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Prepared by the Center for Judicial Ethics

Developments Following *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)

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* In 2002, the United States Supreme Court held unconstitutional a clause in the Minnesota code of judicial conduct that prohibited judicial candidates from announcing their views on disputed legal and political issues. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

* In 2003, the **American Bar Association** House of Delegates amended portions of the *Model Code of Judicial Conduct* in light of the *White* decision.

- The amended section on campaign speech prohibits a judicial candidate from making "with respect to cases, controversies, or issues that are likely to come before the court . . . pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." The amendments eliminate the prohibition on judicial candidates making statements that "appear to commit" the candidate.
- The amendments add a new section 10 to Canon 3B that provides: "A judge shall not, with respect to cases, controversies or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office," with commentary that explains that some restrictions on judicial speech "are essential to the maintenance of the integrity, impartiality, and independence of the judiciary."
- The amendments add the following definition of "impartiality" to the terminology section of the code: "'Impartiality' denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge."
- The amendments include a new section requiring disqualification if the "judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding."

These changes and the prohibition on judicial candidates personally soliciting campaign contributions were maintained in the model code by the ABA House of Delegates when it adopted a revised model code in February 2007.

15 states -- **Arizona, Arkansas, Colorado, Florida, Indiana, Iowa, Maryland, Minnesota, Montana, Nevada, New Mexico, Ohio, Oklahoma, South Dakota, and Wisconsin** – have adopted the ABA restrictions on speech and the disqualification rule. **Louisiana** and **North Dakota** has adopted the restrictions on speech by judges and judicial candidates, but not the disqualification rule. **Kansas** adopted the restrictions on speech and the disqualification rule insofar as it applies to statements that committed the judge but not those that appear to commit the judge. **Utah** adopted the disqualification provision but adopted a version of the speech clause prohibiting a candidate from making "pledges, promises, or commitments other than the faithful, impartial and diligent performance of judicial duties." **Wyoming** adopted the disqualification provision but adopted a version of the speech clause that prohibits a candidate from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and "announc[ing] how the judge would rule on any case or issue that might come before the judge."

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* In light of the decision in *White*, the **Alabama** Judicial Inquiry Commission withdrew a judicial ethics opinion that had advised judicial candidates not to respond to a questionnaire from the Christian Coalition. *Alabama Advisory Opinion 00-763* (www.alalinc.net/jic/).

* The Alabama Supreme Court amended the state's canons of judicial ethics in September 2004. The Alabama code did not have the "announce clause" even before *White*, and the court did not amend the existing provision prohibiting a candidate from making "any promise of conduct in office other than the faithful and impartial performance of the duties of the office" or announcing "in advance the candidate's conclusions of law on pending litigation." The court added the word "knowingly" so that judicial candidates are prohibited from "knowingly misrepresent[ing] his or her identity, qualification, present position, or other fact." The court deleted a clause prohibiting a candidate from distributing "true information about a judicial candidate or an opponent that would be deceiving or misleading to a reasonable person." The court changed the clause on campaign financing from prohibiting a candidate from personally soliciting campaign contribution to strongly discouraging a candidate from personally soliciting campaign contributions and highly recommending that a candidate establish a committee to solicit and accept campaign contributions.

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* The U.S. Court of Appeals for the 9th Circuit held that the Alaska Right to Life Political Action Committee's challenge to the commitments and disqualification clauses in the **Alaska** code of judicial conduct was not ripe. *Alaska Right to Life Political Action*

Committee v. Feldman, 504 F.3d 840 (2007), *vacating Alaska Right to Life Political Action Committee v. Feldman*, 380 F. Supp. 2d 1080 (2005).

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* In June 2004, the **Arizona** Supreme Court amended the state's code of judicial conduct to adopt the changes made by the ABA to the model code in 2003.

