the current restrictions on partisan activity are narrowly-tailored to meet not just the compelling state interest in an impartial judiciary but, alternatively, its compelling interest in an independent judiciary.

In RPM, the Supreme Court noted: "It is true that a 'universal and long-established' tradition of prohibiting certain conduct creates 'a strong presumption' that the prohibition is constitutional . . . ." 536 U.S. at 785. The Court went on to note that the movement toward nonpartisan elections began in the 1870's. In Minnesota,

nonpartisan judicial elections have been the law since 1912. If tradition alone were sufficient to uphold the restrictions on partisan political activity, the current restrictions in Canon 5 would pass constitutional muster as an essential component of the longstanding nonpartisan character of Minnesota's judicial elections. By contrast, the "announce clause" had only a tangential connection with the nonpartisan character of Minnesota's judicial elections.

One final point should be considered in deciding whether to adopt the proposed amendments to Canon 5A and 5B. The Minnesota Constitution provides that judicial elections shall be held "in the manner provided by law." Minn. Const. Art. VI, § 7. Since 1912, judicial elections have been nonpartisan. To suddenly allow judicial candidates to associate closely with partisan political organizations and engage publicly in partisan events would entangle judicial candidates in party politics contrary to the express will of the people of Minnesota as carried out by the legislature. Moreover, in effectively dispensing with the nonpartisan character of judicial elections, the proposed amendments are contrary to the separation of powers principle set forth in Article III, Section 1 of the Minnesota Constitution. The impact of this change is too significant to resolve the issue without benefit of the federal court's decision on the constitutionality of the partisan activity provisions in Canon 5.

JJTM

I, Clifford M. Greene, do represent to this Court that I am a member of the bar and that I request to speak regarding the proposed revisions to the current version of Canon 5 of the Code of Judicial Conduct at the court hearing scheduled on May 26, 2004.

WHEREFORE, I pray that this request for oral presentation to be granted.

s/ Clifford M. Greene
Clifford M. Greene

I, Richard B. Solum, do represent to this Court that I am a former district court judge of the Fourth Judicial District and a concerned member of the bar, and I request an opportunity to appear before the Court and discuss the proposed revisions to the current version of Canon 5 of the Code of Judicial Conduct at the hearing to be held on May 26, 2004.

I just learned of the hearing, and apologize that I do not have any written material to submit. Since leaving the court in 1998, I have had no personal stake in the issues surrounding Canon 5, but I have had an immense interest as a citizen, a lawyer, a former law professor and most importantly one with an abiding conviction about how uniquely important is the judicial branch to the preservation of justice in our state and country.

WHEREFORE, I respectfully request the privilege of addressing the Court.

Richard B. Solum

Richard B. Solum
Dorsey & Whitney LLP
Suite 1500
50 South Sixth Street
Minneapolis, MN 55402-1498

STATE OF MINNESOTA

IN SUPREME COURT

C8-85-697

In re:

Hearing to Consider Proposed Amendments to
the Minnesota Code of Judicial Conduct

REQUEST FOR ORAL PRESENTATION & WRITTEN COMMENTS OF THE MINNESOTA TRIAL LAWYERS ASSOCIATION

TO: The Minnesota Supreme Court

INTRODUCTION

The Court solicited comment about proposed changes to the Minnesota Code of Judicial Conduct. The Court requested input by May 19, 2004. This submission by the Minnesota Trial Lawyers Association ["MTLA"] urges caution as to the adoption of proposed changes to Cannon 5 and requests to make an oral presentation on May 26, 2004.

The MTLA is a group of about 1,200 Minnesota attorneys who represent litigants in civil and criminal matters. It's attorney members have a strong interest in maintaining the objectivity and integrity of the judicial officers before whom its members appear as advocates for their various clients, and feel that with only minor exceptions the existing rule structure strikes a balance between the right to free speech and the compelling public interest in assuring the objectivity and integrity of judges by constraining their public expression of political opinions.

. The changes proposed by the Advisory Committee appear to have been fostered by the decision of the U.S. Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), but that case is presently on remand and many details have yet to be decided about the constitutional parameters for restraint of political speech by judicial officers and candidates. Until those issues are decided, it is premature to expand the current rules more than is absolutely necessary.

SUMMARY

In the past, the Minnesota Supreme Court adopted as judicial canons, a code that prohibited a "candidate for judicial office" from "announc[ing] his or her views on disputed legal or political issues." The "announce clause"was held to violate the First Amendment in *Republican Party of Minnesota v. White*, 526 U.S. 765 (2002). The Advisory Committee appointed by the Minnesota Supreme Court to review the Minnesota Code of Judicial Conduct issued a Report on April 15, 2004 recommending changes to Canon 5A that would lift prior bars against a candidate for judicial office from:

- "identify[ing] themselves as members of a political organization, except as necessary to vote in an election" [Proposed Canon 5A(1)(a)]
- "attend[ing] political gatherings" [Proposed Canon 5A(1)(d)]
- "purchas[ing] tickets for political party dinners or other functions" [Proposed Canon 5A(1)(e)] and
- "mak[ing] pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office [or] announc[ing] his or her views on disputed legal or political issues . . . ." [Proposed Canon 5A(3)(d)(I)]

While the "announce clause" was held invalid and must logically be stricken, the other modifications - - if they are to be made at all - - should be read in the narrowest possible context to preserve as much as possible the objectivity and integrity of the judicial branch of government.

ANALYSIS

1. *White* held that the "announce" clause in the current code violated the First Amendment because it unfairly impinged on speech about a candidate's qualifications for judicial

office. In reversing and remanding *Republican Party of Minnesota v. White*, 247 F.3d 854 (8th Cir. 2001), the U.S. Supreme Court noted that a universal and long-established tradition of prohibiting certain conduct creates a strong presumption that the prohibition is constitutional. *See Republican Party of Minnesota v. White*, 526 U.S. 765 (2002), *citing McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375-77 (1995).

Nonetheless, the Supreme Court in *White* said that the First Amendment did not permit Minnesota to prevent candidates from discussing what elections were about, and that the "announce clause" was "not narrowly tailored to serve impartiality," and thus held that the "announce clause" violated the First Amendment because it was not "narrowly tailored" to "serve a compelling state interest." 526 U.S. at 770, *citing Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 222 (1989).

Since a judicial election is a contest about which candidate is best qualified to perform the functions of the office, the freedom to a candidate to describe their qualifications was held to be constitutionally protected, and to the extent that one's "views on disputed legal or political views" could bear on their qualification for office, the "announce clause" was held invalid.

2. Pending the disposition of the *White* case on remand, it is premature to adopt broader changes to existing judicial canons that are aimed at assuring the integrity of judicial officers. While the "announce clause" must be modified to allow a statement of party affiliation - - and the Advisory Committee's proposal seems well aimed at achieving that goal - - it would be improvident to take action now that further injects judicial candidates into the political environment until the federal court has subjected the remainder of the canon to strict scrutiny and rendered an opinion on whether the current rules are "narrowly tailored" to "serve a compelling state interest." The Eighth Circuit

has remanded to the federal district court the issue of whether the partisan political activity clauses of the existing canon withstand strict scrutiny. *See Republican Party of Minnesota v. White*, 2004 WL 503674 (8th Cir. 2004).

