STATE OF MINNESOTA

IN SUPREME COURT

C7-81-300

ORDER FOR HEARING TO CONSIDER PROPOSED
AMENDMENT TO THE CODE OF JUDICIAL CONDUCT

IT IS HEREBY ORDERED that a hearing be had before this Court in Courtroom 300 of the Minnesota Supreme Court, Minnesota Judicial Center, on November 7, 1997 at 9:00 a.m., to consider the petition of the Board of Judicial Standards to amend Canon 5 of the Minnesota Code of Judicial Conduct. A copy of the proposed amendment is annexed to this order.

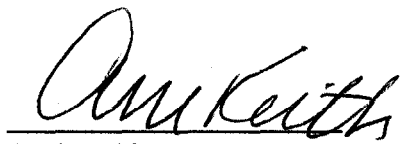
IT IS FURTHER ORDERED that:

1. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing, but who do not wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before November 4, 1997, and

2. All persons desiring to make an oral presentation at the hearing shall file 12 copies of the material to be so presented with the aforesaid Clerk together with 12 copies of a request to make an oral presentation. Such statements and requests shall be filed on or before November 4, 1997.

Dated: September 12, 1997

BY THE COURT:



A.M. Keith
Chief Justice

PROPOSED CHANGES

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~~, either directly or indirectly 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 dinner 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 of conduct in office other than the faithful and impartial performance of the duties of the office; announce his or her views on disputed legal or political issue; or misrepresent his or her identity, qualifications, present position or other fact, or those of the opponent; and

(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 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 a political party or other group, the principal purpose of which is to further the election or appointment of candidates to political office.

E. 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.

STATE OF MINNESOTA

IN SUPREME COURT

C7-81-300

ORDER AMENDING HEARING DATE TO CONSIDER PROPOSED AMENDMENTS TO THE CODE OF JUDICIAL CONDUCT

WHEREAS, a hearing was scheduled before this Court on November 7, 1997 to consider the petition of the Board of Judicial Standards to amend Canon 5 of the Minnesota Code of Judicial Conduct, and

WHEREAS, the Minnesota State Bar Association has requested a postponement of the hearing so that its Board of Governors may consider the proposed amendments and communicate its position to this Court,

NOW, THEREFORE IT IS ORDERED:

1. The hearing on the proposed amendments to Canon 5 of the Minnesota Code of Judicial Conduct will be held on November 19, 1997 at 9:00 a.m. in Courtroom 300 of the Minnesota Judicial Center.
2. All persons, including members of the Bench and Bar, desiring to present written statements concerning the subject matter of this hearing and\or who do wish to make an oral presentation at the hearing, shall file 12 copies of such statement with Frederick Grittner, Clerk of the Appellate Courts, 305 Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155, on or before November 14, 1997.

Dated: October 22, 1997

BY THE COURT:

A.M. Keith
Chief Justice

JOHN REMINGTON GRAHAM

COUNSELOR AT LAW

180 Haut de la Paroisse
St-Agapit (LOTB)
Quebec G0S 1Z0 Canada
TEL-FAX 418-888-5049
October 10, 1997

Frederick Grittner, Esq.
Clerk of Appellate Courts
25 Constitution Avenue
St. Paul, Minnesota 55155 USA

In re: Petition of the Minnesota Board on Judicial Standards for an Amendment to Canon 5 of the Minnesota Code on Judicial Conduct, No. C7-81-300 on the docket of the Minnesota Supreme Court, set for hearing on November 7, 1997.

Dear Sir,

I enclose for filing twelve copies of my opposition to the petition in the above-entitled matter, pursuant to the order of the Chief Justice dated September 12, 1997.

I have sent copies to Gregory Wersal and DePaul Willette.

Respectfully yours,

John Remington Graham

JOHN REMINGTON GRAHAM

COUNSELOR AT LAW

180 Haut de la Paroisse
St-Agapit (LOTB)
Quebec GOS 1ZO Canada
TEL-FAX 418-888-5049
October 10, 1997

Hon. A. M. Keith, Chief Justice
Minnesota Supreme Court
25 Constitution Avenue
St. Paul, Minnesota 55155 USA

In re: Petition of the Minnesota Board on Judicial Standards for an Amendment to Canon 5 of the Minnesota Code on Judicial Conduct, No. C7-81-300 on the docket of the Minnesota Supreme Court, set for hearing on November 7, 1997.

Dear Sir,

I am a member of the Minnesota Bar (#3664X) at the moment working abroad on certain professional business, but frequently traveling to and keeping my legal domicle in Minnesota to handle certain business and certain affairs in my State.

I write in order to oppose any and all the amendments to Canon 5 proposed by the board on judicial standards.

In essence, the proposed amendments would make it improper for a judge or any judicial candidate

-- to identify himself as a member of any political party except as necessary to vote in an election;

-- to endorse "either directly or indirectly" (whatever that may mean) or oppose in a public manner any candidate for any public office, leaving him free to support only himself and oppose only his opponent in an election to a specific judicial seat;

-- to seek, accept, or use endorsements of a political party, or

-- to speak at the meeting of any political party in his own behalf.

Very grave constitutional questions are raised by these proposed amendments, which boldly and shamelessly restrict rights of speech, press, assembly, petition, and association without any compelling interest which justifies the intrusions in question, without any fair relation to the legitimate government objectives, without enhancing the public good in a way which clearly outweighs any resulting restraint on freedom otherwise protected, and without resort to alternative means which might less restrictively and more properly accomplish lawful ends. I have in mind general principles which concern restraints on freedoms usually identified in litigation arising under the First Amendment, as in Sherbert v. Verner, 374 U. S. 398 (1963), among many other cases which might here be cited for illustrative purposes. There is nothing in these suggested regulations which at least makes an honest effort to minimize intrusions upon liberty for just and laudable ends, as in cases like Lathrop v. Donohue, 367 U. S. 846 (1961).

This obnoxious petition, founded on such obviously dubious notions, should be rejected outright. The board should think the problem through once again, and come up with better ideas at a later date.

I am not saying that judicial elections may not be excluded by law from the processes of partisan nomination which might appear on the ballot on election day. I am inclined to think that such laws, now on the books in Minnesota, are constitutitional. I am not saying that necessary and proper regulations on the speech of judges and judicial candidates might not be enacted. Like the director of lawyers professional responsibility, for example, I suspect that our present Canon 5(d)(ii) may well be unconstitutional, but I think that the flaw can be corrected by the measure proposed by the American Bar Association which prohibits candidates for judicial office from making "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Indeed, I think this principle should apply even when lawyers nominated by the President for the federal bench are asked to appear before the United States Senate in confirmation hearings.

It is odd that the board on judicial standards would not address such a pressing issue in the amendments now proposed. If the board were acting in the public interest, it would do so. But I fear that the board is not acting in the public interest.

The proposed amendments have one repugnant objective which is as transparent as glass: it is to curry favor with the members of this court who must run for election or reelection next year, by proposing rules obstructive of meaningful

electoral challenges for the four or five seats which will then be open.

Everybody knows that these amendments are now proposed to prevent Gregory Wersal from persuading his political party that it should publicly endorse candidates for the Minnesota Supreme Court. As I understand it, Wersal does not claim that endorsements of judicial candidates by political parties must appear on the ballot. He merely says that a political party has a constitutional right to endorse judicial candidates, the same as it has a right to pass resolutions about some question of public interest. And, if a political party does give an endorsement, the candidate may use it, nor should it be considered improper for a candidate to seek or use it. In this respect, Wersal is right. And, moreover, I think his idea is decidedly for the common good. I commend him for it, even though he must endure the frowns of some in the legal profession who evidently think that only large law firms and special interests have a constitutional right to express their views on judicial elections.

