

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

**ORDER ESTABLISHING DEADLINE FOR SUBMITTING
COMMENTS ON PROPOSED AMENDMENT TO THE
CODE OF JUDICIAL CONDUCT**

The Advisory Committee to Review the Code of Judicial Conduct and the Rules of the Board on Judicial Standards filed a supplemental report on September 17, 2004, recommending an amendment to Canon 2C of the Code of Judicial Conduct. This court will consider the proposed amendment without a hearing after soliciting and reviewing comments on the report. A copy of the report is annexed to this order.

IT IS HEREBY ORDERED that any individual wishing to provide a written statement in support or opposition to the proposed amendment shall submit fourteen copies of such statement addressed to Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Rev. Dr. Martin Luther King Jr. Blvd., St. Paul, Minnesota 55155, on or before March 4, 2005.

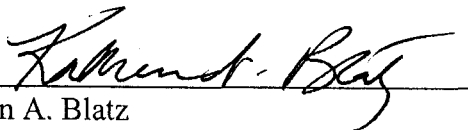
Dated: January 14, 2005

BY THE COURT:

OFFICE OF
APPELLATE COURTS

JAN 14 2005

FILED


Kathleen A. Blatz
Chief Justice

**SUPPLEMENTAL 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

September 15, 2004

Provost 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
Verna Kelly
Earle F. Kyle
Honorable Vicki Landwehr
Vivian Jenkins Nelsen
Lawrence Redmond
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Honorable Edward Toussaint

David S. Paull
Ex Officio Member

Honorable Alan Page
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Walter Burk
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COMMITTEE BACKGROUND

The Advisory Committee to Review the Minnesota Code of Judicial Conduct and the Rules of the Board on Judicial Standards (“the Committee”) was established by the Minnesota Supreme Court on December 9, 2003, to consider changes to the Code of Judicial Conduct (“the Code”) and the Rules of the Board on Judicial Standards (“the Board Rules”). 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 *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (“*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. The Committee submitted its report and recommendations on Issues 1, 2 and 4 to the Court on April 15, 2004.

The Committee reconvened on April 29, 2004 to consider Issues 3 and 5 above. The following report sets forth the Committee’s recommendations on these issues, its recommended changes to the Code of Judicial Conduct concerning these issues, and recommendations concerning other issues related to judicial conduct. The report is organized by topic.

REPORT FORMAT, DISTRIBUTION AND DISCUSSION

The Committee has recommended no changes to the Board Rules at this time. However, it has recommended appointment of an ad hoc committee to review the Board Rules. Therefore this report will present the recommendations of the Committee in four sections:

1. Diversion For Judges Suffering From Chemical Dependency or Mental Illness;
2. Recommendations for Revisions to Canon 2C of the Code of Judicial Conduct;
3. Appointment of an Ad Hoc Committee to Review the Rules of the Board on Judicial Standards; and
4. New Advisory Committee Comment to Canon 2C of the Code.

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.

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. 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.

RECOMMENDATIONS AND PROPOSED REVISIONS

I. Diversion For Judges Suffering From Chemical Dependency or Mental Illness

The Committee considered concerns about options such as diversion for judges suffering from chemical dependency or mental illness. In particular, the Committee discussed whether Rule 6(f) of the Rules of the Board on Judicial Standards should be amended to authorize the Board on Judicial Standards (“the Board”) to issue a private reprimand when directing a judge to submit to professional counseling, treatment, or assistance. The rule currently provides:

RULE 6. PROCEDURE PRIOR TO SUFFICIENT CAUSE DETERMINATION

....

(f) Dispositions in Lieu of Further Proceedings. Even though the board does not find sufficient cause to proceed pursuant to Rule 7, it may make any of the following dispositions, unless the underlying conduct is part of a pattern involving the same or similar conduct:

- (1) The board may warn the judge that the conduct may be cause for discipline.
- (2) The board may impose reasonable conditions on a judge's conduct.
- (3) The board may direct professional counseling, treatment or assistance for the judge.

The Committee recommends that the Rule not be changed at this time. The current rule gives the Board adequate discretion to address the problems and issues brought before it. Adding greater specificity to the rule would impede the Board from fashioning appropriate responses to problems on an ad hoc basis, thereby resulting in a loss of flexibility that is useful to the Board in responding to alleged judicial misconduct.