There obviously exists a compelling state interest in a judicial branch peopled by judges with integrity and independence who are possessed of an appearance of judicial integrity and judicial independence, though the U.S. Supreme Court in *White* said that it was virtually impossible and actually undesirable to seek judicial candidates who were without any preconceptions about the law. 536 U.S. at 773, *citing Laird v. Tatum*, 409 U.S. 824, 835 (1972) (J. Rehnquist declining requested recusal for prior expressed opinion on matter at issue).

Until the federal district court has resolved the issue of whether existing rule structure is constitutional, the existing rules - - which were fostered by a strong and compelling interest in the integrity and independence of the judicial branch - - should be maintained.

3. Unless read very narrowly, the other recommended changes to Canon 5 should not be made. Pending the federal district court's final disposition of the remainder of the structure of canon 5, collateral changes to canon 5 - - apart from the removal of the "announce clause" in Proposed Canon 5A(3)(d)(I) and the statement of political affiliation in Proposed Canon 5A(1)(a) should be withheld. The Advisory Committee has proposed to remove current rules that bar a judicial candidate from:

- "attend[ing] political gatherings" [Proposed Canon 5A(1)(d)] and
- "purchas[ing] tickets for political party dinners or other functions" [Proposed Canon 5A(1)(e)].

These collateral changes could be read narrowly, so as to permit a judicial candidate to attend a

political convention and seek an political endorsement, and to attend a political dinner and pay for its cost while seeking such an endorsement - - which may be protected speech or action under *White* - - the proposals could also be read more broadly to allow direct participation of judicial candidates in what could be wholesale political activities that tie the candidate to a political platform or agenda on matters for which the duties of judicial office require an open and reflective mind-set.

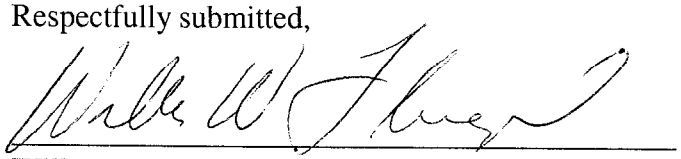
4. Caution is urged with anything bearing on the integrity of judicial officers. While we must do what we must do after *White*, we need not do what we need not do.

Judicial candidates must be allowed to state their qualifications and - - after *White* - - their legal or political opinions on matters generally. It would, however, be a disservice to the public perception of a fair and impartial judiciary to have Candidate X identify himself as the "pro-gun" judge and Candidate Y as the "anti-abortion" judge, when issues of gun safety or of reproductive rights/responsibilities may come before that same judge. Since the agenda of a political party may become very specific about particular legal positions that could well come before any judicial officer (*e.g.*, the alteration of the Minnesota Constitution to constrain judicial construction of what is a "marriage"), the less politically active the judiciary is or appears, the better the mantle of impartiality fits its shoulders.

A judicial candidate may still send an emissary to seek political endorsement at political functions or dinners. Every means by which to keep Minnesota judges above the political fray should be fully used and caution should be exercised as much as possible in applying *White* any more broadly than it absolutely must be applied.

Dated: 5-19-04

Respectfully submitted,



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MSBA

May 19, 2004

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St. Paul, MN 55155

RE: **Proposed Amendments to the Code of Judicial Conduct**
C4-85-697

Dear Mr. Grittner:

Please consider this a request to make an oral presentation at the May 26 hearing on the recommendations of the Supreme Court Advisory Committee to Review the Minnesota Code of Judicial Conduct and Rules of the Board on Judicial Standards. Appearing on behalf of the Minnesota State Bar Association will be MSBA President Jim Baillie.

Please find enclosed 12 copies of the MSBA statement on the proposed amendments to the Code of Judicial Conduct.

Thank you for your consideration.

Sincerely,

Tim Groshens
Executive Director

MSBA

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May 18, 2004

To: The Honorable Justices of the Minnesota Supreme Court

RE: April 15, 2004 Report of the Supreme Court Advisory Committee to Review the Code of Judicial Conduct
C4-85-697

On behalf of the Minnesota State Bar Association, I write to comment on the proposed amendments to the Minnesota Code of Judicial Conduct set forth in the April 15, 2004 Report of the Supreme Court Advisory Committee to Review the Code of Judicial Conduct and the Rules of the Board on Judicial Standards.

We commend the Advisory Committee for its thorough and thoughtful work, and note that in a number of areas the recommendations of the Committee are consistent with recommendations of the MSBA Judicial Elections Committee adopted by the MSBA Board of Governors at its April 16, 2004 meeting. Those recommendations are attached.

Canons 3 and 5

As does the Advisory Committee, the April 2004 MSBA report recommends amending Canons 3 and 5 to delete the announce clause, retain the pledges and promises clause, add a definition of impartiality and add a disqualification provision. The only significant difference between the MSBA position and the Advisory Committee position on these clauses relates to disqualification. We recommend limiting applicability of the provision to statements made by candidates during a judicial campaign, while the Advisory Committee would extend the scope of the provision to statements made by judges outside the campaign. Our concern is that, as drafted, the broader disqualification provision recommended by the Advisory Committee could be interpreted to apply to past statements made by a judge in court in the process of issuing a ruling on a case, or to statements in previous written opinions, articles or books. We urge the court to consider the more narrowly tailored approach contained in the MSBA report.

Judicial Ethics

The Advisory Committee recommends that the Office of Lawyers Professional Responsibility and the Board on Judicial Standards jointly sponsor biennial

seminars on judicial election ethics. The MSBA report goes further, recommending that attendance at these courses be mandatory for all judicial candidates.

Canon 5A and B—Partisan Activities

We oppose the Advisory Committee recommendations which would eliminate the current prohibitions in Canon 5A(1) and B against political party identification, attending and speaking at political gatherings, purchasing tickets for political party dinners or functions, and soliciting publicly stated support. These provisions are not addressed in the April 2004 MSBA report. On May 6, however, the MSBA Executive Committee approved a resolution opposing any amendment of these provisions until the issues remanded by the Eighth Circuit in *RPM v. White* have been addressed and resolved in the courts. This resolution is attached.

The MSBA has a long-standing policy supporting an independent judiciary as crucial to the preservation of our constitutional system of checks and balances. In an examination of the state judicial selection system in 1997, an MSBA task force adopted preservation of the independence of the Minnesota judiciary as one of its guiding principles. That principle was reiterated most recently in the report of the MSBA committee formed to reevaluate judicial selection in Minnesota in light of the Supreme Court decision in *RPM v. White*:

> The committee was unanimous in its conviction that the judiciary in Minnesota possesses a well-deserved national reputation for competence, impartiality and independence, and that the primary goal of the committee would be to develop recommendations designed to preserve a well-qualified and well-respected judiciary in the state.