Partisan endorsements are used in judicial elections in some States, and do not necessarily undermine the impartiality of the bench. Far more deleterious to judicial impartiality are the politics of special interests, especially of large law firms.

In Matter of Cunningham, 538 Atl. 2d 473 (1988), the Pennsylvania Supreme Court removed one municipal judge and seven common pleas judges for taking certain small gratuities from a labor union. Papadakos, J., concurred specially in 538 Atl. 2d at 493 where he said, "I join with the majority in concluding that the respondent judges must forfeit their offices. However, I write separately to caution the board [on judicial standards] that its role in a quasi-judicial setting is not to condemn the system of selecting our judiciary." Our board on judicial standards is most undistinguished, is unable to discharge its trust effectively in disciplining wayward judges, has become a part of the unfortunate clubbiness of our judicial fraternity, and should keep out of the political arena.

I am only one of a growing number of lawyers and citizens who have become ashamed of the Minnesota Supreme Court in its present condition. Gone are the days of LaFayette Emmett, James Gilfillan, and Billy Mitchell.

I feel deep pain in my heart in carrying out the unpleasant duty which I must discharge in addressing this court with with uncommon but long overdue frankness on this occasion. I should prefer not to carry this burden. But the situation of which I speak has too long endured. Patience and diplomacy have failed to produce edifying results. I have for many years said

that there is an urgent need for judicial reform in Minnesota. I know that very many distinguished lawyers and respectable citizens are of like mind, although they do not feel free to speak out. By the grace of God, I am free to speak out. And, as God is my strengh, I shall now speak out:

I am ashamed of the fact that Paul Anderson dares to sit on the news council which purchases causes of action against newspapers in consideration of mediation over which he presides, and that he does so while he also sits as a supreme court justice to review suits against newspapers. I am particularly ashamed of him because he is proud of this obtuse conflict of interest and failure to maintain the appearances of impartiality.

I am ashamed of the fact that Alan Page dared to participate in Derus v. Higgins, 555 N. W. 2d 515 (Minn. 1996), and to vote for the Minneapolis Star Tribune after the newspaper, through its corporate giving arm, had funnelled not less than $45,000 into Page's 501(c)(3) foundation, and had hired Page's wife in a consulting contract, and had allowed its chief executive officer to sit on the advisory board of Page's foundation, and had also hired the wife of the executive secretary of the board on judicial standards who brazonly dismissed a complaint about Page's obvious misdonduct as if nothing was wrong. There is no secret about this notorious scandal. See, e. g., the story "The Friends of Alan Page," in City Pages, July 30, 1997, at pp. 11 and 13.

I am ashamed of every member of this court, including its newest member, for condoning such outrageous improprieties as have been displayed by Paul Anderson and Alan Page, and doing nothing whatever to correct the situation. All of you have an obligation as members of this court to protest such indignities to the bench.

I am ashamed of the fact that Edward Stringer and Paul Anderson should have dared to participate in State ex rel. Graham v. Klumpp, 536 N. W. 2d 313 (Minn. 1995), when they had been lawyers for the governor whose exposure for civil liability was there at stake. Stringer says he did not participate, but he at least sat in oral argument and took notes, which is participation. His office arrogantly defied counsel for an interested party who inquired whether he participated and voted in conference. Only after pressure was applied did he back down. Under the circumstances, nobody is obliged to believe the excuses which were made for him.

I am ashamed of the fact that Esther Tomjanovich should have dared, in State ex rel. Graham v. Klumpp, 536 N. W. 2d at 317, to misrepresent State v. Connally, 82 N. W. 2d 289 at 292-293 (Minn. 1957), for the very opposite of what there was really

decided, all in order to decide the pending case on an issue which had never been argued in the written submissions of counsel. There are professional limits upon how far a judge may bend the law, as appears in Benjamin Cardozo's The Nature of the Judicial Process, Yale Univ. Press 1921, at p. 129.

I am ashamed of the fact that Sandy Keith should have written such a professionally substandard opinion in Doe v. Gomez, 542 N. W. 2d 17 (Minn. 1996), in blatant disregard for elementary principles of law stated, e. g., by William Prosser in his Handbook on the Law of Torts, West Pub. Co., 2nd Ed. 1955 at pp. 174-175, 4th Ed. 1971 at pp. 335-336, and 5th Ed. 1984 at pp. 367-368, and, I believe, every edition thus far published of this basic text used by freshman law students and applicants for the bar examination. How can difficult questions be decided without reference to the fundamentals?

I am ashamed of Sandra Garderbring for what she wrote in Baker v. Baker, 494 N. W. 2d 282 (Minn. 1994): her opinion was directly in variance of the much revered precedent in Thiede v. Scandia Valley, 14 N. W. 2d 400 (Minn. 1944), yet she did not so much as cite or attempt to distinguish it. Where are the lawyerlike standards of the era when the work of Harry Peterson, Tom Streissguth, Luther Youngdahl, Leroy Mattson, and Tom Gallagher graced the jurisprudence of Minnesota?

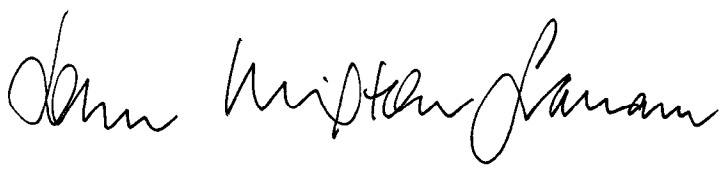
I am ashamed of the unbecoming politics behind the abortive prosecution of LaJune Lange, No. C4-96-596 on the docket of the Minnesota Supreme Court.

Citizens and lawyers in growing numbers want a new supreme court of which we can be honestly proud. We know of no other way quite so likely to reform the judiciary than by winning four or five open seats on the supreme court in the general election next year. It is not my present intent to be such a candidate, but I hope we can put up well qualified lawyers to run.

Endorsement by political parties is the only way we can overcome the process of endorsement by newspapers which have compromised the integrity of this court by undue influence as in the case of Paul Anderson and the case of Alan Page. It seems to be only way we can circumvent the excessive political clout of large law firms in the bar poll, and in judicial elections generally. Special interests have much more unwholesome motives and influence in judicial elections than political parties.

I oppose the petition, because it suggests unconstitutional regulations, and because it is all wrong in policy.

Very truly yours,



HINSHAW & CULBERTSON

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APPLETON, WISCONSIN
BROOKFIELD, WISCONSIN
LAKE GENEVA, WISCONSIN
MILWAUKEE, WISCONSIN

October 30, 1997

WRITER'S DIRECT DIAL NO.
612-334-2650

Mr. Frederick Grittner
Clerk of Appellate Court
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: November 19 Hearing to consider proposed amendments to the Code of Judicial Conduct
Court File No. 81-300

Dear Mr. Grittner:

Pursuant to the court's Order published in the September 19, 1997 issue of Finance and Commerce, please find twelve (12) copies of my request for an opportunity to address the court at the hearing and twelve (12) copies of material to be presented at the hearing.

Sincerely,

Bruce A. Peterson

BAP:kcm
Enclosures

**STATE OF
MINNESOTA
IN SUPREME COURT**

Court File No. C7-81-300

In Re:

Proposed Amendment to the
Code of Judicial Conduct

The undersigned respectfully requests permission to make an oral presentation at the hearing on the above matter scheduled for November 19, 1997.