* The Arizona Judicial Ethics Advisory Committee issued an advisory opinion stating that a judge standing for retention or election may respond to a political interest group questionnaire seeking the candidate's views on disputed political and legal issues or judicial philosophy if the responses do not constitute commitments and that a judicial candidate may publicly discuss an initiative measure to amend the state constitution also appearing on the ballot. However, the Committee stated that a sitting judge who is not campaigning for election or retention may not publicly express his or her views on disputed political or legal issues. *Arizona Advisory Opinion 06-5* (www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Committee.htm).

* The U.S. District Court for the District of Arizona dismissed a lawsuit challenging several provisions regarding campaign and political conduct in the state's code of judicial conduct, finding that the plaintiff "faces insufficient hardship to warrant the exercise of jurisdiction given the lack of any real or imminent threat of enforcement." *Wolfson v. Brammer*, Order (District of Arizona August 8, 2007). In May 2008, the same judicial candidate filed another complaint and motion for preliminary injunction in federal court challenging provisions in the code of judicial conduct requiring disqualification and prohibiting endorsements of and contributions to political candidates, taking part in another campaign, making pledges, promises, and commitments, and personal solicitation of campaign contributions. The court also dismissed the second lawsuit, finding it was moot because the plaintiff had lost his election bid and stated that he did not intend to be a candidate in the next election. *Wolfson v. Brammer* (District of Arizona January 14, 2009). On appeal, the U.S. Court of Appeals for the 9th Circuit reversed, holding that the action falls within the exception to mootness for actions "capable of repetition, yet evading review," that the plaintiff had stated an intention to seek office in the future that was sufficient to preserve jurisdiction, and that some of the plaintiff's claims against the solicitation, endorsement, and campaigning prohibitions were ripe, but that his claims regarding the pledges and promises clause were not ripe. *Wolfson v. Brammer* (9th Circuit August 16, 2010) (www.ca9.uscourts.gov/datastore/opinions/2010/08/13/09-15298.pdfs).

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* The **Arkansas** Judicial Ethics Advisory Committee declined to consider whether the prohibition on a judge publicly endorsing or opposing candidates for public office was unconstitutional, noting its guidelines state that opinions "shall not address issues of law." The committee stated its role is to interpret the code of judicial conduct and apply it to factual patterns not previously considered, not hold that a provision of the code is

unconstitutional or rewrite the code, which is the task of the judiciary. *Arkansas Advisory Opinion 06-2* (www.state.ar.us/jeac/summaries.html).

* The Arkansas Supreme Court held that the prohibition on judicial candidates personally soliciting campaign contributions was constitutional and upheld an admonishment issued by the Judicial Discipline and Disability Commission to a judge who had personally solicited campaign contributions from two attorneys who appeared before him. *Simes v. Judicial Discipline and Disability Commission*, 247 S.W.3d 876 (Arkansas 2007). The court concluded:

> Allowing a judge to personally solicit or accept campaign contributions, especially from attorneys who may practice in his or her court, not only has the possibility of making a judge feel obligated to favor certain parties in a case, it inevitably places the solicited individuals in a position to fear retaliation if they fail to financially support that candidate. Attorneys ought not feel pressured to support certain judicial candidates in order to represent their clients. In addition, the public should be protected from fearing that the integrity of the judicial system has been compromised, forcing them to search for an attorney in part based upon the criteria of which attorneys have made the obligatory contributions.

* Granting the judge's motion for summary judgment, the Arkansas Judicial Discipline and Disability Commission dismissed charges against a court of appeal judge based on statements he made in speeches and articles on controversial public issues. *In the Matter of Griffen*, Final Decision and Order (September 27, 2007) (www.arkansas.gov/jddc/pdf/griffen_report_8-8-07.pdf). The charges had cited, for example, a statement by the judge, quoted in the *Arkansas Democrat-Gazette*, telling a public meeting of the state chapter of the NAACP that the Katrina disaster revealed the scab of racism and classism and criticizing President Bush, Vice President Dick Cheney, the Christian right, Justice Clarence Thomas, the late President Ronald Reagan, and others. The Commission concluded that the judge's speech was protected under the First Amendment and that "there is no Arkansas Canon that expressly prohibits a judge or judicial candidate from publicly discussing disputed political or legal issues" and the "Canons cited in the Formal Statement of Charges cannot be used as a basis for a finding of judicial misconduct if the alleged misconduct is solely related to a public discussion of disputed political or legal issues."