In furtherance of this view, the Association has consistently opposed politicization of the judicial selection process and has consistently supported the Minnesota system of non-partisan judicial elections. Permitting candidates to identify themselves as members of a political party, and allowing them to attend and speak at political gatherings, will inevitably increase the politicization of judicial elections in Minnesota and erode the non-partisan nature of the process.

We recognize that the Advisory Committee has recommended retaining the existing prohibitions against acting as a leader or holding office in a political organization, making speeches on behalf of a political organization, or seeking or using the endorsement of a political organization. We also recognize that the Committee was attempting to eliminate those restrictions that it believed were less critical to preserving the non-partisan nature of judicial elections, but in our view the result of the Committee's line drawing is arbitrary; there is little reason to

believe that being permitted to identify oneself as a member of a political party will have any less of an adverse effect on the non-partisan nature of the process than would holding office in a political organization.

There is nothing in the remand order in *White* indicating that Minnesota no longer possesses a compelling state interest in using non-partisan elections as a means of protecting the independence and quality of its judiciary and preserving public confidence in the independence of its judiciary. On remand, the district court will perform a comprehensive reexamination of Minnesota's current political activity restrictions as directed by the Eighth Circuit, and the state will have the opportunity to demonstrate that the restrictions are narrowly tailored enough to survive first amendment scrutiny. There is no need to preempt that evaluation by taking action now.

Thank you for the opportunity to submit these comments.

James L. Baillie
President, Minnesota State Bar Association

Minnesota State Bar Association

Recommendations of the Judicial Elections Committee
Adopted by the Board of Governors – April 16, 2004

The MSBA Judicial Elections Committee originally submitted its report to the Board of Governors in December 2003. At the December 5 meeting of the Board consideration of the report, with the exception of one recommendation, was indefinitely postponed. (Recommendation C.4—candidates in contested judicial races should be at the top of the judicial ballot—was adopted.) At this time the sections of the report which follow—Recommendations C.3, C.6, and all of the recommendations in Section D—are being brought back to the Board and recommended for adoption.

C. Statutory and Regulatory Changes to the Current System

3. The Minnesota Code of Judicial Conduct should be amended to require disqualification of a judge who makes a statement during a judicial campaign that raises questions about the judge's impartiality, and to eliminate the provision found to be unconstitutional in *RPM v. White*.

Implementation of this recommendation would require that Canons 3 and 5 and the corresponding Comments of the Minnesota Code of Judicial Conduct be amended as follows:

Additions underlined; deletions struck through

CANON 3

A Judge Should Perform the Duties of the Office Impartially and Diligently

...

D. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

...

(e) the judge, while a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to

(i) an issue in the proceeding; or

(ii) the controversy in the proceeding.

...

CANON 5

A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

A. All Judges and Candidates

...

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to candidate;

...

(d) shall not:

(i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, ~~or~~ promises or commitments ~~of conduct in office other than~~ that are inconsistent with the ~~faithful and~~ impartial performance of the adjudicative duties of the office; ~~announce his or her views on disputed legal or political issues;~~ or knowingly misrepresent his or her identity, qualifications, present position or other fact, or those of an opponent; and

(ii) by words or conduct manifest bias or prejudice inappropriate to judicial office.

COMMENTS—CANON 3

. . .

Terminology: "Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

...

COMMENTS—CANON 5

. . .

Terminology: "Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

...

Section 5A(3)(d). Section 5A(3)(d) prohibits a candidate for judicial office from making statements that 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 his or her personal views. See also Section 3A(8), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge

from making private statements to other judges or court personnel in the performance of judicial duties.

These changes are based on proposed changes to the ABA model canons, but unlike the ABA proposals, limit statements strictly to the campaign period between filing for office and the election.

6. The Minnesota Code of Judicial Conduct should be amended to require an education course for all judicial candidates on ethical issues involved in campaigns for judicial office.

Implementation of this recommendation would require amendment of Canon 5 of the Code of Judicial Conduct as follows:

Additions underlined

Canon 5

A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

A. In General

(4) No earlier than one year prior to and no later than thirty days after filing an affidavit of candidacy with the election authority, a candidate for election to judicial office, including an incumbent judge, shall complete a two-hour course in campaign practices, finance, and ethics approved by the Minnesota Board on Judicial Standards. Within five days of completing the course, the candidate for election to judicial office, including an incumbent judge, shall certify to the Minnesota Board on Judicial Standards his or her completion of the course and understanding of the requirements of the Code of Judicial Conduct.

A course on this topic has been offered in August of even-numbered years, but attendance is presently voluntary. The committee believes that mandatory attendance is preferable.

D. MSBA Action in the Post-White Environment

The committee asks that the recommendations in this section of the report be adopted by the Board of Governors and implemented by the Association. The committee recognizes that it is likely that a number of these recommendations would need to be implemented by an independently funded Political Action Committee.

1. The Minnesota State Bar Association should draft and publish a "position statement," setting forth the organization's views relative to both free speech and expectations regarding restricting such speech with respect to judicial candidates.

The position statement should be limited to one page or less, and provide a framework for acceptable speech and conduct. The statement should take a strong stand against a

candidate's "announcing" personal views or opinions regarding controversial issues. The statement should also urge citizens to hold candidates accountable to the standards enunciated by the MSBA and set forth in Canon 5 of the Code of Judicial Conduct. See recommendation C. 3, above. This recommendation is in line with Recommendation No. 4 of the 1997 MSBA Judicial Elections Task Force Report, which states, "The MSBA should cooperate with the State Board of Judicial Standards, the Office of Lawyers Professional Responsibility, and community organizations to educate candidates and the public about the permissible range of candidate speech in judicial elections."

2. The position statement should be supported with an outline of recognizable attributes useful in determining a candidate's qualifications.

Impartiality and independence should be included in the outline. Sample questions for use in interviewing judicial candidates should also be provided each election year. These items should be made available on the MSBA website, and placed in printed pamphlet or news release format. See also recommendation 5 below on development of a "voters' guide."

3. The MSBA should prepare and disseminate a press release in each election year republishing the position statement.

Further consideration should be given to preparing such a release as a full-page ad for publication in a statewide or several statewide papers.

4. The MSBA should establish, in each election year, a committee charged with monitoring all contested judicial elections and accepting complaints in those elections.

If a candidate's actions or speech appear in contravention of the MSBA position statement and/or Canon 5 of the Code of Judicial Conduct, the committee shall recommend appropriate sanctions. The MSBA could consider utilizing the Fair Response Committee for this purpose – this may involve rewriting the scope of the Fair Response Committee's authority and its internal guidelines.

5. The MSBA should retain the plebiscite, but the process should be conducted electronically.

The committee believes that plebiscites in contested judicial races encourage the election and retention of qualified judges by informing voters of the opinions of those most acquainted with the judiciary. Conducting the plebiscite electronically should reduce costs and cut down on MSBA staff involvement. The electronic process will also allow district bar association participation, which the MSBA should encourage. Contemporaneous with the revision of the plebiscite, the MSBA should provide educational materials to the public, specifically, publication of a "voter's guide" to judicial elections and candidates. This publication could be produced jointly with other public interest groups such as The League of Women Voters.

