

The American Bar Association (ABA) Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility have collaborated on a recommendation to amend portions of the ABA Model Code of Judicial Conduct in light of recent First Amendment challenges to judicial campaign speech restrictions.

Background

In September 2001, the ABA Standing Committee on Judicial Independence formed a Working Group on the First Amendment and Judicial Campaigns to review Canon 5 of the ABA Model Code of Judicial Conduct in light of recent First Amendment challenges to restrictions on judicial campaign speech. The Working Group is the next logical step in a series of projects undertaken by the ABA. In 1998, Part II of the report of the Task Force on Lawyers Political Contributions¹ made recommendations specifically addressing contributions to judicial campaigns, urging the House of Delegates to amend the ABA Model Code of Judicial Conduct. These recommendations were withdrawn from the House of Delegates and the Ad Hoc Review Committee on Judicial Election Campaign Finance Reform was formed by ABA President Philip Anderson to review how the objectives of the Task Force Report Part II might best be given effect. The Ad Hoc Committee ultimately made recommendations for amendments to the Model Code relating to judicial campaign contributions that were adopted by the ABA House of Delegates in August 1999.²

The Ad Hoc Committee, in its report submitted to the ABA House of Delegates, suggested that further study was necessary in certain areas. One area addressed the possibility of using public financing as a tool for reducing the high campaign costs and rhetoric involved in state judicial elections. The Standing Committee on Judicial Independence formed a Committee to review this proposal and in February 2002 issued a comprehensive, seminal report recommending full public financing for states that elect judges at the appellate level. This ground-breaking report has led to numerous legislative proposals in the states. In the fall of 2002, the first of these legislative proposals based, in part, on the recommendations of the Committee, was signed into law in North Carolina.

The debate over public financing is premised on the concern that judicial elections are becoming costlier and more contentious. The increased cost of judicial elections, combined with the new age of television advertising, has contributed to a new dynamic for judicial elections. Judicial candidates are beginning to question ethics restrictions on judicial campaign speech, designed to protect the independence and impartiality of the judiciary. Raising First Amendment arguments, challenges to provisions of judicial canons across the states have surfaced in the past few years. In addition, national attention has been brought to the issue with two conferences held by the National Center for State Courts (NCSC). In December 2000, the NCSC hosted a National Summit on Judicial Selection. Teams attended the summit from approximately 17 states that elect their judiciaries. The teams included the Chief Justice of the state as well as

¹ ABA Report and Recommendations of the Task Force on Lawyers Political Contributions, Part II (1998).

² See amendments to AMERICAN BAR ASSOCIATION MODEL CODE OF JUDICIAL CONDUCT CANONS 3C(5); 3E(1)(e); and 5C(3) and (4). House of Delegates Report 123, Annual Meeting 1999.

representatives of the legislature and the public. During the summit, which focused on campaign finance issues in judicial elections, questions arose regarding judicial campaign speech, given the changing nature of judicial campaigns. Following up on those concerns, the NCSC convened a Symposium on Judicial Campaign Conduct and the First Amendment, in November 2001. At this conference, scholars, judges, state chief justices, ethics experts and others debated the various approaches to, and justifications for, restrictions on judicial campaign speech.

At this same time the Working Group convened to begin its evaluation of Canon 5 provisions regarding judicial campaign speech. The Working Group drew its members from a number of ABA entities directly involved in judicial issues. The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility were represented by a majority of the Working Group members. The Judicial Division also provided a representative. Members included Margaret Childers, Executive Director, Alabama Judicial Inquiry Commission; Ralph Elliot; Hon. Ralph Erickson; Daniel Hildebrand; Douglas Houser; M. Peter Moser; Hon. Randall Shepard; Paul Verkuil; and Hon. Laurie Zelon. Judge James Wynn of North Carolina chaired the Working Group and Professor James Alfini of Northern Illinois University College of Law served as the reporter.

In addition to the members of the Working Group, an active and diverse group of special advisors was formed to assist the Working Group in its efforts. Those special advisors included New York Supreme Court Justice George Marlow, nominated by Chief Judge Judith Kaye; attorney James Bopp; Professor Robert O'Neil of the University of Virginia and Professor Roy Schotland of Georgetown University Law Center.