* The Arkansas Supreme Court adopted the 2003 ABA revisions to the code of judicial conduct.

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* After reviewing the *White* decision, the **California** Commission on Judicial Performance, without explanation, dismissed formal charges it had filed against a former judge. *Inquiry Concerning Former Judge Gray*, Decision and Order (August 27, 2002) (cjp.ca.gov/pubdisc.htm). The formal charges had been based on a mailer distributed during Judge Gray's re-election campaign (which she lost). In the mailer, the judge had

made several statements in reference to her opponent Elliot Daum, a criminal defense attorney claiming, for example, that "Elliot Daum Cares About the Rights of Violent Criminals. Judge Patricia Gray Cares About the Rights of Crime Victims."

* In December 2003, the California Supreme Court amended its code of judicial ethics to delete the phrase "appear to commit" from the restriction on speech by judicial candidates because, as commentary explains, it could have made the prohibition against judicial candidates making promises "overinclusive." After the amendments, the California code also includes a prohibition on a judicial candidate "knowingly or *with reckless disregard for the truth*, misrepresent[ing] the identity, qualifications, present position or any other facts concerning the candidate or his or her opponent" (the italicized phrase was added) and new commentary clarifying that "making knowing misrepresentations, including false statements or misleading statements, during an election campaign" is prohibited.

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* Rejecting a judge's argument that her campaign speech was protected by the First Amendment following *White*, the **Florida** Supreme Court publicly reprimanded the judge and fined her $50,000 for, during her election campaign, (1) making pro-prosecutorial statements; (2) knowingly misrepresenting that her opponent, the incumbent, had not revoked a defendant's bond at an emergency bond hearing; and (3) knowingly giving the false and misleading impression that her opponent had granted bond to a defendant charged with attempted murder and burglary. *Inquiry Concerning Kinsey*, 842 So. 2d 77 (Florida), *cert. denied*, 540 U.S. 825 (2003). One justice would have publicly reprimanded the judge only for her misrepresentations and dismissed the other findings as protected by the First Amendment.

* In January 2006, the Florida Supreme Court amended the state's code of judicial conduct to adopt most of the changes made by the ABA to the model code in 2003.

* The Florida Supreme Court removed a judge from office for "flagrant misrepresentations made to the voting public" during his judicial campaign coupled with serious campaign financial misconduct and violations of law." *Inquiry Concerning Renke,* 933 So. 2d 482 (Florida 2006).

* The Florida Judicial Ethics Advisory Committee issued an advisory opinion stating that a judicial candidate may respond to questionnaires that cover such subjects as same-sex marriage, parental notification, and school vouchers and whether the candidate agrees or disagrees with recent court decisions as long as the candidate clearly indicates that the answers do not constitute a promise to rule a certain way, clearly acknowledges the obligation to follow binding legal precedent, and does not appear to endorse another candidate or any platform of a political party, and any commentary on past judicial decisions is analytical, informed, respectful, and dignified. *Florida Advisory Opinion 06-18* (www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/jeac.html).

* Vacating the District Court's order of dismissal on the merits, the U.S. Court of Appeals for the 11th Circuit held that a challenge to disqualifications clauses in the Florida code of judicial conduct should be dismissed for lack of subject matter jurisdiction. *Florida Family Policy Council v. Freeman*, 561 F.3d 1246 (11th Circuit 2009).