6. The MSBA should reconsider implementation of Recommendations 6, 7, 8 and 9 from the 1997 Judicial Elections Task Force Report.

Recommendation No. 6: The MSBA should continue to conduct plebiscites for contested statewide judicial seats, and should endorse the prevailing candidate in the plebiscite if that candidate receives at least 60% of the votes cast.
Recommendation No. 7: The MSBA should launch a three-stage effort to ensure a more informed electorate in judicial races, the goals of this effort should be 1) engaging the press in a dialogue about its role in the process; 2) education of the electorate about judicial seats and about the qualities of a good judge; and 3) education of the electorate about specific candidates and how they are viewed by the Association.
Recommendation No. 8: The MSBA should appoint a committee in each year in which it conducts a judicial plebiscite, the purpose of which would be to educate the media and the electorate of the plebiscite results and any endorsements.
Recommendation No. 9: The MSBA should encourage each of the state's district bar associations to adopt similar procedures regarding the conduct of judicial plebiscites, endorsement of prevailing candidates, and education of the electorate.

RESOLUTION

WHEREAS, the April 15, 2004 Report of the Minnesota Supreme Court Advisory Committee to Review the Code of Judicial Conduct and the Rules of the Board on Judicial Standards makes the recommendations regarding amendment of Canon 5A(1) and 5B of the Code (partisan political activities provisions) as set forth in the attached pages; and

WHEREAS, the Minnesota State Bar Association has a long-standing policy supporting an independent judiciary as crucial to the preservation of our constitutional system of checks and balances; and

WHEREAS, the Minnesota State Bar Association has consistently opposed politicization of the judicial selection process in the state and has consistently supported the Minnesota tradition of non-partisan judicial elections; and

WHEREAS, in *Republican Party of Minnesota v. White*, the United States District Court and the Eighth Circuit Court of Appeals have previously found the partisan activities provisions to be constitutional and the United States Supreme Court did not accept certiorari with respect to issues regarding these provisions and did not address these provisions in its decision; and

WHEREAS, the Eighth Circuit Court of Appeals has remanded *Republican Party of Minnesota v. White* to the district court in Minnesota for reconsideration of several of the partisan political activity provisions of the Code of Judicial Conduct challenged by the plaintiffs in that case; and

WHEREAS, on remand, the State will argue that the restrictions on partisan political activity contained in the current Minnesota Code are narrowly tailored and should survive first amendment scrutiny in light of the Supreme Court decision in *White;* and

WHEREAS, the district court will have an opportunity to take testimony and to fully examine these issues; and

WHEREAS, it is premature to act on the Advisory Committee's recommendations related to political activity until after final resolution of *RPM v. White*; now

BE IT RESOLVED that the Minnesota State Bar Association opposes any effort to amend the partisan political activity provisions of the Minnesota Code of Judicial Conduct as recommended in the April 15 Advisory Committee report until after final resolution of *RPM v. White* in the courts.

Adopted by the Minnesota State Bar Association Executive Committee May 6, 2004

Canon 5. A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office.

A. In General.

Each justice of the supreme court and each court of appeals and district court judge is deemed to hold a separate nonpartisan office. MS 204B.06 Subd 6.

(1) Except as authorized in Section 5B(1), a judge or a candidate for election to judicial office shall not:

(a) act as a leader or hold any office in a political organization; ~~identify themselves as members of a political organization, except as necessary to vote in an election;~~

(b) publicly endorse or, except for the judge or candidate's opponent, publicly oppose another candidate for public office;

(c) make speeches on behalf of a political organization;

(d) ~~attend political gatherings; or~~ seek, accept or use endorsements from a political organization; or

(e) solicit funds for or pay an assessment to or make a contribution to a political organization or candidate~~, or purchase tickets for political party dinners or other functions~~.

....

B. Judges and Candidates For Public Election.

(1) A judge or a candidate for election to judicial office may, except as prohibited by law,

(a) speak to gatherings~~, other than political organization gatherings,~~ on his or her own behalf, except as prohibited by Canon 5A(1)(d);

(b) appear in newspaper, television and other media advertisements supporting his or her candidacy; and

(c) distribute pamphlets and other promotional campaign literature supporting his or her candidacy.

(2) A candidate shall not personally solicit or accept campaign contributions ~~or solicit publicly stated support~~. A candidate may, however, establish committees to conduct campaigns for the candidate through media advertisements, brochures, mailings,

candidate forums and other means not prohibited by law. Such committees may solicit and accept campaign contributions, manage the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy. Such committees are not prohibited from soliciting and accepting campaign contributions and public support from lawyers, but shall not seek, accept or use political organization endorsements. Such committees shall not disclose to the candidate the identity of campaign contributors nor shall the committee disclose to the candidate the identity of those who were solicited for contribution or stated public support and refused such solicitation. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

MINNESOTA BOARD ON JUDICIAL STANDARDS

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VIA FIRST CLASS MAIL

May 18, 2004

Frederick Grittner
Clerk of the Appellate Courts
25 Rev. Dr. Martin Luther King, Jr. Boulevard
305 Judicial Center
St. Paul, MN 55155

Re: Report of the Supreme Court Advisory Committee
Proposed Amendments to Canons 3 and 5
[No request for oral presentation]

Dear Mr. Grittner:

In my capacity as the Executive Secretary to the Board on Judicial Standards (Board), permit me to submit the following comments on the Report of the Supreme Court Advisory Committee (Committee) to Review the Minnesota Code of Judicial Conduct (Code) and the Rules of the Board on Judicial Standards (R.Bd.Jud.Stds), filed on April 15, 2004. The Board has not submitted a statement of position on the proposed changes. However, this letter has been circulated to each member of the Board for comment.

As the only *ex officio* member, I attended every Committee meeting. I must join in what I perceive to be a chorus of praise for the Committee's work. The Committee's task posed a complex challenge – to balance the rules that preserve the impartiality and integrity of our judicial system with the recently expressed requirements of the First Amendment. In dealing with these difficult issues, the members were at all times inquisitive, open to new ideas, creative, practical, intellectually honest and completely devoted to the task at hand.

As part of its recommendation, the Committee has proposed to modify several of the current political activity restrictions contained in the Code at Canon 5A and Canon 5B. Specifically, the Committee proposed to permit judges and judicial candidates to engage in the following activities:

- Identifying themselves as a member of a political party [Canon 5A(1)(a)];
- Attending gatherings of political organizations [Canon 5A(1)(d)];
- Purchase tickets for political party dinners or other function (Canon 5A(1)(e)];
- Speaking to political organization gatherings in the candidate's own behalf [Canon 5B(1)(a)];
- Personally soliciting publicly stated support [(Canon 5B(2)].

