

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

C4-85-697

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MEMORANDUM

The Minnesota Supreme Court granted the Advisory Committee leave to submit a memorandum responding to questions of the Court and public comments presented to the Court at the public hearing held on Wednesday, May 26, 2004. The Committee submits this memorandum to clarify its position on three issues of apparent concern to the public and the Court:

- (1) How are the Committee's recommendations affected by the pending federal litigation challenging the partisan activity restrictions?
- (2) What is the basis for the Committee's distinctions between the partisan activities it recommends retaining and those it recommends removing?
- (3) Is there an inconsistency between the Committee's recommendations to remove the restriction against direct solicitation of publicly stated support and to retain the restriction on personal solicitation of contributions?

This memorandum will address briefly each of these concerns, and conclude with a final note:

I. Effect of Pending Litigation

A number of public comments suggested that the Court should await the outcome of the pending federal litigation before changing any of the restrictions on partisan activity by judicial candidates. Some speculated that the Committee's recommendations concerning Canons 3 and 5 were intended to avoid future lawsuits or affect the resolution of the current litigation in *Republican Party of Minnesota v. White*. The Committee believes recent developments in the litigation suggest an increased probability that some of the partisan activity clauses will not survive challenge. However, the Committee's recommendations are not based upon speculations about the course of current litigation or the possibility of future litigation concerning the Code. The Committee was guided by its charge from the Court to examine the Canons in light of the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) and other related constitutional precedents. The Committee's recommendations are intended to ensure that the Code will withstand constitutional scrutiny while continuing to effectively protect the impartiality, integrity and independence of the judiciary. The rules adopted by the Court will govern candidate conduct for upcoming judicial elections. The Committee believes its recommendations and the Court's actions should be guided by principle and precedent, and should not await direction from the federal courts.

II. Distinctions Among Partisan Activities

Some public comments criticized the Committee's line-drawing between permitted and prohibited partisan activities. The Committee believes the current legal landscape calls for precise and detailed analysis of each restriction to determine whether it is narrowly tailored to promote a compelling state interest. The restrictions on partisan activity that the Committee recommends retaining are those that seek to avoid candidates becoming entangled with political organizations or beholden to a political organization, thereby affecting judicial impartiality or open-mindedness. The restrictions on partisan activity that the Committee recommends removing are those that do not involve entanglement or

obligation, but limit a candidate's speech or associations in an effort to reduce the influence of political parties on judicial elections.

III. Solicitation of Publicly Stated Support

The Committee recommends eliminating the restriction on personal solicitation of publicly stated support in Canon 5B(2), because it is ambiguous and appears to prohibit conduct that does not threaten impartiality or independence. In addition, once an individual or organization provides unsolicited public support in favor of a judicial candidate, the candidate automatically becomes aware of the source of that support. Because the public nature of the support nullifies the efficacy of prohibiting direct solicitation of that support by the candidate, the restriction does nothing to reduce any adverse effect upon judicial impartiality or open-mindedness. That distinguishes this restriction from the restriction against direct solicitation of campaign contributions. In the latter, the use of a campaign committee to accept contributions operates to prevent the candidate from learning the identity of the source of the contribution; and Canon 5B(2) explicitly prohibits a campaign committee from disclosing to the candidate the identity of contributors.

IV. Conclusion

Much of the discussion at the May 26 Supreme Court hearing focused on the Committee's recommendations concerning the partisan political activity restrictions in Canon 5. The Committee considered a number of other very important issues, and its Report makes a number of recommendations on those issues. Those recommendations should not be obscured by the recent focus on the political activity recommendations.