* In July 2008, the Florida Supreme Court amended the state code of judicial conduct to incorporate the requirements of Canon 3B(2) and Canon 3B(11) into Canon 7A, thereby making applicable to all judicial candidates the requirement to be "faithful to the law and maintain professional competence in it, and . . . not [to] be swayed by partisan interests, public clamor, or fear of criticism" and the prohibition on commending or criticizing jurors for their verdict, "other than in a court pleading, filing, or hearing in which the candidate represents a party in the proceeding in which the verdict was rendered." One justice wrote an opinion expressing concerns about the constitutionality of the amendment prohibiting judicial candidates from criticizing jurors.

* The investigative panel of the Florida Judicial Qualifications Commission has filed a notice of formal charges alleging, inter alia, that, during his campaign for office, Judge James Turner participated in partisan political activity; identified himself to voters as a member of a partisan political party; knowingly permitted his campaign workers to simultaneously campaign for him and another political candidate as if they were running together on a partisan ticket; publicly voiced support for a partisan political candidate at a candidate forum; promoted the attendance of others at a partisan fund-raising event; personally solicited contributions in writing; attended partisan political functions where he knew he would be identified as a candidate for judge closely associated with a partisan political party; attended a political party fund-raiser to which his opponent was not invited; attended a partisan political celebration immediately following the primary election to which his opponent was not invited; and accepted a campaign contribution in excess of the limit imposed by state law. Judge Turner has raised *Republican Party of Minnesota v. White* as an affirmative defense.

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* The U.S. Court of Appeals for the 11th Circuit held unconstitutional two provisions in the **Georgia** code of judicial conduct prohibiting judicial candidates from personally soliciting campaign funds and from using or participating "in the use of any form of public communication which the candidate knows or reasonably should know is false, fraudulent, misleading, deceptive, or which contains a material misrepresentation of fact or law or omits a fact necessary to make the communication considered as a whole not materially misleading or which is likely to create an unjustified expectation about results the candidate can achieve." The court also held unconstitutional a rule allowing the Judicial Qualifications Commission to issue cease and desist orders regarding campaign speech. *Weaver v. Bonner*, 309 F.3d 1312 (11th Circuit 2002).

* In January 2004, the Georgia Supreme Court amended the state's canon on campaign speech and fund-raising and the rule governing complaints about judicial campaign

conduct. The court deleted provisions in the code requiring candidates to maintain the dignity appropriate to judicial office and prohibiting pledges or promises of conduct in office. The new campaign speech provision states that judicial candidates "shall not make statements that commit the candidate with respect to issues likely to come before the court" and "shall not use or participate in the publication of a false statement of fact concerning themselves or their candidacies, or concerning any opposing candidate or candidacy, with knowledge of the statement's falsity or with reckless disregard for the statement's truth or falsity." New commentary states:

> This Canon does not prohibit a judge or candidate from publicly stating his or her personal views on disputed issues, see *Republican Party v. White*, 536 U.S. 765 (2002). To ensure that voters understand a judge's duty to uphold the constitution and laws of Georgia where the law differs from his or her personal belief, however, judges and candidates are encouraged to emphasize in any public statement their duty to uphold the law regardless of their personal views.
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> The determination of whether a candidate knows of falsity or recklessly disregards the truth or falsity of his or her public communication is an objective one, from the viewpoint of a "reasonable attorney," using the standard of "objective malice." See *In re Chmura*, 608 N.W.2d 31 (Mich. 2000).

The amended canon regarding campaign fund-raising provides that candidates "may personally solicit campaign contributions and publicly stated support." Commentary explains:

> Although judges and judicial candidates are free to personally solicit campaign contributions and publicly stated support, see *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002), they are encouraged to establish campaign committees of responsible persons to secure and manage the expenditure of funds for their campaigns and to obtain public statements of support of their candidacies. The use of campaign committees is encouraged because they may better maintain campaign decorum and reduce campaign activity that may cause requests for recusal or the appearance of partisanship with respect to issues or the parties which require recusal.

The court also added the following language to the preamble to the code:

> Every judge should strive to maintain the dignity appropriate to the judicial office. . . . As a result, judges should be held to a higher standard, and should aspire to conduct themselves with the dignity accorded their esteemed position.
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> * * *
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> The Code is to be construed so as not to impinge on the essential independence of judges in making judicial decisions, or on judges' First Amendment rights of freedom of speech and association.