The reasons for the Committee's proposed modifications to these canons are well stated in the report. In considering the Committee's recommendations, the Court may wish to consider these additional ideas as well:

- The proposed changes to Canon 5 authorize political activity that might be inconsistent with other ethical obligations. Canon 4, for example, generally requires judges to conduct "all extra-judicial activities so as to *minimize* the risk of conflict with judicial obligations (emphasis supplied)." Canon 5A(3)(a) requires judges and judicial candidates to conduct themselves in "a manner consistent with the integrity and independence of the judiciary."

- The proposed changes to Canon 5 could create enforcement problems. Distinguishing between a speech before a political organization and a request for endorsement, for example, may be difficult. It might be difficult to make a distinction between a request for endorsement and the purchase of tickets to a political party dinner or an appearance at a political gathering.

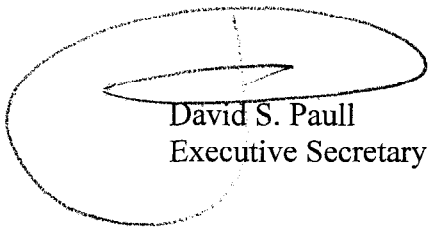
- The restrictions the Committee proposes to modify might create (or appear to create) improper obligations. In *RPM v. White*, the U.S. Supreme Court viewed the announce clause as an unjustified regulation on a unilateral act of speech. The proposed changes are similarly based on free speech considerations, but also seek to abolish actions that mix speech with recognizable political activity – identification with a political party, attending a political event, purchasing a ticket to a political event and speaking to a political party.

- The pending litigation could be adversely affected by the proposed changes. At issue are several subject areas covered by Canon 5 such as the identification clause and the personal solicitation of support. The plaintiffs in the action are seeking attorney's fees.

- Despite the balanced thinking and best intentions of the Committee, the reasons provided by the Committee to justify its proposals might not be well received by the general public. For example, the Committee draws a distinction between restricting the kind of support a judicial candidate should be permitted to seek and deregulating what a candidate might say about his or her own political affiliations. Despite the justification stated, permitting activity of this kind could be perceived by the general public partisan politics as usual. Such a view could ultimately harm public's confidence in the impartiality, integrity and independence of the judicial system.

Thank you for the opportunity to present these ideas.

Yours truly,



David S. Paull
Executive Secretary

Michael J. Bolen
Attorney At Law
7250 York Ave. So, Suite 422
Edina, Minnesota 55435
(952) 927-7371 mjbolen@mn.rr.com

May 19, 2004

Hon. Frederick Gritener
Clerk of Appellate Court
305 Minnesota Judicial C (MJC)
25 Reverend Dr. Martin Luther King Blvd
St. Paul, MN

Re: Public hearing on report of the advisory committee to review MN code of judicial conduct and rules, etc. **C4-85-697**

Dear Mr. Gritener,

Request is hereby made to appear and make comments on the above captioned report at the hearing before the Minnesota Supreme Court.

My comments will be directed at my years of experience as:

- A Republican Party of Minnesota activist.
- My service on at least five RPM state convention committees including the 1996 Rules Committee and the 2002 Judicial Advisory Committee.
- Service in 1967 as a Special Asst Attorney General in charge of the Consumer Protection Unit for the State.
- As a so-called "expert" on Minnesota Election Law, including over 20 election contests.
- Opposition to Mr. Wersal and his supporters.

Available at this time, and submitted herewith, are:

- The Majority and Minority reports for the 2002 RPM State Convention.
- Mr. Wersal's handout (in my opinion) 'campaign piece' at 1999 RPM State Convention and most, if not all, lesser conventions held that year.

If, and when retrieved, after my recent move, I will submit the following items:

- Wersal handout from 2002 RPM State Convention, on "Why We Should Endorse."
- Report of OLPR / LPRB on Complaint of Frank Berman vs. Gregory Wersal.
- Report of OLPR / LPRB on Complaint of Gary Flakne vs. Gregory Wersal.

Respectfully submitted,

Michael J. Bolen
ARN 9556

Judicial activism can only survive where judges are unaccountable to the public.

Democracy can only survive where judges are accountable to the public.

Make your choice.

Greg Wersal was a candidate for the Minnesota Supreme Court in 1998. He believes elections are our only means to stop judicial activism.

OUR GOALS:

1. **to elect judges who will strictly construe the constitution.**
2. **to elect judges who will interpret the law, not write the law.**

Prepared and paid for by Greg Wersal 3/1/99
P.O. Box 26186, Mpls, MN 55426 • (612) 546-3513

End judicial activism-

Elections are the answer.

RECEIVED BY MICHAEL E. BOREN AS DELEGATE ELECTED FROM S.D. 42, EDINA, MN TO REPUBLICAN CONVENTION FOR MN HELD 2002

Judicial Endorsements:

The Hows, Whys and Why Nots of Endorsements

How to Endorse

At the State Convention, the process of endorsing judicial candidates will be different than for other public offices. A Judicial Nominating Committee, consisting of delegates from the various Congressional Districts, will recommend candidates to the State Convention for endorsement. **Whoever that committee recommends, we should endorse them.**

Yes this might mean endorsing a candidate we are not familiar with. So why do it? Remember it is the incumbent judges who have created rules that prohibit judicial candidates from stating their views on legal issues and attending political conventions. The purpose of these rules is to keep voters ignorant and protect incumbents. To not endorse is to reward the incumbents' attempt to steal these elections from the public. And the incumbents may have some second thoughts about these rules if their opponents start getting party endorsement and party support.

Secondly, we may know more about these recommended candidates than we think. We will know that they are lawyers. We will know that a committee of our peers is recommending them. Hopefully the reason for that recommendation is that the candidates are conservatives who believe in strictly construing the Constitution. And given the judicial activism of our Minnesota Supreme Court, we'll know that our candidates are better than any judge now sitting on our Supreme Court.

Finally, we need to understand that we are building an election system. Attorneys do not run against incumbent judges because they don't think they can win. Our Party must send a message to those potential candidates that we want them to run. We have to tell them that we will endorse them and help them get elected. At this State Convention we need to endorse candidates recommended to us by the Judicial Nominating Committee, **so that in the future we will have more candidates, more information and real elections.**

Prepared and paid for by: GREG WERSAL
7841 Wayzata Blvd. Ste. 201, MPLS, MN 55426 (612) 546-3513

Why--

Why should the Republican Party endorse judges?

1. Safety From Criminals

Our judges have failed to protect us from criminals. Minnesota has the lowest imprisonment rate of **any** state. Too often our judges let criminals back onto our streets who should be sent to prison.

2. Social Engineers

Our judges have become social engineers. The Vermont Supreme Court has "discovered" a constitutional right to gay marriage. Courts in Oregon have "discovered" a right to assisted suicide. And in Minnesota, the Supreme Court has "discovered" that not only is there a right to kill the unborn, but that as taxpayers, you and I, must pay for it.

3. The Constitution

Too many judges believe that the Constitution has no meaning except what they say it means. Instead, we need judges who will strictly construe the Constitution. Judges should interpret the law not write it.