Dated: October 30, 1997

BY: Bruce Peterson

Bruce A. Peterson, I.D. 85637
222 South 9th Street
Suite 3200
Minneapolis, MN 55402

STATE OF MINNESOTA
IN SUPREME COURT

In Re:

Court File No. C7-81-300

Proposed Amendment to the
Code of Judicial Conduct

STATEMENT BY BRUCE A. PETERSON ON THE PROPOSED AMENDMENT TO THE CODE OF JUDICIAL CONDUCT

TO: THE SUPREME COURT OF THE STATE OF MINNESOTA

I am writing to state my opposition to one of the proposed amendments to the Code of Judicial Conduct. Specifically, I oppose the proposed amendment to Canon 5(B)(1)(a), which would prohibit a judge or candidate for judicial office from speaking to political organization gatherings on his or her own behalf.

Most of the proposed amendments to Canon 5 of the Code of Judicial Conduct are obviously designed to keep partisan politics out of judicial elections. I strongly support this concept. Party-dominated judicial elections in other states have not fostered the fact or the appearance of an impartial judiciary. Minnesota has done a relatively good job of maintaining campaign decorum without stifling compaigners. Nonetheless, I believe that prohibiting judicial candidates from speaking to political organization gatherings is not necessary to accomplish this objective and perhaps goes further than was intended.

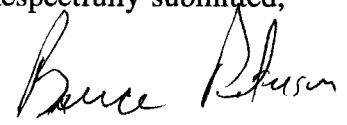
I was a candidate in the November 1996 election for an open seat on the Hennepin County District Court bench. During the campaign I spoke at several of the monthly Senate district committee meetings held by the political parties. I spoke at approximately an equal

number of Republican and DFL gatherings. The audiences ranged in size from about ten to thirty. These meetings were some of the high points of the campaign. The audiences were knowledgeable and interested, the questions were intelligent, and the people present seemed likely to share their opinions with their friends and neighbors. I never mentioned my party affiliation, nor did I ask for an endorsement. The meetings were purely informational.

The proposed amendment to Canon 5B(1)(a) would appear to prohibit this kind of campaign appearance. Given the difficulty of educating the public about judicial candidates, I believe it would be a mistake to deprive candidates of this ready access to the most politically interested, active, and aware citizens, i.e., those attending political organization gatherings.

For these reasons, I suggest that the Court delete the amendment to Canon 5(B)(1)(a) from the other changes to the Code under consideration.

Respectfully submitted,



Bruce A. Peterson, I.D. 85637
222 South 9th Street
Suite 3200
Minneapolis, MN 55402

Dated: October 30, 1997

Wersal Law Office, P.A.

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

APPOINTMENTS MAY
BE SCHEDULED AT
LOCATIONS THROUGHOUT
THE METRO AREA

October 29, 1997

Frederick Grittner
Clerk of Appellate Courts
305 Judicial Center
25 Constitution Ave.
St. Paul, MN 55155

RE: Case File No. C7-81-300
Order for Hearing to Consider Proposed
Amendment to Code of Judicial Conduct

Dear Mr. Grittner:

Please treat this letter as my request to make an oral presentation to the Minnesota Supreme Court on November 7, 1997 at 9:00 a.m. when the Court will consider the Petition of the Board on Judicial Standards to Amend Canon 5 of the Minnesota Code of Judicial Conduct. I have attached twelve copies of this request to this letter. In addition, I have attached twelve copies of the material to be presented at the hearing.

Yours truly,

~~WERSAL LAW OFFICE~~, P.A.

Gregory F. Wersal

GFW/gg
Enclosures

STATE OF MINNESOTA

IN SUPREME COURT

C7-81-300

MEMORANDUM OF GREGORY WERSAL REGARDING PROPOSED AMENDMENT TO CANON 5 OF THE CODE OF JUDICIAL CONDUCT

ISSUES:

I. Whether the proposed changes to Canon 5 of the Minnesota Code of Judicial Conduct, preventing a judicial candidate from speaking at political conventions or from a candidate's campaign committee from seeking or using political endorsements violates the First Amendment right to free speech.

II. Whether the proposed changes to Canon 5 of the Minnesota Code of Judicial Conduct violates the First Amendment right to freedom of association.

III. Whether the proposed changes to Canon 5 of the Minnesota Code of Judicial Conduct constitutes an unconstitutional infringement of the legislative function pursuant to the Minnesota Constitution which states that judges shall stand for election in the manner prescribed by the Legislature?

IV. Whether the justices on the Supreme Court who stood for election in 1996 or who will stand for election in 1998 should recuse themselves from deciding this issue.

FACTS

In February of 1996 Gregory Wersal began a campaign for the position of Associate Justice to the Minnesota Supreme Court for the election to be held in November, 1996. His opponents in that race were Justice Stringer and Justice Anderson. In his campaign Gregory Wersal gave numerous speeches at political party conventions and his campaign committee actively sought the endorsement of organizations, including a political party.

In January, 1997, Mr. Wersal began actively campaigning for the position of Associate Justice to the Minnesota Supreme Court for the 1998 elections. Again in his campaign he has given speeches at numerous political party conventions and his campaign committee is actively seeking the endorsement of a political party.

The Minnesota Board on Judicial Standards has now filed a Petition to Amend Canon 5 of the Code of Judicial Conduct to prevent judicial candidates from speaking at political party gatherings and to prevent their campaign committee from seeking or using political organization endorsements. The Board has sought these changes to Canon 5 for the <u>political purpose</u> of stopping Mr. Wersal's current campaign. The Board in the Petition states their purpose:

> The Board is aware of individuals who have sought endorsement for judicial positions from major political parties in 1996, and is aware of a current campaign underway to achieve that goal in 1998. For these reasons, the Board has requested amendments to Canon 5. Board on Judicial Standard's Report to Amend Canon 5 of the Minnesota Code of Judicial Conduct, p.2.

ARGUMENT

I. Prohibiting judicial candidates from speaking at political gatherings and prohibiting campaign committees from using political endorsements violates the First Amendment right to freedom of speech.

The courts are charged with reviewing state regulations to determine if a regulation is necessary to serve a compelling state interest, and if it has been narrowly written to protect against the evil that the government can control. Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982). Where a regulation extends so far as to completely outlaw speech because of the subject matter of its content, there is a strong presumption of its unconstitutionality. Widmar v. Vincent, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

Moreover, restrictions affecting free speech that can result in disciplinary action to the speaker are subject to an even stricter scrutiny. In re Primus, 436 U.S. 412, 98 S.Ct. 1893, 56 L.Ed.2d 417 (1978). The question then becomes whether the enacted regulation has been so narrowly drafted, and strictly applied, that the compelling state interest is served without unnecessarily burdening the exercise of free speech? First National Bank of Boston v. Bellotti, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

How can anyone argue that these proposed regulations are so narrowly drafted and strictly applied that a compelling state interest is served without unnecessarily burdening the exercise of free speech when, in fact, they prohibit all speech that a

candidate may want to give to a political gathering? And how can anyone argue that the proposed regulations are so narrowly drafted when they prohibit all use of political endorsements by a campaign committee.

Federal courts have struck down judicial codes which have prevented candidates from speaking.

> While the court agrees with defendants in this case that the State of Florida has a compelling interest in protecting the integrity of the judiciary, it cannot agree that a prohibition of all discussion of disputed legal and political issues is the most narrowly drawn means of protecting that interest. American Civil Liberties Union v. The Florida Bar, 744 F.Supp. 1094 (N.D.Fla. 1990). (Emphasis in original)

And state courts have taken similar action.