* * *

> The mandatory provisions of the Canons and Sections describe the basic minimal ethical requirements of judicial conduct. Judges and candidates should strive to achieve the highest ethical standards, even if not required by this Code. As an example, a judge or candidate is permitted under Canon 7, Section B, to solicit campaign funds directly from potential donors. The Commentary, however, makes clear that the judge or candidate who wishes to exceed the minimal ethical requirements would choose to set up a campaign committee to raise and solicit contributions.

* * *

* Vacating a decision enjoining enforcement of the pledges, promises, and commits clauses in the **Indiana** code of judicial conduct, the U.S. Court of the Appeals for the 7th Circuit held that the plaintiff organization had not proven that there were any judicial candidates who were willing to answer its questionnaire and who felt constrained by the clauses and, therefore, the organization lacked standing and the suit should be dismissed. *Indiana Right to Life v. Shepard*, 507 F.3d 545 (7th Circuit 2007). In April 2008, Indiana Right to Life filed a new federal lawsuit and concurrently a motion for a temporary restraining order challenging on First Amendment grounds challenging the pledges, promises, and commits clauses in the Indiana code of judicial conduct. Entering a preliminary injunction, the U.S. District Court for the Northern District of Indiana enjoined enforcement of the pledges, promises, and commits clauses. *Bauer v. Shepard* (Northern District of Indiana May 6, 2008). In July 2009, the court vacated that preliminary injunction based on the new code of judicial conduct adopted by the **Indiana** Supreme Court, effective January 1, 2009 and granted summary judgment in part in favor of the defendants. (The Indiana Supreme Court had adopted the 2003 ABA amendments to the model code.) The District Court upheld the constitutionality of canons in the Indiana code of judicial conduct that (1) prohibit judges and judicial candidates from making pledges, promises, and commitments; (2) require disqualification based on a prior commitment; (3) prohibit judges and judicial candidates from acting as a leader in or holding an office in a political organization or making speeches on behalf of a political organization; and (4) prohibit judges and judicial candidates from soliciting funds for, paying an assessment to, or making a contribution to a political organization or a candidate for public office and personally soliciting or accepting campaign contributions other than through a campaign committee. *Bauer v. Shepard*, 634 F. Supp. 2d 912 (Northern District of Indiana 2009). On August 20, 2010, the 7th Circuit affirmed. *Bauer v. Shepard* (7th Circuit August 20, 2010) (www.ca7.uscourts.gov/tmp/0F1FFJ0U.pdf).

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* In May 2006, the **Iowa** Supreme Court adopted some of the amendments to the model code enacted by the ABA in 2003. As amended, the Iowa code prohibits both judges and judicial candidates from making "with respect to cases, controversies or issues that are likely to come before the court, . . . pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." The

court also adopted a variation of the 2003 disqualification change; the Iowa code now disqualifies a judge from a case if the judge "while seeking appointment for a judicial vacancy or serving as a judge, . . . made a public statement, other than in a prior judicial decision or opinion, that commits, or appears to commit, the judge to reach a particular result with respect to an issue in the proceeding or a controversy in the proceeding." The Iowa court did not adopt the commentary, amendments to Canon 1, or definition of impartiality included in the 2003 ABA amendments.