The Working Group suspended its efforts in March 2002, after the Supreme Court of the United States heard oral arguments in *Republican Party of Minnesota v. White*. 122 S. Ct. 2528 (2002). This case challenged a provision of the Minnesota Code of Judicial Conduct restricting a candidate's ability to "announce his or her views on disputed legal or political issues."³ Following the Court's ruling in the case, finding the "announce clause" unconstitutional on First Amendment grounds, the Working Group began again in earnest to review Canon 5, as well as other provisions of the Model Code, in light of the Court's opinion.

The Working Group held a number of meetings and conference calls, reviewed extensive materials, and debated a variety of alternative wordings to Model Code provisions. A preliminary proposal of amendments to the Model Code was presented at the American Judicature Society 18th National Conference on Judicial Conduct and Ethics, in October 2002. Over 200 conference attendees, including directors of state judicial ethics commissions, lawyers, judges and scholars, were given an opportunity to review and comment on the preliminary amendments. Based on these comments and those received from a meeting of the Arizona Judicial Conduct Commission, the Working Group again revised its amendments to the Model Code. The final version of the proposed amendments was voted on and approved by the Working Group in January 2003. The Standing Committee on Judicial Independence approved the report in February 2003 and the Standing Committee on Ethics and Professional Responsibility approved the report in April 2003.

³ MINN. CODE OF JUDICIAL CONDUCT, CANON 5A(3)(d)(i) (2000).

The resulting proposed amendments seek to update the Model Code of Judicial Conduct by accommodating judicial independence and impartiality with First Amendment principles protecting the interest in vigorous electoral activity.

Republican Party of Minnesota v. White

Challenges to the constitutionality of ethics provisions restricting judicial campaign speech escalated in the 1990s and into the twenty-first century, culminating in the U. S. Supreme Court ruling in *Minnesota Republican Party v. White*.⁴ In this case, a provision of the Minnesota Code of Judicial Conduct restricting judicial campaign speech was ruled unconstitutional on First Amendment grounds. The decision in *White*, which was handed down on the final day of the 2002 term, was awaited with a great deal of apprehension because it was the first time that the United States Supreme Court had ruled on the constitutionality of a judicial ethics provision.

The Court's ruling in *White* has provoked extensive commentary. Some have claimed that the decision effectively closes the door on attempts to restrict candidate speech in judicial election campaigns. However, disciplinary bodies and judicial ethics advisory committees in a number of jurisdictions have stated that campaign speech restrictions not explicitly addressed by the *White* decision should continue to be enforced.⁵ Similarly, the ABA Working Group on the First Amendment and Judicial Campaigns believes that the decision can and should be read narrowly, leaving the door open for the drafting of campaign ethics restrictions that will pass constitutional muster.

In the *White* case, the Supreme Court of the United States, in a five to four decision, ruled: "The Minnesota Supreme Court's canon of judicial conduct prohibiting candidates for judicial election from announcing their views on disputed legal and political issues violates the First Amendment."⁶ The majority opinion was authored by Justice Scalia, with concurring opinions by Justices O'Connor and Kennedy. Justice Stevens authored a dissenting opinion that was joined by Justices Souter, Breyer, and Ginsburg. Justice Ginsburg authored a separate dissenting opinion joined by Stevens, Souter, and Breyer.

The language that the Supreme Court declared unconstitutional is an outdated attempt at regulating judicial campaign speech. The offending language reads as follows: "a candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues."⁷ This so-called "announce clause" was a key provision in the 1972 version of the ABA Model Code of Judicial Conduct. Only nine states, including Minnesota, still had the announce clause in their judicial ethics canons at the time of the decision in *White*.⁸ Due to concerns over the constitutionality of the "announce clause," the 1990 version of the ABA Model Code of Judicial Conduct does not contain this language.

⁴ *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002).

⁵ See Cynthia Gray, *The states' response to Republican Party of Minnesota v. White*, 86 *Judicature* 163 (2002).