II. Revision to Canon 2C of the Code of Judicial Conduct

The Minnesota State Bar Association (MSBA) recommends that Canon 2C of the Code of Judicial Conduct be amended as follows (additions indicated by underline, deletions by ~~strikeout~~):

“A judge shall not knowingly hold membership in any organization that practices unlawful discrimination ~~on the basis of race, sex, religion or national organization.~~”

The Committee's discussion of this recommendation revealed broad agreement with the arguments in favor of the amendment. In particular:

1. Current Canon 2C is inconsistent with Canon 3A(5). Canon 2C currently prohibits judges from holding membership in any organization that practices unlawful discrimination on the basis of race, sex, religion, or national origin, while Canon 3A(5) demands that judges perform their duties without prejudice, *including but not limited to* bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status. (emphasis added). Thus Canon 2C bars discrimination on four bases, while Canon 3A(5) broadens the protected categories to eight. Thus the Code as currently written allows judges to hold membership in organizations that discriminate on the basis of age, disability, sexual orientation, or socioeconomic status, but demands that, in the courtroom, they manifest no such bias or prejudice in regard to those same characteristics.
2. The Code currently requires judges to (1) comply with the law at all times; (2) perform their duties without 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 (3) forgo membership in any organization that practices unlawful discrimination on the basis of race, religion, sex, or national origin. *See* Minn. Code Jud. Conduct, Canons 2A, 3A(5), 2C. Taken together, these three canons define discrimination more narrowly than state law. In particular, the Minnesota Human Rights Act bars discrimination on the basis of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age. *See generally* Minn. Stat. § 363.03 (2002). In employment matters, however, religious organizations may lawfully discriminate on the basis of religion and sexual orientation, where either or both are a bona fide occupational qualification for employment. Minn. Stat. § 363.02, subd. 1(2) (2002). Likewise, private-service organizations whose primary function is providing occasional services to minors may lawfully discriminate based on sexual orientation with respect to employment or volunteer opportunities within their programs. *Id.* at subd. 1(3).
3. Allowing judges to knowingly join some organizations that illegally discriminate, but not others, does not comport with the Code's requirement that judges "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" (Canon 2A), because membership in an organization that illegally discriminates in any manner taints both the individual judge and the judiciary, and decreases public confidence in the impartiality of the judiciary. It is not unwarranted to expect that a member of the public who becomes aware of a judge's membership in an organization that illegally discriminates might reasonably entertain doubt that the judge would be able to remain impartial when ruling on a discrimination claim. For example, an individual bringing a claim for discrimination on the basis of sexual orientation under the Minnesota Human

Rights Act might reasonably entertain doubt regarding a judge’s ability to impartially review her claim if she knows that the judge knowingly holds membership in an organization that illegally discriminates on the basis of sexual orientation. This diminishes public trust and confidence in the judiciary because, “it is not enough that a legal proceeding be fair and impartial, but [it is] also essential that the litigants believe that it is so.” *Violette v. Midwest Printing Co.*, 415 N.W.2d 318, 325 (Minn. 1987) (citing *Jones v. Jones*, 242 Minn. 251, 262, 64 N.W.2d 508, 515 (1954)).

4. The language of Canon 4 also supports the proposed revision to Canon 2C: “A judge shall conduct all extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge; (2) demean the judicial office; or (3) interfere with the proper performance of judicial duties.” Canon 4A(1)-(3). Canon 4 further notes that judges should not participate in civic or charitable activities that reflect adversely upon the judge’s impartiality. Minn. Code Jud. Conduct, Canon 4C(3). The proposed revision to Canon 2C brings it into alignment with these specific standards in Canon 4.
5. The language of the proposed revision to Canon 2C is general and flexible, and does not enumerate particular types of discrimination. Consequently, it will incorporate and remain current with any future changes in state or federal law. Further, the language is not that of strict liability; it only prohibits judges from knowing membership in an organization that illegally discriminates. Finally, the language is narrowly tailored to prohibit only knowing membership in organizations that unlawfully discriminate. Thus, the proposed amendment would not bar judges from holding membership in primary youth-serving organizations that lawfully discriminate on the basis of sexual orientation or in religious organizations that lawfully discriminate on the basis of sex or sexual orientation. *See* Minn. Stat. § 363.02 (excepting certain types of organizations from Minnesota Human Rights Act in certain narrow circumstances). Its effect will be to promote public confidence in the impartiality and integrity of the judiciary by barring judges from knowingly holding membership in any organization that illegally discriminates.