> However, SCR 4.300 Canon 7(B)(1)(c) is not so narrowly drawn as to limit a candidate's speech to such specific prohibitions. Instead, the section prohibits all discussion of a judicial candidate's views on disputed legal or political issues, and thus unnecessarily violates fundamental state and federal constitutional free speech rights of judicial candidates. J.C.J.D. v. J.R.C.R., 803 S.W.2d 953 (Ky. 1991). (Emphasis in original)

Courts have acted in such a manner because they recognize that if elections are to be meaningful the candidates must be allowed to speak. The election process enjoys the strongest possible protection under the First Amendment of the U.S. Constitution because it is during elections that freedom of speech is most urgently needed. It is said that if the electorate is to make informed decisions, then the information for that decision-making must be freely available. Monitor Patriot Co. v. Roy, 401 U.S. 265, 272, 91 S.Ct. 621, 625, 28 L.Ed.2d 35 (1971). Thus, the state must not interfere with a candidate's

rights to "engage in the discussion of public issues and vigorously and tirelessly advocate for his own election... and make his views known so that the electorate may intelligently evaluate the candidates' personal qualities and their views on vital public issues before choosing them on election day." Buckley v. Valeo, 424 U.S. 1, 52-53, 96 S.Ct. 612, 651, 46 L.Ed.2d 659 (1976); Brown v. Hartlage, 456 U.S. 45, 102 S.Ct. 1523, 71 L.Ed.2d 732 (1982).

First Amendment jurisprudence also extends these strong protections to judicial elections.

> [W]hen a state decides its trial judges are to be popularly elected, it must recognize the candidates right to make campaign speeches and the concomitant right of the public to be informed about the judicial candidates. American Civil Liberties Union v. The Florida Bar, 744 F.Supp. at 1097.

We already have rules that prohibit a candidate from making pledges or promises or announcing his views on disputed legal or political issues. These restrictions are already contained in Canon 5. With these restrictions in place, what could a candidate possibly say to a political convention that compels us to adopt these proposed rules as the least restrictive means of controlling free speech? And with these restrictions in place, endorsement of a political organization tells us no more about a candidate than does an endorsement from any other organization. Political organizations, like other organizations, have an interest in good government; political organization, like other organizations, want to have an impartial judiciary and desire the rule of law and not men. The proposed rules prohibiting candidates from speaking at political conventions or for a

campaign committee from using a political endorsement are so broad and sweeping that there is no way to justify them as the least restrictive means to accomplish a state purpose.

Finally, the proposed rules are overbroad and will have a chilling effect on protected speech. The proposed rules prohibit a candidate from speaking to "political organizations", or for a campaign committee from seeking or using endorsements of "political organizations". However, the definition of "political organization" is so broad as to create a chilling effect on all speech. The term "political organization" denotes a group "the principal purpose of which is to further the election or appointment of candidates to political office". How is this language to be applied to groups such as Mothers Against Drunk Driving, the National Organization of Women or the Minnesota Citizens Concerned for Life all of whom has as part of their purpose the election of candidates to office who have similar viewpoints. What about newspapers that, in their editorials, endorse one political candidate over another. In fact, the language is so broad that a judicial candidate's campaign committee would seem to be a "political organization" to which the candidate could not speak.

And then the question also becomes why prohibit candidates from speaking to any type of organization, if that organization does not endorse or support judicial candidates. If the National Organization of Women supports candidates for political offices other that judicial offices, why should a judicial candidate be

prohibited from speaking to such a group? For that matter, the Republican Party in the state of Minnesota does not currently endorse judicial candidates and has not in the past. If that is their policy, what is wrong with a judicial candidate speaking to such a group any more than any other group of citizens of this state? The proposed rules are not only over broad in a First Amendment sense but raise problems of equal protection promised by the Fourteenth Amendment.

II. Prohibiting judicial campaign committees from seeking and using the endorsement of political organizations violates the First Amendment right to freedom of association.

Decisions involving associational freedoms establish that the right of association is a "basic constitutional freedom," Kusper v. Pontikes, 414 U.S., at 57, 94 S.Ct., at 307, that is "closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society." Shelton v. Tucker, 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed.2d 231 (1960). See, e.g., Bates v. Little Rock, 361 U.S. 516, 522-523, 80 S.Ct. 412, 416, 4 L.Ed.2d 480 (1960); NAACP v. Alabama, supra, 357 U.S., at 460-461, 78 S.Ct., at 1170-1171; NAACP v. Button, supra, 371 U.S., at 452, 83 S.Ct., at 347 (Harlen, J., dissenting). In view of the fundamental nature of the right to associate, governmental "action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny". NAACP v. Alabama, supra, 357 U.S., at 460-461, 78 S.Ct., at 1171. The proposed rule violates freedom of association by prohibiting the candidate's campaign committee from seeking or

using the endorsement of political organizations.

What is most oppressive about the proposed rule is that it completely ignores the distinction between the candidate and the candidate's campaign committee. Canon 5 already prohibits a candidate from seeking endorsements or from personally soliciting funds and specifically permits the establishment of campaign committees to carry on these functions. Campaign committees are used to assure the impartiality of judges. The evil to be prevented by prohibiting the candidate from seeking endorsement personally is already overcome by the use of campaign committees. Therefore, there is no need for a proposed rule prohibiting campaign committees from seeking or using political endorsements. The proposed rule is not the least restrictive means and violates the freedom of association of the campaign committee. The campaign committee has the constitutional right to associate with all sorts of groups or individuals to pursue its goal, the election of the judicial candidate.

III. The proposed changes to Canon 5 of the Code of Judicial Conduct are an unconstitutional infringement on the legislative function pursuant to Article VI, Section 7 of the Minnesota Constitution which provides that judges shall stand for election in the manner provided by law.

Article VI, Section 7 of the Minnesota Constitution provides that judges "shall be elected by the voters from the area which they are to serve in the manner provided by law". This section

of the Constitution contains two separate notions: The first is that judges are to be elected and the second is that the elections are to occurr in the manner provided by law. The requirement for elections means that not only will the public get to vote, but that they have a right to hear what a candidate has to say, including their views on legal and political issues. J.C.J.D. v. J.R.C.R., 803 S.W.2d at 956; Deters v. Judicial Ret. and Removal Com'n, 873 S.W.2d, 200 at 204 (Ky. 1994). As the Supreme Court places more and more restrictions on a candidate's ability to speak and convey a message to the public, it comes closer and closer to violating the central concept of a free and open election. The proposed rule preventing judicial candidates from speaking to political organizations would definitely prevent a large portion of the voting public, those belonging to political organizations, from hearing what a candidate has to say.

But even more insidious is that the proposed rules violate Article VI, Section 7 of the Minnesota Constitution in that it provides that the elections shall be conducted in "the manner provided by law". It is the Legislature, which is to pass law and which is to control the manner of judicial elections; not the Court. The Legislature, in fact, has established some rules with regard to judicial elections and judicial candidates. Minn. Stat. 204. In addition, the Legislature has established

political parties and their roles, the roles they may play in partisan and nonpartisan elections. Minn. Stat. 204(B). A nonpartisan election is one in which there is no party designation shown on the ballot; nonpartisan does not mean that political parties do not become involved in the election process. Mayor and city council positions are nonpartisan, but everyone knows that Sharon Sayles-Belton is the Democratic Party endorsed candidate for Mayor of Minneapolis. If the Legislature wished, it could pass laws prohibiting political parties from endorsing candidates in nonpartisan offices, including judicial offices, but it has not. And it is not proper for this Court to speculate why the Legislature has taken this position. The point is that Legislature has control of elections, including judicial elections and the Legislature has not sought to limit the role of political parties in nonpartisan elections. If this Court moves to impose the proposed restrictions on judicial candidates, it will have violated the clear constitutional directive that it is the Legislature who is to determine the manner of elections.

IV. The judges of the Court who will be standing for election in 1998 and who stood for election in 1996 should recuse themselves from deciding this issue.