⁶ *White*, 122 S. Ct. at 2542.

⁷ MINN. CODE OF JUDICIAL CONDUCT, CANON 5A(3)(d)(i) (2000).

⁸ Materials prepared in conjunction with Aug. 9, 2002 ABA Standing Committee on Judicial Independence CLE program, "The Supreme Court Speaks – Can Judicial Candidates? Life After *Republican Party of Minnesota v. White*," at the 2002 Annual Meeting of the ABA in Washington, D. C.

In the lower court opinion, *Republican Party of Minnesota v. Kelly*,⁹ the Eighth Circuit declared that it was construing the “announce clause” narrowly and that the Court was effectively reading into it the “commit clause”¹⁰ language from the 1990 version of the Model Code. At present, thirty states have language similar to the “commit clause.”¹¹ Thus, the critical question for most states is, how does the Court’s opinion affect this and other provisions in the 1990 Model Code that regulate campaign speech? In addition to the “commit clause”, Canon 5A(3)(d) includes the “pledges or promises clause,”¹² and the “misrepresent clause.”¹³ Forty-one states have language similar to the “pledges or promises clause,” and 41 states have language similar to the “misrepresent clause.”¹⁴

A narrow reading of the *White* decision has led many to conclude that the campaign speech provisions of the 1990 ABA Model Code of Judicial Conduct are still viable. With regard to the “pledges or promises” clause, Justice Scalia seemingly ducks the issue by stating: “... this is a prohibition that is not challenged here and on which we express no view.”¹⁵ As to the “commit clause,” the Court again arguably avoids the issue by stating: “We do not know whether the announce clause (as interpreted by state authorities) and the 1990 ABA Canon are one in the same. No aspect of our constitutional analysis turns on this question.”¹⁶ Subsequent to the Court’s decision in *White*, at least five states that have provisions similar to those in the 1990 ABA Model Code—Florida, Georgia, Kentucky, Indiana, New York and Ohio--have issued statements through their high courts or conduct commissions that these provisions are not affected by the *White* decision and will continue to be enforced.

To conclude, however, that the *White* decision leaves the current Code provisions intact may fail to reckon with certain aspects of the Court’s analysis. Although the court explicitly declined to rule on the constitutionality of the pledges-or-promises and commit clauses, both of these provisions and the “misrepresent clause” are, like the “announce clause”, content-based restrictions on a candidate’s speech and would therefore be subject to strict scrutiny if challenged in subsequent cases. That is, defenders of these provisions would have the burden of showing that they are “(1) narrowly tailored, to serve (2) a compelling state interest.”¹⁷ Justice Scalia’s majority opinion finds unconvincing the state’s argument that the “announce clause” restriction is justified because of the state’s compelling interest in preserving judicial impartiality and the appearance of impartiality.

Justice Scalia considers three possible definitions of impartiality. The first definition considers impartiality in its “traditional sense,”¹⁸ citing earlier Supreme Court cases, as a “lack of bias for or against either party.”¹⁹ Because the announce clause prohibits expressions of bias

⁹ 247 F.3d 854 (2001).

¹⁰ *Id.* citing AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(ii) (1990).

¹¹ ABA Materials, *supra* note 8.

¹² AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(i) (1990).

¹³ AMERICAN BAR ASSOCIATION, MODEL CODE OF JUDICIAL CONDUCT Canon 5A(3)(d)(iii) (1990).

¹⁴ ABA Materials, *supra* note 8.

¹⁵ *White*, 122 S. Ct. at 2532.

¹⁶ *Id.* at 2534, footnote 5.

¹⁷ *White*, 122 S. Ct. at 2534.

¹⁸ *Id.* at 2535.