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* In an appeal from a preliminary injunction against enforcement of the pledges and commits clauses and the "publicly stated support" portion of the solicitation clause in the state code of judicial conduct, the U.S. Court of Appeals for the 10th Circuit certified 5 questions to the **Kansas** Supreme Court. *Kansas Judicial Watch v. Stout*, 519 F.3d 1107 (10th Circuit 2008). The Kansas Supreme Court answered the 5 questions:

> 1. Does a judicial candidate violate Canon 5A(3)(d)(i) and (ii) by answering a questionnaire asking for his or her views on disputed legal and political issues?
> Answer: Perhaps, depending on the questions asked.
>
> 2. Does a judicial candidate solicit "publicly stated support" in violation of Canon 5C by personally collecting signatures for his or her nomination petition?
> Answer: Yes.
>
> 3. Does the definition of "the faithful and impartial performance of the duties of the office" in Canon 5A(3)(d)(i) include all conduct relevant to the candidate's performance in office?
> Answer: Yes.
>
> 4. Is the definition of "appear to commit" in Canon 5A(3)(d)(ii) limited to an objective appearance of a candidate's intent to commit himself or herself?
> Answer: Yes.
>
> 5. Does the definition of "publicly stated support" in Canon 5C(2) include endorsements of a candidate?
> Answer: Yes.

Kansas Judicial Review v. Stout, 196 P.3d 1162 (Kansas 2008). The Kansas Supreme Court adopted a new code of judicial conduct, effective March 1, 2009, that included the 2003 ABA amendments except that it did not require disqualification when a judge made statements while a candidate that appeared to commit the judge. Based on the revised code, the 10th Circuit directed the District Court to dismiss the lawsuit as moot and vacated the preliminary injunction. *Kansas Judicial Review v. Stout*, 562 F.3d 1240 (10th Circuit 2009).

* The U.S. District Court for the District of Kansas held that the clause in the Kansas code of judicial conduct prohibiting judicial candidates from personally soliciting campaign contributions was unconstitutional but upheld the clause prohibiting a judge or judicial candidate from publicly endorsing or opposing another candidate for public office. *Yost v. Stout* (District of Kansas November 16, 2008). The plaintiff appealed, but the U.S. Court of Appeals dismissed the appeal, finding that the notice of appeal was not timely filed. *Yost v. Stout*, 607 F.3d 1239 (10th Circuit 2010).

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* In a suit arising from the refusal of judicial candidates to answer questionnaires from a right-to-life group, the U.S. District Court for the Eastern District of **Kentucky** entered a preliminary injunction prohibiting the enforcement of the canon providing that a judicial candidate "shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; [and] shall not make statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." *Family Trust Foundation of Kentucky v. Wolnitzek,* 345 F. Supp. 2d 672 (2004). However, the court held that the plaintiffs were not likely to prevail on their claim that the state's recusal statute and canon chill protected speech.

In response, the Kentucky Supreme Court amended the state's code of judicial conduct to provide:

> A judge or candidate for election to judicial office shall not intentionally or recklessly make a statement that a reasonable person would perceive as committing the judge or candidate to rule a certain way on a case, controversy, or issue that is likely to come before the court; and shall not misrepresent any candidate's identity, qualifications, present position, or other facts.

A federal lawsuit challenging the revised code was filed. The U.S. District Court for the Eastern District of Kentucky upheld the commits clause as amended but held that the solicitation clause and restrictions on partisan activity by judges and judicial candidates were unconstitutional. *Carey v. Wolnitzek*, Opinion and order (Eastern District of Kentucky October 15, 2008). On appeal, the U.S. Court of Appeals for the 6th Circuit affirmed the holding that the personal solicitation clause and the party affiliation clause were unconstitutional; it also held that the Kentucky version of the commits clause was constitutional insofar as it applies to cases or controversies but that its application to issues was materially ambiguous, requiring a remand to the district court. *Carey v. Wolnitzek* (6th Circuit July 13, 2010).

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* In 2002, the **Louisiana** Supreme Court amended its code to provide that a judicial candidate "shall not while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its

fairness." Commentary explains that that amendment "is not intended to apply to in-court comments by lawyer candidates, or comments regarding a case or proceeding that the lawyer candidate is participating in." Effective February 1, 2005, the Louisiana Supreme Court adopted the 2003 amendments to the ABA model code of judicial conduct regarding statements.