Greg Wersal was an announced candidate for the position of Associate Justice to the Minnesota Supreme Court in 1996 and actively campaigned against Justices Stringer and Anderson in that election. He is now a candidate for the position of Associate Justice to the Minnesota Supreme Court for the

elections to be held in 1998. As part of his campaign, Mr. Wersal has spoken at numerous political conventions and his campaign committee has sought the endorsement of a political party. It is because of Mr. Wersal's actions, and no one else's, that the board on judicial standard has now proposed the changes to Canon 5. The preface of the Board on Judicial Standard's Report to Amend Canon 5 specifically states "the Board is aware of individuals who have sought endorsements for judicial positions from major political parties in 1996 and is aware of a current campaign underway to achieve that goal. For these reasons, the Board has requested amendments to Canon 5". (Emphasis supplied).

As sitting judges are to avoid even the appearance of impropriety, it will be impossible for judges on the Minnesota Supreme Court who are standing for election in 1998 to sit and decide this issue which directly affects the ongoing campaign of their opponent. Each of the judges who will stand for election in 1998 will have a direct and personal interest in how this issue is decided. Such direct and personal interest requires that the judges recuse themselves from deciding this issue.

It would also give a grave appearance of impropriety for Mr. Wersal's past campaign opponents, Justice Stringer and Justice Anderson, to now sit and decide an issue which directly affects Mr. Wersal's current, ongoing campaign. Even though Justice Stringer and Justice Anderson are not involved in the current campaign or the elections to be held in 1998, as Mr. Wersal's previous opponents, they would have a direct and

personal interest in this current controversy. Again, these judges can not avoid the appearance of impropriety and it would be appropriate for them to recuse themselves.

Respectfully Submitted,

10-30-97
Date

Gregory Wersal
Attorney ID #122816
Wersal Law Office, P.A.
P. O. Box 26186
Minneapolis, MN 55426
(612) 546-3513

STATE OF MINNESOTA
FOURTH JUDICIAL DISTRICT COURT

STEPHEN C. ALDRICH
JUDGE
HENNEPIN COUNTY GOVERNMENT CENTER
MINNEAPOLIS, MINNESOTA 55487-0421
(612) 348-7433
FAX (612) 348-2131

October 30, 1997

Mr. Frederick Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

Re: Proposed Amendments to Canon 5
Code of Judicial Conduct

Dear Mr. Grittner:

Pursuant to the Court's order in the September 19, 1997 *Finance and Commerce,* this letter and 11 copies thereof is my request for an opportunity to testify at the hearing on the above Amendments.

I will submit a testimony summary before the new hearing date of November 19, 1997 at 9:00 a.m.

Very truly yours,

S. C. Aldrich

Stephen C. Aldrich

November 3, 1997

Frederick Grittner
Clerk of the Appellate Courts
305 Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: PROPOSED AMENDMENT TO THE CODE OF JUDICIAL CONDUCT

Dear Mr. Grittner:

I write to urge the Court to carefully consider the restrictions upon First Amendment rights contained in the proposed amendment to the Code of Judicial Conduct. Because Minnesota uses, at least in part, an electoral process to choose judges, the right of the public to receive information in a free marketplace and the right of candidates for judicial office to speak out on subjects of interest should be limited only for compelling reasons. I believe that the dignity of the judicial system and public respect for the legal system may be sustained within more generous guidelines than those set forth in the proposed amendment.

The political affiliations and views of some candidates for judicial office may be well-known. To deny those candidates without a public record the ability to effectively promote their candidacy may lead to an absence of public debate and an even less-informed electorate regarding judicial elections. Limiting the ability of a candidate to raise funds may merely aid wealthy candidates or incumbent judges. The restrictions on debate and political activity may promote underground campaigns for well-organized ideologues.

Judicial selection may not be well-served by popular elections, but if elections are used, the exchange of information about the candidates and the judicial system should be encouraged. Perhaps the Court will use the occasion of the consideration of these rules to provide the bench, the bar and the public with insight into the problems of judicial elections, including the views of any minority. An open explanation of the rule-making process could educate the legislature and the public about the need for an improved system of choosing and retaining judges.

Respectfully submitted,

Lee Mosher
Attorney at Law
Suite 150
7500 Olson Memorial Highway
Golden Valley, Minnesota 55427

DISTRICT COURT OF MINNESOTA
TENTH JUDICIAL DISTRICT

HONORABLE GARY J. MEYER
CHIEF JUDGE

CHAMBERS
WRIGHT COUNTY COURTHOUSE
10 SECOND STREET NW, ROOM 201
BUFFALO, MINNESOTA 55313-1192
(612) 682-7539

SHERBURNE COUNTY COURTHOUSE
13880 HIGHWAY 10
ELK RIVER, MINNESOTA 55330-4608
(612) 241-2800

November 10, 1997

Frederick Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, Minnesota 55155

Re: Proposed amendments to Canon 5

Dear Mr. Grittner:

I am requesting to make an oral presentation before the Supreme Court on November 19, 1997, on the proposed amendments to Canon 5 of the Minnesota Code of Judicial Conduct. I have enclosed 12 copies of my materials, as well as 12 copies of this letter indicating my request.

Very truly yours,

Gary J. Meyer
Judge of District Court

PRESENTATION
Before the
MINNESOTA SUPREME COURT
ON CANON 5
November 19, 1997
BY JUDGE GARY J. MEYER

Chief Justice Kieth; Justice Tomljanovich; Justice Garderbring; Justice Page; Justice Anderson; Justice Stringer and Justice Blatz:

I am Gary Meyer. I am the Chief Judge of the Tenth Judicial District, with my chambers in Buffalo in Wright County. I also Chair the Administration Committee of the Conference of Chief Judges.

I am here today to speak in opposition to the proposed amendments to Canon 5.

I would prefer that you simply say "No" to the request to amend Canon 5 at all. However, if you deem it necessary to amend Canon 5, please take a hard look at the definition of "Political Organization" found in Paragraph D.

The recommendations I make today are made as an individual judge, and not as Chief Judge of the Tenth District, or as the CCJ Administration Committee chair. I will, however, try to inform you of the concerns of trial judges as I understand them.

I have sought to obtain some consensus for you from my trial court colleagues. As Administration Committee Chair, I asked the Conference of Chief Judges to take a position. However, a resolution approving the proposed Canon 5 amendment failed virtually unanimously at the Administration Committee. There was a strong consensus that we do not need any changes in the present Canon 5, but no alternatives were proposed.

In my Tenth District, there was dissatisfaction with the amendment to Canon 5, but no resolution of either opposition or support to pass on to you.

My own assignment area, Wright/Sherburne, did pass a resolution asking that the definition of "Political Organization" in Paragraph D include not just political parties, but all organizations (though not individuals) which endorse candidates for elected office.

Trial judges do not want to bring partisan politics into judicial elections. We do not want to get into a Texas or Illinois experience. No one wants a judicial ballot which designates "DFL" or "Republican". I suggest, however, that you do not take partisan politics out of a judicial election simply by excluding support from political parties.

The definition of "Political Organization" in Paragraph D effectively limits the term to political parties. It thereby allows a candidate for the judiciary to seek and use the endorsement of such special interest organizations as the National Rifle Association, Minnesota Citizens Concerned for Life, the National Organization for Women, Mothers Against Drunk Drivers, or any labor union.

Clearly, organizations such as these can and frequently do support and oppose candidates for political office. Yet argument can be made that their "principle purpose" is not to "further the election or appointment of candidates to political office." Therefore, candidates will not be restricted from seeking and using the endorsement of these politically active groups.