¹⁹ *Id.*

with regard to issues rather than parties, the Court concludes that impartiality is not preserved in this sense. The second definition construes impartiality as a “lack of preconception in favor of or against a particular legal view.”²⁰ Although impartiality, so defined, ostensibly is protected by the announce clause, the Court failed to see a compelling state interest in discouraging judges, in light of their legal backgrounds, from developing and expressing views on legal issues. Finally, the Court posits that impartiality might mean “open-mindedness”,²¹ but states that the announce clause fails to preserve impartiality in this sense because it is under-inclusive, preventing judicial candidates from announcing their positions only while campaigning for office.²²

The majority opinion in *White* greatly informed the work of this project. Members of the Working Group carefully analyzed the provisions of the Model Code directly related to campaign speech and arrived at a series of recommendations to accommodate the important interest of preserving judicial impartiality, integrity and independence with the equally important concepts embodied in the First Amendment. The Working Group did not undertake a comprehensive revision of the entire Model Code. Instead, the Working Group proposed the following series of discrete amendments.

Recommended Revisions to the 1990 Model Code of Judicial Conduct

In light of the *White* opinion, the Working Group believes that restrictions on judicial speech will most likely pass constitutional muster if they are:

1. supported by a definition of “impartiality” to be added to the terminology section of the Code of Judicial Conduct, that comports with the discussion of impartiality in the majority opinion in *White*;
2. narrowly crafted to further the compelling state interest in judicial impartiality; and
3. imposed on judges in connection with all of their judicial duties, in response to the majority’s criticism that the announce clause restriction was under-inclusive.

Terminology

The definition of “impartiality” tracks the analysis of impartiality in the majority opinion of *White*, by couching the definition in terms of an absence of bias or prejudice towards individuals and maintaining an open mind on issues. References to impartiality already existed in the Model Code and the Working Group felt it was important to provide a clear definition of its meaning. By following the language found in the Court’s opinion, the Working Group developed a definition that is narrowly tailored yet encompasses the general concepts of judicial impartiality that are vital to the maintenance of an independent judiciary.

Commentary Revisions

Members of the Working Group determined it was important to reiterate and reinforce the need to preserve the crucial values of judicial impartiality, integrity and independence. Language was added to the commentary sections of Canons 1, 2 and 3 to supply a clearer definition of the importance of these judicial attributes. Given the scope of the Working Group’s

²⁰ *Id.* at 2536.

²¹ *Id.*

²² *Id.* at 2537.

project, members did not feel that it was appropriate to completely revise all portions of the Model Code. Therefore, the Working Group decided only to amend portions of the commentary sections of these Canon provisions to provide a clearer understanding of judicial impartiality, integrity and independence. The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility acknowledge that further study of the black letter of these canons might be necessary and support the need for a comprehensive review of the Model Code of Judicial Conduct.

Canon 3

Recognizing the necessity to make all speech restrictions applicable to sitting judges as well as judicial candidates, members of the Working Group sought to amend the provisions of Canon 3. Members of the Working Group deliberated over the merits of amending Canon 3B(9) to incorporate language more akin to the restrictions of Canon 5A(3)(d). The members settled on adding a new provision to the enumerated adjudicative responsibilities of Canon 3B. By adding a new provision that mirrors the speech restrictions for judicial candidates but is applicable to all sitting judges during the administration of their regular adjudicative responsibilities, the prevailing goal of preserving judicial independence, integrity and impartiality will be better served.

Disqualification

The members of the Working Group determined it was important to include a provision within the disqualification provisions of Canon 3 that related directly to judicial campaign speech. The proposed new Canon 3E(1)(f) is designed to make the disqualification ramifications of prohibited speech violations explicit. The language of this provision reflects the goals of Canon 5A(3)(d). A few states, in reviewing their codes of judicial conduct in light of the majority opinion in *Republican Party of Minnesota v. White*, have provided for disqualification as a remedy for preserving judicial impartiality.

Campaign Speech

The directive of the Working Group focused on analyzing the judicial campaign speech restrictions primarily found in Canon 5A(3)(d). The Working Group carefully considered the components of the majority opinion in *White* and rigorously reviewed each provision related to restrictions on judicial campaign speech. The members of the Working Group agreed that the addition of “impartiality” was a necessary addition to the provision of Canon 5A(3)(a) directing a judicial candidate to maintain the dignity appropriate to judicial office and to act in a manner consistent with the impartiality, integrity and independence of the judiciary.

