

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

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- 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

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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 provision¹¹, 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 Committee¹³ 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).

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 ~~sub~~Section 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.

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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.

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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.

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APPLICATION OF THE CODE OF JUDICIAL CONDUCT

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

(1) is not required to comply

(a) except while serving as a judge, with Section 3A(910);

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