One Committee member raised a possible concern about the recommended change – i.e., that the proposed rule would unfairly impact judges affiliated with particular religious groups if those groups are perceived as being opposed to homosexuality. Following substantial discussion of this topic, the Committee voted unanimously to recommend adoption of the MSBA proposal.

III. Ad Hoc Committee to Review the Rules of the Board on Judicial Standards

The Committee discussed the possibility of changing the Rules of the Board on Judicial Standards to relax the strict confidentiality between the Board and a judge under investigation, thereby making the process of investigating alleged judicial misconduct more open to the public. The Committee felt that it was beyond the scope of its mandate, as specified by the Supreme Court, to recommend such a revision. Instead, the Committee unanimously agreed to recommend that an ad hoc committee be established with a broad mandate to generally review the Board Rules and recommend possible improvements to those rules.

Respectfully Submitted,

Provost E. Thomas Sullivan, University of Minnesota

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

September 15, 2004

COMMENT TO CANON 2 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. The following Comment to Section 2C would be added to the previous Comments to Canons 3 and 5 adopted by the Committee on April 15, 2004.

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 2

Section 2C. Illegal discrimination by a judge in his or her activities, whether in the course of performing judicial duties or in view of the public outside the courthouse, mars the public perception of that judge's, and the judiciary's, impartiality and integrity.

By eliminating a specific list of types of discrimination and instead broadening the prohibited forms of discrimination to any that are illegal, this Canon emphasizes that discrimination on any illegal basis is impermissible.

TEXT OF PROPOSED REVISIONS – CANON 2 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 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities.

....

C. A judge shall not knowingly hold membership in any organization that practices unlawful discrimination ~~on the basis of race, sex, religion or national organization.~~

SUMMARY OF TECHNICAL AMENDMENTS

The Committee does not recommend any technical amendments in connection with the proposed revision of Canon 2.

FLOWER, SCHUTZ & STEVENS, PLC
ATTORNEYS AT LAW

OFFICE OF
APPELLATE COURTS

FEB 18 2005

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February 16, 2005

MR FREDERICK GRITTNER
CLERK OF THE APPELLATE COURTS
305 JUDICIAL CENTER
25 REV DR MARTIN LUTHER KING JR BLVD
ST PAUL MN 55155

Re: *Proposed Change to Canon 2 of the Judicial Code*

Dear Mr. Grittner:

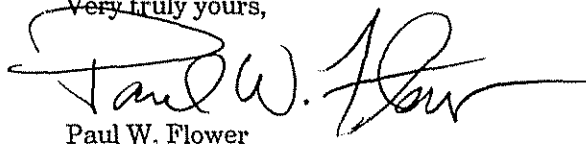
I am writing this in order to submit a comment regarding the proposed change to Canon 2C of the Judicial Code, which would prohibit judges from having membership in organizations that unlawfully discriminate. I am opposed to this proposed change. I question whether it is necessary. In my 24 years of law practice, I do not recall that any judges have ever had an issue of being members of organizations that discriminate. I am concerned that the motivation behind this proposal is to ultimately seek a prohibition on judges' membership in religious organizations or groups like the Boy Scouts that bar active homosexuals from membership.

Secondly, I believe that such a prohibition would have a chilling effect on judges and judicial candidates in their rights to free association. Even if their membership in an organization would not be in violation of current laws, the potential for such a charge being made could have an effect on their decisions to become a member of a church, etc.

While there may be some merit behind this proposal, I see more potential problems than benefits if were approved. This is an example of an unnecessary change in a law that would be better left as is.

Thank you for your consideration of this comment.

Very truly yours,


Paul W. Flower

PWF:km

Enclosure: 13 copies