The Working Group focused much of its discussion on the three provisions of Canon 5A(3)(d). These provisions, modified most recently in the 1990 revision of the Model Code, are commonly referred to as the “pledges and promises” clause, the “commit” clause and the “misrepresent” clause. The Working Group determined that it was appropriate at this time to maintain the current format of the “misrepresent” clause.

The provisions of the “pledges and promises” clause and the “commit” clause were carefully analyzed by the Working Group and a number of revisions were considered. Among other options, the members debated whether to maintain the current construction of both clauses,

completely eliminate the “commit” clause, or modify the language of both the “pledges and promises” clause and the “commit” clause to provide tighter construction. The final determination of the Working Group collapsed certain portions of the “commit” clause into the “pledges and promises” clause, and modified the language of that newly constructed clause. Specifically, members decided that restrictions on statements that commit a judge or judicial candidate “with respect to cases, controversies or issues that are likely to come before the court” served to protect a compelling interest in the maintenance of judicial impartiality, integrity and independence. The Working Group determined, though, that restrictions on statements that “appear to commit” were too vague to withstand strict scrutiny analysis. Therefore, the Working Group voted to strike “appear to commit” from the language of this provision.

Further, the Working Group determined that it was in the best interest to provide one provision that clearly stated what type of speech was restricted in a judicial campaign. Therefore, the Working Group voted to combine the remaining elements of the “commit” clause with the “pledges and promises” clause. In addition, the Working Group voted to amend the “pledges and promises” clause by removing reference to “conduct in office” and the “faithful” performance of the duties of the office. Reference to “faithful” was removed after a determination that this did not adequately state the compelling state interest in the preservation of judicial impartiality, integrity and independence. The new wording of the provision provides a clear enumeration of the restricted speech (“with respect to cases, controversies or issues that are likely to come before the court”) and a clear statement of what is being protected by the restriction of this speech (“inconsistent with the impartial performance of the adjudicative duties of the office”). In the opinion of the Working Group, and adopted by both Standing Committees, these amended provisions of Canon 5A(3)(d) provide the appropriate construction to balance the First Amendment interest in vigorous and informative campaign speech with the compelling state interest in performing the duties of the judicial office impartially.

Provisions Requiring Further Study

The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility recognize that a comprehensive review and revision of the Model Code of Judicial Conduct is a necessary undertaking, given the changing nature of judicial elections and the role of judges in the 21st Century. Indeed, the Commission on the 21st Century Judiciary, convened in 2002 by ABA President Alfred P. Carlton, Jr., highlights the need for a comprehensive Model Code revision in its report and recommendations submitted to the House of Delegates this August. According to the report of the Commission on the 21st Century Judiciary a comprehensive revision of the Model Code should be undertaken soon in light of the implications of *White*; the changing role of the trial court judge as evidenced by the emergence of problem-solving courts; and the recognition that the last major Model Code revision was completed over 13 years ago, prior to the latest escalation of interest in judicial independence and accountability.

Conclusion

The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility, in adopting the recommended amendments of the Working Group on the First Amendment and Judicial Campaigns, seek to update the important provisions of the Model Code designed to preserve judicial impartiality, integrity and

independence. The Standing Committees acknowledge that judicial campaigns have entered into a new dimension with higher costs, more advertising and greater competition. Ushered in with this new age of judicial campaigns have been challenges to the Model Code restrictions on judicial campaign speech. Given this new climate of judicial elections and challenges to existing Model Code provisions, it is imperative that the ABA work quickly and efficiently to review and update its judicial speech restrictions. The maintenance of judicial impartiality, integrity and independence is crucial to the effective functioning of the judicial branch, at both the state and federal level. While judicial codes should be flexible to meet the demands and challenges of a new age, it is vitally important that a balance be found that preserves the independence, impartiality and integrity of the judiciary. The Standing Committees believe that these amendments are an important first step, followed closely by a comprehensive revision of the Model Code, to ensure that the Model Code continues to provide relevant, useful guidance for years to come.

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