4. Accountability

Judges should be accountable to the public. For elections to work, the public needs to know who candidates are and have some reason to vote for them. Challengers must have the means to defeat an incumbent. Political party endorsement will begin to provide accountability.

An active Republican, Greg Wersal is a lawyer with 20 years experience in criminal and civil law. Greg was a candidate for the Minnesota Supreme Court in 1998. He is a co-plaintiff with the Republican Party of Minnesota in the lawsuit brought in Federal Court in 1998 to open up judicial election. Greg, his wife Cheryl, and their children live in Golden Valley. He is also active in his church, an Assistant Boy Scout Leader and a member of the John Adams Society, a conservative debating society.

Why Not--

3 reasons not to endorse judges..and why they are wrong!

We've Never Done It Before

Wrong! For decades the Republican Party endorsed judicial candidates for the Minnesota Supreme Court. The first incumbent judge to lose a seat on the Supreme Court, lost when the Republican Party endorsed his opponent!

It's illegal

Wrong! After this argument disrupted the State Convention in 1998, the Republican Party of Minnesota sued in Federal Court. On September 3, 1999, Federal Judge Davis issued his Order stating, "Nothing... prohibits the Republican Party from endorsing judicial candidates."

It's Constitutionally Suspect

Wrong! In the debates held by the framers of the Minnesota Constitution it is clear that they expected political parties to endorse judges. The framers rejected an appointed judiciary as dangerously unaccountable to the public. Debates and Proceedings of the Minnesota Constitutional Convention (1857)

Wersal Law Office, P.A.

Michael Bolen

REPLY TO:
P.O. Box 26186
Minneapolis, MN 55426
(612) 546-3513

APPOINTMENTS MAY BE SCHEDULED AT LOCATIONS THROUGH THE METRO AREA

EXHIBITS ATTACHED TO FRANK BERMANN'S COMPLAINT VS. WERSAL AND ORDER OF OLRR/LPRB THEREON

Betrayed

Should the Republican Party endorse judges who are pro-abortion?

Should the Republican Party endorse judges who are judicial activists?

Should the Republican Party endorse judges who are soft on crime?

Should the Republican Party endorse the judges who have created and perpetuated rules that prevent judicial candidates from speaking at our conventions?

The answer to these questions is "NO". We need to remove the incumbent judges from our state Supreme Court – But the Judicial Nominating Committee will be asking you to endorse them at the State Convention.

It's unthinkable! It's a betrayal of our own beliefs!

These incumbent judges are not fit to sit on our Supreme Court.

VOTE AGAINST ENDORSEMENT OF KATHY BLATZ
VOTE AGAINST ENDORSEMENT OF JAMES GILBERT
VOTE AGAINST ENDORSEMENT OF JOAN LANCASTER
VOTE AGAINST ENDORSEMENT OF RUSSELL ANDERSON

Greg Wersal
Delegate, Dis. 46A

EX D

Kathleen Blatz:

Why We Shouldn't Endorse He

Kathleen Blatz is judicial activism embodied. The Judicial Nominating Committee is going to recommend her for endorsement. But our Party should not endorse her.

1. Socially Liberal -- Socially Unacceptable:

Kathleen Blatz authored the Supreme Court decision creating a "right of privacy" under Minnesota law in 1998. The "right of privacy" has been used by courts to justify **abortion on demand, the decriminalization of prostitution, medically assisted suicide and gay marriage.** Kathy Blatz opened the door to all of these things.

2. Judicial Activism -- Judicial Insanity:

Kathleen Blatz is judicial activism embodied. The Supreme Court, in several recent decisions, has asserted that it has the power to do whatever it thinks is "right", even if state statutes or the Constitution would produce the opposite result. Marshall Tanick, a respected First Amendment lawyer, has not only called the recent decisions of the court judicial activism, he has said that this activism can be "attributed to the vibrancy and vigor of Chief Justice Blatz." Such vigor we don't need. A District Court Judge, who now has an ethical complaint filed against him because he dared to speak up, called the recent decisions of the Supreme Court "judicial legislation".

3. Soft on Crime:

Kathleen Blatz voted in favor of vastly expanding Miranda in 1999, which means that more criminals -- more criminals who have actually confessed to their crime -- will go free. No wonder Minnesota has the lowest imprisonment rate of any state!

4. Rigging Judicial Elections--Canon 5:

Kathleen Blatz was one of the judges that created rules (Canon 5) in 1998 that prevent judicial candidates from attending and saying anything at all at a political convention. The purpose of these rules is to maintain a judiciary that is unaccountable to the public. The purpose of the rules is to defeat the democratic election system and disenfranchise voters. The Republican Party is currently suing in Federal Court to have the Canon 5 rules declared unconstitutional infringements of free speech; yet the Judicial Nominating Committee is recommending Kathy Blatz for endorsement!!! **Why would the Republican Party ever endorse a judge like Kathleen Blatz, who seeks to defeat the legitimate right of all Republicans to get information on candidates and participate in the election process?**

5. Gay Marriage:

Will Kathy Blatz give us "gay marriage"? The issue of "gay marriage" will soon be in Minnesota courts. Vermont, by order of its Supreme Court, has already created gay marriage. Gay couples from Minnesota will soon get married in Vermont and return to Minnesota and demand recognition of their marriages. As noted earlier, Kathleen Blatz authored the decision creating a Minnesota "right of privacy". And the "right of privacy" is the door through which others have asserted a right to "gay marriage". But there is more. When she was in the Legislature in 1993, **Kathy Blatz voted to give gays special protections under the law.** She voted to expand the Minnesota Human Rights Act to protect a person's sexual orientation and affection preference. She voted in favor of the bill three times. She voted to pass the bill out of the Judiciary Committee even though the bill contained **no protection for children.** Only after the bill was returned to the House did others change the bill to eliminate "affectional preferences" and to specifically state that sexual relations between adults and children were not protected by the act. Do we really want Kathleen Blatz deciding whether to impose gay marriage on the people of Minnesota?

6. Religious Freedom:

Kathleen Blatz has attacked the fundamental right to freedom of religion. In 1999, in a bizarre ruling which she authored, Kathleen Blatz said that the First Amendment guarantees of freedom of religion did not apply to a religious ceremony preformed by a religious leader for the purpose of restoring an individual's soul. It is unbelievable! Do we really want judge like Kathleen Blatz on our court?

What is going on with the Judicial Nominating Committee? The items presented here were taken from 91 pages of material which were provided to each of the members of the Judicial Nominating Committee by Greg Wersal so that they could evaluate Kathleen Blatz and the other judges of the Minnesota Supreme Court. The Committee failed to do its job. Mr. Wersal asks that you vote against the endorsement of any of the incumbent judges on the Minnesota Supreme Court.

