

STATE OF MINNESOTA

IN SUPREME COURT

C4-85-697

In re Amendment of the Code
of Judicial Conduct

ORDER

By order filed December 9, 2003, this court created the Advisory Committee to Review the Code of Judicial Conduct and the Rules of the Board on Judicial Standards. Among other subjects, the court directed the Advisory Committee to consider revision of Canon 3A(8) of the Code of Judicial Conduct (Code) to conform to its counterpart in the ABA Model Code on Judicial Standards and revision of Canon 5 of our Code in light of recent legal developments. The Advisory Committee submitted its report to the court on April 15, 2004, recommending amendments to Canons 3 and 5. By order filed April 19, 2004, the court set a hearing date of May 26, 2004, and invited comments on the committee's recommendations by May 19, 2004. Following the hearing, additional comments were allowed and received.

As ordered *infra*, we adopt most of the amendments recommended by the Advisory Committee, but we decline to adopt the recommended amendments expanding the scope of permissible partisan political activity. Because we specifically requested the Advisory Committee to consider amendments to Canons 3 and 5, it is appropriate to

explain briefly why we have not adopted the committee's recommendations in their entirety.

The first reason relates to timing. Although the committee complied with our request to file its report by April 15, 2004, in order to allow changes to the canons to be implemented in time for the 2004 election cycle, circumstances are such that implementation would not occur until after filings for office have taken place and very close to the primary election date of September 14, 2004. We conclude that changing the rules in the midst of an election cycle could create confusion and possibly prejudice some participants. Accordingly, any changes relating to partisan political activity should await the period between election cycles.

More importantly, we are not convinced the recommended changes are either necessary or desirable on their merits. Responding to the direction in our December 9, 2003 order, the Advisory Committee considered the effect of the decision of the United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) (*RPM*), on Canons 3 and 5. In doing so, the Advisory Committee looked for guidance to the August 2003 amendments to Canons 3 and 5 of the ABA Model Code of Judicial Conduct made in response to the *RPM* decision. The ABA report accompanying those amendments indicated that the changes were made to enhance the likelihood of surviving a constitutional challenge similar to that in *RPM*. Our Advisory Committee reviewed and modified the ABA amendments with the same goal in mind.

We conclude that the restrictions on partisan political activity contained in our Code of Judicial Conduct are too important to undermine based on the possibility that

they may be vulnerable to constitutional attack, particularly as we are convinced that there are sound bases for their constitutional validity. Although Minnesota has embraced election of judges rather than lifetime appointment, the goal of an impartial and independent judiciary is no less critical. As we have explained:

The methods by which the federal system and other states initially select and then elect or retain judges are varied, yet the explicit or implicit goal of the constitutional provisions and enabling legislation is the same: *to create and maintain an independent judiciary as free from political, economic and social pressure as possible so judges can decide cases without those influences.* That that goal guided the framers of the federal Constitution to grant life tenure to judges is evidenced by the writings of Alexander Hamilton which expressed his concern that life tenure would provide judges sufficient security to allow them to rule with their consciences and according to the Constitution, rather than bow to political notions. While the framers of our state Constitution have developed a system of selection and election quite different from that federal scheme, they too designed a plan to recognize the uniqueness and independence of the state judiciary.

Peterson v. Stafford, 490 N.W.2d 418, 420 (Minn. 1992) (footnote omitted; emphasis added). We explained further in *Peterson* that the records of our constitutional debates recognize the difference between elections for judicial and other offices:

Reflected in the considerable memorials to the recurring [constitutional] debates is the common thread of both public and legislative recognition that judicial elections are unique in this state's comprehensive elective scheme, demonstrating the fact that the powers conferred on the judicial branch differ markedly from those exercised by the other two branches of government.

Id. at 422. And finally, we pointed out that since early in the last century our state has recognized the importance of separating judges from the partisan political process:

The need for a competent, impartial, and independent judiciary creates, however, the potential of conflicts of interest when the judicial office is an elective office. These potential conflicts arise between the demands of an election process and the judicial impartiality required to

decide cases free from political maneuvering. To counter this potential conflict, the 1912 Legislature decreed that elections for judicial office be nonpartisan.

Id.

We believe that the goal of an independent and impartial judiciary is no less important, no less valid, and no less consistent with the election of judges after the *RPM* decision than it was before. We take the *RPM* majority at its word when it stated that “we neither assert nor imply that the First Amendment requires campaigns for judicial office to sound the same as those for legislative office.” *RPM* at 783.

The goal of maintaining an independent and impartial judiciary is not merely a policy choice, but embodies constitutional principles that are properly counterbalanced against the First Amendment interests that are affected by regulation of elections. First, the separation of powers inherent in the creation of three distinct branches of government, one of which is the judicial branch, in article III, section 1 of the Minnesota Constitution provides the constitutional underpinning for the independence of the Minnesota judiciary. As the executive and legislative branches are inextricably intertwined with partisan politics, maintenance of an independent judicial branch is reliant on the freedom of its officials from the control of partisan politics. Second, the goal of an impartial judiciary is compelled by the due process rights of litigants. Due process requires decisionmakers who are fair, unbiased, and impartial, and importantly, decisionmakers who are perceived as such by litigants who appear before them. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986); *In re Raab*, 793 N.E.2d 1287, 1290-91 (N.Y. 2003) (per curiam). Moreover, we cannot underestimate the importance of the public’s perception that judges

are fair, unbiased, and impartial to the continued respect for and legitimacy of the judicial branch. *See Mistretta v. United States*, 488 U.S. 361, 407 (1989). Without this perception, the public's confidence and support cannot be maintained and the very independence of the judicial branch mandated by the Constitution will be threatened.

We do not believe that the Supreme Court's decision in *RPM* left the states with the choice between lifetime appointment of judges and unrestrained partisan judicial elections. Nor do we believe that a proper assessment of the competing constitutional interests at play in the selection of judges mandates such a choice. Because the limitations on partisan political activity contained in Canon 5 serve the important constitutional goal of preserving an independent and impartial judiciary, we decline to implement the amendments recommended by the Advisory Committee that would allow expanded participation by judges and judicial candidates in the partisan political process.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED THAT the attached amendments to the Code of Judicial Conduct be, and the same are, prescribed and promulgated to be effective upon the filing of this order.

Dated: September 14, 2004

BY THE COURT:



Kathleen A. Blatz
Chief Justice

OFFICE OF
APPELLATE COURTS

SEP 16 2004

FILED

Amendments to the Code of Judicial Conduct

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 direction 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. Minn. Stat. § 204B.06, sSubd 6.

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(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) with respect to cases, controversies or issues that are likely to come before the court, make pledges or promises 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;

(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 personally 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 a candidate files 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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