It appears that the proposed changes to Canon 5 are an attempt to strip partisan affiliation from judicial elections, while allowing, and perhaps encouraging, candidates to adopt issue affiliation. This does not take party politics out of judicial elections. It merely creates a back door opportunity for implied party affiliation through issue affiliation.

If, on the other hand, the intent is to include the really political "non-political" organizations like MCCL or the NRA in the definition of "Political Organizations", then the definition must be made clear to that effect.

To me, the present proposed definition of "Political Organizations" clearly includes only political parties. Judge Bruce Willis, who spent a couple of hours with us on this issue at the Minnesota District Judges Association at Maddens, agrees. However, Paul Willette, who spoke at the conference a few months ago, suggests that the definition could include other special interest groups such as NRA or MCCL.

If it is your intention to include such groups within the definition of "Political Organization", I would suggest that the proposed Paragraph D be amended as follows:

> D. Political Organization. For purposes of Canon 5, the term political organization denotes a political party or other special interest group, ~~the principle~~ one of the purposes of which is to further the election or appointment of candidates to political office.

If Canon 5 must be amended, I encourage you adopt the above version of Paragraph D. To do otherwise will only create inequity between candidates in judicial elections.

I question why it is appropriate to deny a judge the ability to have literature distributed with his or her political party, while at the same time, allow the opponent to seek MCCL support and distribution of literature endorsing the opponent in church parking lots on the Sunday before the election?

Is it fair for a judge who supported a "No Guns" peace policy within his or her political party to not be able to seek the help of that party against an opponent who seeks and uses the NRA mailing lists for an endorsement?

Why should a judicial candidate be able to solicit labor union support, and eventually its sample ballot, but not the support of the political party for which he or she worked for many years?

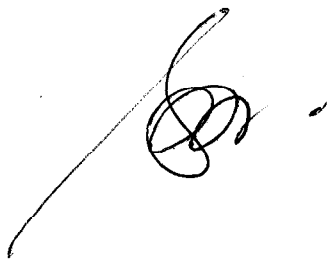
Is it appropriate for a judicial candidate to speak and appear at a MADD function, but not at a political party bean feed?

Why would these special interest endorsements and activity be protected as Constitutionally guaranteed free speech and assembly, but political party endorsements and activity not be so protected?

Perhaps by adopting the Canon 5 amendment we are stirring up unnecessary questions that have only one answer.

I hope you will consider not adopting the amendment, or if you do, that you will consider changing the definition of political organization in Paragraph D.

Thank you.



MINNESOTA BOARD ON JUDICIAL STANDARDS

2025 CENTRE POINTE BOULEVARD
SUITE 420
MENDOTA HEIGHTS, MINNESOTA 55120

DePAUL WILLETTE
EXECUTIVE SECRETARY

DEBORAH K. FLANAGAN
ADMINISTRATIVE ASSISTANT

612-296-3999
FAX 612-452-3433

November 13, 1997

Frederick Grittner
Clerk of the Appellate Courts
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul, MN 55155

RE: Hearing on Proposed Changes to Canon 5, Code of Judicial Conduct
C7 - 81 - 300

Dear Mr. Grittner:

I am enclosing for filing of an original and twelve copies of my written commentary with respect to the Hearing to consider the proposed amendments to the Code of Judicial Conduct.

I plan to be present and in addition, make an oral presentation. Honorable Charles A. Flinn, Jr., Vice-Chairperson of the Board on Judicial Standards, also requests an opportunity for a brief oral comment.

Sincerely,

DePaul Willette
Executive Secretary

DW:df
Enc.

STATE OF MINNESOTA
IN SUPREME COURT
C7 - 81 - 300

RE: Hearing to Consider Proposed Amendments
to the Code of Judicial Conduct

Comments to the Supreme Court
Prepared by
DePaul Willette
Executive Secretary
Minnesota Board on Judicial Standards

TO: Honorable Chief Justice and Honorable Justices of this Court

Background

Members of the Court will recall the Report of the Advisory Committee to review the American Bar Association's Model Code of Judicial Conduct and the Rules of the Minnesota Board on Judicial Standards submitted to you for consideration in June of 1994. This Report resulted in the Court adopting a revised Code of Judicial Conduct and Rules for the Board, effective January 1, 1996. There were revisions to Canon 5 dealing with judicial elections, which dealt primarily with the reorganization of the former Canon 7. Proposed changes to campaign speech were submitted to the Court, but were not adopted.

In 1996, there were 18 judicial elections; 5 were open positions and 13 were contests involving incumbent judges or justices. As a result of these

campaigns, complaints concerning election conduct were received by both the Board on Judicial Standards, with responsibilities for incumbent judges' conduct, and the Lawyers Professional Responsibility Board, charged with responsibilities for lawyer candidates' election conduct.

In considering the complaints, it became apparent to the members of the Board on Judicial Standards that Canon 5 needed clarification concerning the nonpartisan nature of Minnesota judicial elections, the limitation on seeking political support and what constitutes a political organization.

After the 1996 election, a staff member from the Lawyers Professional Responsibility Board and I met to review the types of complaints each organization had received and whether or not, in view of the complaints, the language of the Code was clear and unambiguous and therefore, enforceable. These meetings resulted in a proposed draft of changes to the Code, which was considered and approved by the Board. The draft was then circulated to the Conference of Chief Judges, staff of the Lawyers Professional Responsibility Board, the Minnesota State Bar Association's Judicial Election Task Force and the District Judges' Association for their comments.

Nonpartisan Judicial Election

The nonpartisan nature of Minnesota's judicial elections have been taken for granted. But a search of the statutes and rules showed there is, in fact, very little, if any, specific language describing what nonpartisan elections are. The Board's first recommendation is to add, as an introduction to Canon 5, the language from Minnesota Statute 204B.06, subd. 6, to emphasize the nonpartisan

nature of judicial elections (Canon 5A). To ensure the maintenance of nonpartisan elections, the Board recommends that judicial candidates not be permitted to identify themselves as past or present members of a political organization (Canon 5A(1)(a). This limitation would not prohibit a candidate from stating, as part of their background, that they had been elected to the legislature, or had been active in a political party or a precinct captain. The rule would prohibit identifying the political party which the person represented in those various capacities. The proposed change also makes it clear that a candidate may not seek an endorsement from a political organization (Canon 5A(1)(d)) and prohibits the candidate's committee from seeking, accepting or using political endorsements (Canon 5B(2). These recommendations clearly restrict candidates from seeking political organizations' support and make the enforcement of the violation possible.

One of the complaints made during the 1996 election challenged the meaning of the term "political organization." The present Code has no definition of political organization. To avoid misunderstanding, the Board recommends the incorporation of the definition of political organization, contained in the present commentary, as part of the Code (proposed Canon 5D). This language is adopted from the terminology section of the 1990 ABA Model Code. The adoption of the new terminology provides a three part test which clearly defines the prohibited endorsement by political organizations or groups. First, is there a political party or another group, secondly, is its principle purpose to further the election of a candidate and thirdly, is it for a political office. There is a direct parallel in Minnesota law. A "political committee" is defined by Minn. Stat. 10A.01, subd. 15, as "any association * * * whose major purpose is to influence the nomination

or election of a candidate or to promote or defeat a ballot question . " Neither this definition nor the definition of a political party, as defined by Minn. Stat. Chap. 200, would include ad hoc groups that use a party name. The commentary language does address ad hoc groups. The proposed definition provides flexibility to meet future circumstances and does not prohibit traditional organizations endorsement of a judicial candidate that have been used in the past.

The Judicial Standards Board members believe the proposed language change will make it clear that judicial elections are to be nonpartisan. Minnesota has a long tradition of nonpartisan judicial elections, and these changes will assure a strong, independent judiciary.