VOTE AGAINST ENDORSEMENT OF KATHY BLATZ
VOTE AGAINST ENDORSEMENT OF JAMES GILBERT
VOTE AGAINST ENDORSEMENT OF JOAN LANCASTER
VOTE AGAINST ENDORSEMENT OF RUSSELL ANDERSON

Greg Wersal is a lawyer with 20 years experience in criminal and civil law. Greg was a candidate for the Minnesota Supreme Court in 1998. He is a co-plaintiff with the Republican Party of Minnesota in the lawsuit brought in Federal Court in 1998 to open up judicial elections. Greg, and his wife Cheryl, are active Republicans who live in Golden Valley.

MINNESOTA LAWYER
minnlawyer.com

Bar committee defends Blatz against 'unfair' pamphlet

Date: July 3, 2000

The Fair Response Committee of the Minnesota State Bar Association (MSBA) recently drafted and promulgated a response to a flyer circulated at the Republican Party state convention in Rochester about Chief Justice Kathleen Blatz and several Supreme Court decisions. The committee said that the flyer was unfair and contained a number of factual inaccuracies. The full-text of the committee's statement — which was circulated at the MSBA's recent annual meeting — appears below.

[The committee] has determined that recent criticism of Supreme Court Chief Justice Kathleen Blatz, in the form of a flyer that apparently has been widely distributed [including at the Republican state convention in Rochester], is unfair and inaccurate and requires response to protect the independence of the judiciary and to inform the public.

The committee has identified the following serious factual errors in the criticism directed at Chief Justice Blatz:

Right of Privacy

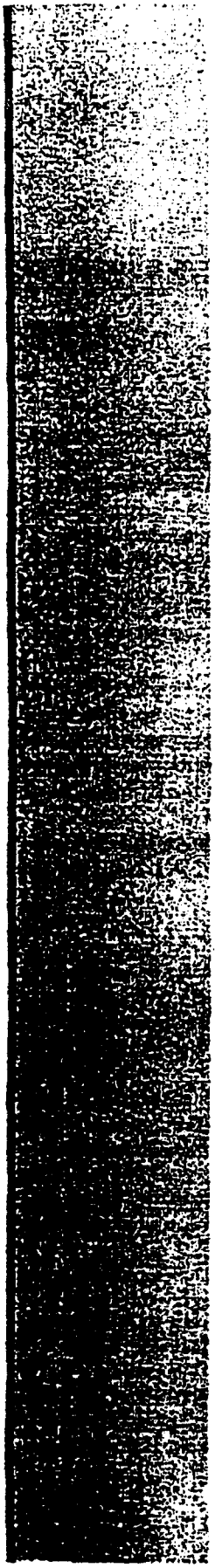
The flyer suggests that Justice Blatz's opinion in *Lake v. Wal-Mart Stores Inc.* ... will lead to decriminalization of prostitution, medically assisted suicide and gay marriage. The *Wal-Mart* decision, however, does not address any of these subjects.

Rather, the *Wal-Mart* decision concerned claims by people who wanted to pursue a lawsuit against Wal-Mart over the developing of film, which included photographs of the customers naked in the shower. The customers claimed that Wal-Mart improperly circulated copies of the photographs. The District Court dismissed the case because Minnesota had not recognized a cause of action for invasion of privacy.

The Supreme Court's 5-2 decision, written by Justice Blatz, restored the lawsuit. It recognized the common law, not constitutional cause of action for invasion of privacy in three settings: 1) if one intrudes upon another's private affairs; 2) if one uses the likeness of another for personal benefit; and 3) if one publishes private facts about another under certain circumstances. The decision observes that only two other states do not recognize a cause of action for invasion of privacy. The decision does not mention prostitution, medically assisted suicide, or gay marriage (or abortion), which is also referenced in the flyer.

Miranda Warnings

Ex 3



The case referred to in the flyer as being "soft on crime" seems to be *State of Minnesota v. Kirk Lennell Munson* ... authored by [Supreme Court] Justice [James H.] Gilbert with no dissents. *Munson* does not expand the U.S. Supreme Court decision of *Miranda v. Arizona*, but instead, follows established Constitutional law, as it must. *Munson* stands for the proposition that the investigators must cease questioning the suspect if the suspect invokes his or her right to counsel in a clear and unequivocal manner. The only exception is if the suspect initiates further discussions with the police, an exception adopted by the U.S. Supreme Court in *Edwards v. Arizona*. The burden of proving that the suspect initiated more discussion is on the state.

In *Munson*, the officers did not stop their conversation with the defendant once he requested counsel. The state could not establish that the suspect reinitiated conversation with the police because the tape recording made by the police was of very poor quality. The court decided that the state's failure to provide a proper recording, required by an earlier Minnesota Supreme Court decision, *State v. Scales*, meant that the state failed in meeting its burden of proving that the suspect reinitiated the conversation with police.

The court followed the law based upon the facts of the case. It did not change the law or "vastly expand" *Miranda*.

Restraints on Judicial Candidates

Chief Justice Blatz and the other members of the Supreme Court did not create Canon 5 in 1998. It is neither new nor a vehicle for "rigging" judicial elections. Since Feb. 20, 1974, Canon 7 of Code of Judicial Conduct, and its successor Canon 5, have explicitly prevented judicial candidates from attending and speaking at political conventions. These restrictions are based on model codes promulgated by the American Bar Association and have been adopted by most states. Earlier canons of judicial ethics going back to the early part of the twentieth century also barred such overt political conduct, although in less explicit language.

In December 1997, effective Jan. 1, 1998, the Supreme Court amended Canon 5 to clarify that the "attendance and speech" ban was limited to political party gatherings and did not include other gatherings which might be more loosely termed "political." This technical amendment actually protects speech by judicial candidates.

Religious Freedom

The flyer states that Chief Justice Blatz's opinion in *State of Minnesota v. Anthony Tenerelli* ... attacked the fundamental right to freedom of religion. It says that the decision holds that the "First Amendment guarantees of freedom of religion did not apply to a religious ceremony preformed [sic] by a religious leader for the purpose of restoring an individual's soul." Even the most cursory reading of *Tenerelli* demonstrates that neither statement is accurate. The free exercise of religion was not an issue in *Tenerelli*. The appellant was convicted of assault for stabbing TxawJ Xiong. As a result of the stabbing, Xiong participated in a traditional Hmong healing ceremony known as Hu Plig, and as part of a victim impact statement under Minn. Stat. sec. 611A. 04 (1996), sought restitution from his attacker for the expenses of the ceremony.

The trial court awarded Xiong the Hu Plig expenses. On appeal, appellant claimed that Minn. Stat. sec. 611A.04 did not permit the trial court to order restitution or, if it did, the statute was unconstitutional as applied because it amounted to a violation of the "establishment" clauses of the U.S. and state constitutions.

The [Supreme Court] held that Minn. Stat. sec. 611A.04 granted the trial court discretion to award the costs of the Hu Plig. As to the appellant's claim that this violated the "establishment" clauses of the state and federal constitutions, the court found that he failed to introduce sufficient evidence to meet his burden of establishing that the ceremony was "religious." His own witness, an expert in Hmong sociology and cultural anthropology, testified that while Hu Plig is traditional, he could not call it "religious."

Contrary to the flyer's assertions, *Tenerelli* does not hold, state, or even infer that a state could or should preclude an individual from participating in an Hu Plig ceremony or in any way threaten the establishment clause.

Full text of the cited cases is available on the Minnesota Appellate Courts web site at the following URL's:

—*Lake v. Wal-Mart Stores Inc.* 582 N W2d, 231 (Minn. 1998) C 97-263

—*State of Minnesota v. Kirk Lennell Munson*

—*State of Minnesota v. Anthony Tenerelli*

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depauladr@att.net

March 10, 2004

Minnesota Supreme Court
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St Paul, MN 55155

In re: Code of Judicial Conduct

Dear Justices:

I have read the report of the Advisory Committee to review the Code of Judicial Conduct and the Rules of the Board on Judicial Standards. I think the work of the committee is thorough and its recommendations are thoughtful and carefully crafted. However, I am greatly concerned about the invasion of politics into judicial elections, particularly with regard to the recommended changes to Canon 5.

The Advisory Committee analysis is based on whether the restrictions on a candidate's political activity "tend to make the candidates beholden to a political party" and whether the restrictions "further the interests in judicial impartiality, independence and the appearance of (impartiality)." (page 23, Advisory Committee report). If judges and judicial candidates attend political gatherings, they are going to participate on a regular basis. When events are of interest to the news media, there are references to the prominent people in attendance, with interviews, quotes on party activities, photos and videos. Judges and candidates are prominent newsworthy public figures. The message is clear: "I am active in this political party and support it."

Such activities inevitably give the impression that the judge or candidate is beholden to the party organization, and affect the appearance of impartiality and independence of the judiciary. It is a fundamental truth of our judicial system that public acceptance of judicial decisions rests upon the confidence the public holds that judges are independence and impartiality. This is the basis for the state's interest in restricting candidates' political activity.

I accept the recommendations of the committee to Canon5(1)(a) permitting a candidate to be identified as a member of a political organization, but only if membership preceded becoming a candidate, and to Canon 5B(1)(a) permitting a candidate to speak to a political organization gathering. But there is a major difference between speaking at a political gathering and regularly attending political gatherings; such attendance, again, will give the appearance of the judge or candidate being beholden to a political party. I oppose changes to the present Canon 5A(1)(d) which would allow unlimited attendance at political gatherings (except to speak) and to Canon 5A(1)(e) which would allow the purchase of tickets to political party dinners or similar functions.

I strongly support the present restriction in Canon 5B(2) that says a candidate may not solicit publicly stated support. I am unable to distinguish a difference between a judge or candidate personally soliciting money and personally soliciting publicly stated support. Yet the section of the code regarding money remains unchanged, while the Advisory Committee recommends that judges and candidates be allowed to personally solicit publicly stated support. I think that any permitted election conduct which allows a judge or candidate to confront someone with a request, whether for money or for stated support, can only lead to abuse, which would undermine the integrity of the judiciary.

Finally, I think the review of the code and rules gives the Court an opportunity to address one of the most persistent complaints made by the public about judicial elections, the lack of information about judicial candidates. This is a legitimate complaint. One way to provide the public with greater knowledge about persons who are interested in judicial office is to use the code to require candidates to furnish personal background information as a step toward becoming a candidate under Canon5F. A candidate would be required to complete a candidate information statement that would be filed with the Court. The statement would be made public. I think the application form used by Minnesota Commission on Judicial Selection would provide the type of background information voters are seeking in a judicial election. It covers many important requirements for good judges: education, employment history, professional history and community activities. Requiring all candidates to complete this type of informational form would be a great service to the voters of Minnesota, who want to know about candidates seeking to be judges. Canon 5F could be modified by inserting after ". . .contributions or support." the following: **After becoming a candidate, the candidate shall file with the Supreme Court a candidate information statement as required by the court which shall be available to the public.**

I have attached for the your information the application used by the Commission on Judicial Selection.

I request the opportunity to appear before the Court on May 26, 2004.

Sincerely,

DePaul Willette

enc.: 12 copies

STATE of MINNESOTA
COMMISSION on JUDICIAL SELECTION
APPLICATION for JUDGE of DISTRICT COURT

In which judicial district are you seeking appointment? _____

Applicant Data

Name _____ _____
(Last) (First) (Middle) (Attorney License Number)

Address of residence _____
(Street)

_____
(City) (State) (Zip Code) (County)

Home telephone (_____) _____-_____

Current Employment

Position _____

Employer _____

Employer address _____
(Street)

_____
(City) (State) (Zip Code) (County)

Office telephone (_____) _____-_____ Facsimile (_____) _____-_____

E-mail address _____

Do you work primarily in the judicial district for which you are applying? ☐ Yes ☐ No

Employment History

List employment and other professional positions since law school

Position	Employer	Location	Dates

Education

	School	Degree	Graduate Date
Undergraduate			
Graduate			
Law School			

List any awards, scholarships, or other recognitions you received

Undergraduate	Law School

Professional History

Describe the nature of your law practice.

What percentage of your practice is devoted to civil matters? _____% criminal matters? _____%

How many cases have **you** tried to a verdict? _____

How many were jury trials? _____ Court trials? _____

Describe the general nature of those cases

Describe your pro bono legal activities in the last five (5) years, the nature of the work, and the number of hours devoted annually to the activities

List all jurisdictions in which you have been admitted to practice law

State or federal jurisdiction	Date of admission

List current and past memberships/activities in law and/or professional associations

Describe any teaching you have done in law school, continuing legal education, or other professional education program

List any articles or publications you have written since law school

Identify the lawyer adversaries in the last five matters you have completed

Identify the last two judges before whom you made significant appearances

List your residences for the last 10 years

Address (street, state, city, ZIP code) | Years of residence

List significant community activities

Offices held | Dates of involvement

Do you object to the Commission contacting people regarding your application? ☐ Yes ☐ No

Have you ever been suspended, expelled, or otherwise discharged from a college, graduate or professional school in which you were enrolled? ☐ Yes ☐ No If yes, please attach an explanation.

Have you ever been involuntarily discharged or terminated from a job? ☐ Yes ☐ No If yes, please attach explanation.

Have you ever been warned, reprimanded, or otherwise disciplined by a bar association ethics committee or the Lawyers Professional Responsibility Board (or the corresponding ethics board of another state)? ☐ Yes ☐ No. Are there any pending complaints against you? ☐ Yes ☐ No If yes, please attach an explanation.

Have you ever been sanctioned under Rule 11 of the Minnesota or federal Rules of Civil Procedure or under M.S. §549.211? ☐ Yes ☐ No If yes, please attach an explanation.

Have you ever been arrested for and/or convicted of a crime?
☐ Yes ☐ No If yes, please attached an explanation.

I certify that the information contained in this application is true and accurate. I understand that my candidacy for judicial appointment may become public knowledge.

(Signature of applicant) (Date)