Public Endorsement

The proposed language provides that the candidate shall not either directly or indirectly publicly endorse or oppose another candidate for public office. The addition of "either directly or indirectly" makes it clear that inferences of joint candidate activity is inappropriate (Canon 5(A)(b). The present commentary to the Code, however, suggests that this provision does not prohibit a candidate from expressing private views on a judicial candidate or public office seekers, and we do not propose that to be changed.

Judicial Candidates Addressing Gatherings

In the 1996 election, both the Board and the Lawyers Professional Responsibility Board received complaints concerning candidates' attendance at

what appeared to be political gatherings. Candidates claimed they were permitted to speak at gatherings which including political gatherings, because the language in Canon 5B(1)(a) provided a candidate may "speak to gatherings." The Board's recommendation clarifies some confusion caused between Canon 5A(1)(d), which prohibits a candidate from attending political gatherings and Canon 5B(1)(a), which permits candidates to speak to gatherings. By returning to the former language of Canon 7, "at other than partisan political gatherings" to Canon 5B(1)(a), it is clear that candidate's appearances are limited to gatherings other than political gatherings.

Disclosure of Nonsupport

A candidate's election committee has a duty not to disclose to the candidate those who are supporting and providing financial assistance for the candidate. The Board believes it is equally important that the candidate be unaware of those who have refused to make contributions or provide public support (Canon 5B(2).

Integrity and Impartiality

There has been criticisms by judge candidates involved in judicial campaigns that lawyer judicial candidates are not subject to same duties and obligations as the incumbent judge candidates to conduct their campaigns in a manner to promote confidence in the integrity and impartiality of the judiciary, as required by Canons 1 and 2A.. To impose this obligation on all candidates, the

Board recommends adding reference to Canons 1 and 2A as part of Canon 5E, thus, making lawyer candidates subject to these provisions.

Summary

The proposed changes reflect the Board's concern that Minnesota continues to have nonpartisan judicial elections that will maintain the impartiality and independence of the judiciary. The Board submits this Report as a supplement to clarify the proposed changes to the Code and recommends their adoption by the Court.

I will be present at the oral statement, November 19, 1997 and will welcome any questions the Court may have.

November 14, 1997

Respectfully submitted,
MEMBERS OF THE BOARD ON
JUDICIAL STANDARDS

By: DePaul Willette, Executive Secretary

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November 14, 1997

Fred Grittner
Clerk of Appellate Courts
25 Constitution Avenue
Room 305
St. Paul, MN 55155

Re: In Re Proposed Amendments to the Code of Judicial Conduct
Supreme Court File No. C7-81-300

Dear Mr. Grittner:

Please find enclosed the original and 12 copies of my statement in the above matter. I do not desire to make an oral presentation at the November 19, 1997, hearing on the amendments, but intend to be present for the hearing.

Very truly yours,

Office of Lawyers Professional
Responsibility

By 
Kenneth L. Jorgensen
First Assistant Director

tt
Enclosures

FILE NO. C7-81-300

STATE OF MINNESOTA

IN SUPREME COURT

In Re Proposed Amendments to
the Code of Judicial Conduct

**STATEMENT OF
KENNETH L. JORGENSEN**

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT.

1. I am the First Assistant Director of the Office of Lawyers Professional Responsibility (Director's Office). Pursuant to Rule 8.2(b) of the Minnesota Rules of Professional Conduct, lawyer candidates for judicial office are required to comply with Canon 5 of the Minnesota Code of Judicial Conduct when campaigning for judicial office. The Director's Office therefore has lawyer discipline jurisdiction over lawyers while campaigning for office, as well as those lawyers who are unsuccessful in judicial elections.

2. Since 1992 I have handled nearly all of the disciplinary complaints against lawyers arising out of judicial campaigns and alleging violation of Canon 5 (as applied through Rule 8.2(b)). Since 1992 there has been an increasing number of judicial campaign complaints with each election. During the 1996 elections alone there were seven complaints alleging campaign violations. All of these complaints were filed by either lawyers or judges. Many of the allegations in these complaints arose out of good faith disputes about interpretations of various provisions of Canon 5 of the Minnesota Code of Judicial Conduct.

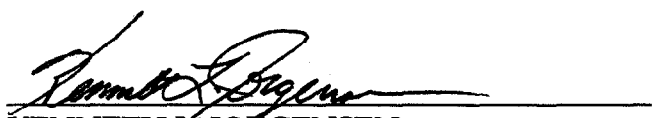
3. Promulgating professional standards which clearly define prohibited behavior in every circumstance is difficult, if not impossible. At the same time, the lack of clarity in the professional standards affecting judicial elections has, at times, created inequities in the manner in which campaigns are conducted. The amendments proposed by the Board on Judicial Standards address many of the problem areas which have in the past resulted in judicial campaign complaints.

4. For example, the issue of what constitutes a political organization was involved in at least two complaints in the 1996 elections. Although the commentary to the Minnesota Code of Judicial Conduct includes a definition for "political organization," the comments are not official interpretations of the Court. The proposed amendments by the Judicial Standards Board remedies this problem by officially recognizing the definition of political organization within the Code. *See* Judicial Standards Board proposed amendment to Canon 5(D). Including a recognized definition is critical if the Canon 5 provisions are to be fairly and uniformly applied by triers of fact (e.g. Board on Judicial Standards or Lawyers Board Panels). Simply defining political organizations as political parties does not remove the existing ambiguity.

5. Another issue which has resulted in alleged campaign violations is personal solicitation for public support. At least two candidates have interpreted the existing provisions to permit personal solicitation by the candidate. The proposed amendment to Canon 5(B)(2) provides greater clarity concerning the prohibition against personal solicitation. Moreover, the amendment also points out the currently unstated obligation imposed upon the candidate's campaign committee (i.e., not to disclose the identity of those who were solicited for publicly stated support but declined).

6. The amendments proposed by the Judicial Standards Board would directly address many of the issues which have resulted in complaints of judicial campaign violations. These amendments should be adopted by the Court in an effort to provide greater clarity about the professional standards governing judicial campaigns.

Dated: November 14, 1997. Respectfully submitted,



KENNETH L. JORGENSEN
Attorney No. 159463
25 Constitution Avenue, Suite 105
St. Paul, MN 55155-1500
(612) 296-3952

STATE OF MINNESOTA
IN SUPREME COURT
No. C7-81-300

In re:

Amendment to Code of Judicial Conduct

PETITION OF MINNESOTA STATE BAR ASSOCIATION AND RESPONSE TO PETITION OF BOARD ON JUDICIAL STANDARDS

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association ("MSBA") respectfully submits this pleading to respond to the petition of the Board on Judicial Standards and to petition this Honorable Court to amend the Code of Judicial Conduct in two respects different from the proposal of the Board on Judicial Standards. In support of this Petition, MSBA would show the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys admitted to practice law before this Court and the lower courts of the State of Minnesota.

2. This Honorable Court has the exclusive and inherent power and duty to administer justice and to adopt rules of practice and procedure before the courts of this state and to establish the standards for regulating the legal profession and to establish mandatory ethical standards for the conduct of lawyers and judges. This power has been expressly recognized by the Legislature. *See* Minn. Stat. § 480.05 (1992).

3. Both the Board's petition and the MSBA petition deal with the ethical standards on judges and lawyers seeking to run for judge in judicial elections. Petitioner MSBA has a deep interest in the judicial election process and the impact the election process has on the administration

of justice in the State of Minnesota. In early 1997, the MSBA created its Judicial Elections Task Force, co-chaired by George Soule of Minneapolis and Natalie Hudson of Saint Paul. That Task Force studied problems and perceived problems in the judicial election process and made a number of recommendations. Among those recommendations was a recommendation that Canon 5 of the Code of Judicial Conduct be amended in certain ways to improve the operation of the rule and the fairness of judicial elections.

4. The MSBA supports the Petition of the Board on Judicial Standards in all respects except for the two additional provisions set forth in paragraphs 5 and 7 below. The MSBA applauds the Board's endeavors to make the rules governing judicial elections provide clearer guidance to candidates for judicial office and improve the overall election process by providing more information on candidates.

5. Petitioner MSBA respectfully proposes that the language proposed by the Board be amended and modified in one important respect. The MSBA believes that the definition of "political organization" in the Board's proposal should be modified so that restrictions on candidates and candidate committees should be limited to those involving political parties and political party organizations, not the broader and less-defined "party or other group" standard of the Board's proposed rule. We believe the definition proposed by the Board on Judicial Conduct would invite confusion and dispute over what is a "political organization." The specific change proposed by the MSBA is set forth below (with additions and deletions shown with respect to the Board's proposed language, not the existing rule):

> **D. Political Organization.** For purposes of Canon 5 the term political organization denotes a political party organization~~, or other group, the~~

~~principal purpose of which is to further the election or appointment of candidates to political office~~.

(This entire rule, as changed, is an addition to the existing Canon 5.)

6. The amendment in paragraph 5 was approved and endorsed by the Board of Governors of the MSBA at its meeting on November 8, 1997, and was recommended to it by its Civil Litigation Section and its Court Rules and Administration Committee.

7. The MSBA also recommends that the rules should permit a candidate to make general appeals for financial support when speaking to any permitted group and to solicit individual endorsements personally. This change should be implemented as the following amendment to the beginning of Canon 5, section 5B(2) (with additions and deletions shown with respect to the Rule's existing language, as the language is not part of the Board's proposed changes):

> (2) A candidate shall not personally solicit or accept contributions ~~or solicit publicly stated support.~~ A candidate may, however, make general appeals for financial support when speaking to gatherings as set forth in Section 5B(1)(a). A candidate may personally solicit publicly stated support from individuals. 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. * * *

(The MSBA supports the remaining changes to the rule as proposed by the Board.)

8. The amendment in paragraph 7 was approved and endorsed by the MSBA General Assembly at the annual meeting of the MSBA in June 1997. The change was recommended to it by the MSBA Judicial Elections Task Force and the Court Rules and Administration Committee.

9. The MSBA respectfully submits that these changes, as proposed by the MSBA and by the Board, will improve the quality and fairness of judicial elections in Minnesota and thereby improve the administration of justice.

Accordingly, Petitioner Minnesota State Bar Association respectfully requests this Honorable Court to amend the Code of Judicial Conduct as proposed by the Board on Judicial Standards, with the further modifications of the Board proposal set forth in paragraphs 5 and 7 above.

Dated: November 13, 1997.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By _____
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Its President

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October 24, 1997

Mr. Frederick Grittner
Clerk of Appellate Court
305 Minnesota Judicial Center
25 Constitution Avenue
St. Paul MN 55155

RE: November 7 hearing to consider proposed amendments to the Code of Judicial Conduct.
Court File No. C7-81-300

Dear Mr. Grittner:

Pursuant to the court's Order published in the September 19, 1997 Finance and Commerce, please find twelve copies of my request for an opportunity to request the court at the hearing and twelve copies of material to be presented at the hearing.

Very truly yours,

LOMMEN, NELSON, COLE & STAGEBERG, P.A.

Stephen C. Rathke

SCR:jrw
Enclosures

STATE OF MINNESOTA

IN COURT OF APPEALS

Court File No. C7-81-300

In Re:

Proposed Amendment to the
Code of Judicial Conduct

The undersigned requests permission to make an oral presentation at the hearing on the above matter scheduled for November 7, 1997.

Dated: October 23, 1997.

BY _____
Stephen C. Rathke, I.D. No. 89771

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STATE OF MINNESOTA

IN COURT OF APPEALS

In Re:

Court File No. C7-81-300

Proposed Amendment to the Code of Judicial Conduct

STATEMENT BY STEPHEN C. RATHKE OPPOSING THE PROPOSED AMENDMENT TO THE CODE OF JUDICIAL CONDUCT

TO: THE MINNESOTA SUPREME COURT.

The proposed amendments relate to Canon 5 which governs judicial elections. One year ago this week my campaign for an open seat on the Hennepin County District Court ended. Five attorneys filed for that position. All of us, Stephen Aldrich, Charles Reite, James Reynolds, Jerry Gallivan and myself, conducted vigorous and respectful campaigns. Not only did we adhere to Canon 5 but we also avoided personal attacks on each other. By the end of the campaign, my respect for all four of my opponents was greater than when the campaign began. Two aspects of Canon 5 struck me as unduly restrictive and virtually unnatural in any kind of a campaign. Although I agree that the candidates should not directly solicit campaign funds, it is unrealistic to deprive the candidates of the names of those who have contributed. Contributions of over $100 are a matter of public record while smaller, more routine contributions are not. Many people, unaware of this provision of Canon 5, personally informed me that they have or will contribute to my campaign. Very few attorneys are aware

that the candidate is not to know the identity of the contributor. It is wrong to assume that the candidate is somehow corrupted by knowledge of the contributors.

Second, it is illogical and unnatural to prohibit the candidate from directly soliciting support. Again, very few attorneys are aware of or understand the prohibition. People want to be asked for their support and they expect the candidate to do the asking. The candidate, of course, is well-aware of his or her public supporters. The candidate is equally aware of those who support the opponent and those who decline to support anyone at all. The rule is easily evaded by either asking the individual to serve on a "campaign committee" or by engaging a potential supporter in a general discussion. The individual contacted will generally either offer their support or decline to do so without being directly asked.

A Hennepin County committee chaired by George Soule recently made recommendations consistent with the above. This court should be considering those recommendations rather than those offered by the Board of Judicial Standards.

The proposals before the court make the election procedure more rather than less irrational. Political organizations exist for the purpose of electing candidates. If a judicial candidate has participated in political organizations in the past (I assume that is still ethical), it is only natural for that candidate to utilize his or her political connections to advance the candidacy. I have been active in the DFL Party. I obtained a list of individuals who attended the DFL Precinct Caucus and prepared a mailing which included the historical fact that I was a delegate to nine state DFL conventions. Under the Board's proposal, I would apparently be prohibited from making disclosure of that fact.

The prohibition of solicitation of party endorsements is a solution in search of a problem. Although a number of candidates for judicial offices were active in party affairs and could have sought endorsement, none did. The candidates understood that such a partisan approach would likely injure a candidacy rather than enhance it.

The proposal also prohibits a candidate from speaking to a political organization. We all know that those who attend political organizations are far more likely to vote than those who do not. Three of us running for separate judgeships requested an opportunity to address both the Republican and DFL Senate District Committees. If the particular senate district was having a meeting, we were always invited. The participants were eager to learn more about the judicial election. Everyone attending undoubtedly voted and may have encouraged others to vote. Thus, such meetings were helpful to both the electorate and the candidate. Nevertheless, the Board of Judicial Standards seeks to prohibit this activity. I find it incredible and offensive that the Board would suggest that such activity is unethical.

Accordingly, I urge the court to reject all of the proposed amendments offered by the Board of Judicial Standards. If this court is in the procedural posture to do so, I urge the court to enact the proposals suggested by the Soule committee.

Dated: October 24, 1997.

BY _____
Stephen C. Rathke, I.D. No. 89771

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