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* The **Maine** Supreme Judicial Court rejected a judge's argument that the prohibition on soliciting funds has a chilling effect on a candidate's ability to speak to potential contributors about their contributions and endorsements and that the restriction was impermissibly designed to make judicial elections different from legislative elections. *In re Dunleavy*, 838 A.2d 338 (Maine 2003). The judge had run for the state senate without first resigning his judicial position and solicited contributions to qualify for public campaign funding from the Maine Clean Elections Fund. The court agreed with the Committee on Judicial Responsibility that the judge had violated the code of judicial conduct but imposed no discipline.

* Rejecting the judge's argument that his speech was protected by the First Amendment, the Maine Supreme Judicial Court censured and reprimanded a judge and suspended him from office for 30 calendar days without pay for making a knowing misrepresentation about one of his opponents in the primary election. *In the Matter of Nadeau*, 914 A.2d 714 (Maine 2007).

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* Effective July 1, 2005, the **Maryland** Court of Appeals amended the state's code of judicial conduct to adopt the changes made by the ABA to the model code in 2003. The court also deleted the announce clause (Maryland was one of the 9 states with the clause in its code when it was declared unconstitutional in *White*) and qualified the prohibition on misrepresentations so that it applies only to misrepresentations "knowingly" made. As before the changes, the Maryland code omits the prohibition on a judicial candidate personally soliciting campaign contributions and publicly stated support.

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* Reviewing several previously issued opinions in light of the decision in *White*, the Ethics Committee of the State Bar of **Michigan** stated that, although the "pledges or promises" clause in the Michigan code of judicial conduct "is presumed constitutionally valid and enforceable," it must be "narrowly construed and cautiously applied to campaign speech." *Michigan Advisory Opinion JI-131* (2005) (michbar.org/opinions/ethicsopinions.cfm). Thus, the committee advised, a judicial candidate may use a campaign slogan such as "A strict sentencing philosophy! A hard working man!" or other expression of philosophy. Similarly, the committee stated that judicial candidates may respond to questionnaires eliciting the candidates' opinions on

matters pending or impending in any court and criticizing the majority opinion of a divided court of last resort and the legal philosophy that underlies it.

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* In the remand of *Republican Party of Minnesota v. White*, the U.S. Court of Appeals for the 8th Circuit held that (1) the personal solicitation clause is unconstitutional insofar as it prohibits a judicial candidate from soliciting contributions from large groups and transmitting solicitations above their personal signatures (the extent of the plaintiffs' challenge) and (2) the clauses in the **Minnesota** code of judicial conduct prohibiting judges or judicial candidates from identifying themselves "as members of a political organization," attending political gatherings, and seeking, accepting, or using endorsements from a political organization are unconstitutional. *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005), *cert. denied sub nom.*, *Dimick v. Republican Party of Minnesota*, 546 U.S. 1157 (2006).

On March 29, 2006, the Minnesota Supreme Court adopted revisions to conform its code of judicial conduct to the remand decision in *White II*. As required by the decision, the changes delete the prohibitions on a judge or a candidate for election to judicial office identifying himself or herself as a member of a political organization, attending and speaking at political gatherings, seeking, accepting, or using endorsements from a political organization. The court also adopted the following version of the solicitation clause:

> A candidate shall not personally solicit campaign contributions, except as expressly authorized herein, and shall not personally accept campaign contributions. 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. 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 may (a) make a general request for campaign contributions when speaking to an audience of 20 or more people, and (b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate. The candidate must take reasonable measures to ensure that the names and responses, or lack thereof, of those solicited will not be disclosed to the candidate, except that the candidate may be advised of aggregate contribution information in a manner that does not reveal the source(s) of the contributions. A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.

The Minnesota Supreme Court also adopted the 2003 ABA amendments to the code of judicial conduct.

In a subsequent challenge to three clauses in the Minnesota code of judicial conduct, the U.S. Court of Appeals for the 8th Circuit has held that (1) the endorsement clause was unconsitutional, (2) the personal solicitation clause was unconstitutional as applied to the plaintiff's desire to solicit contributions door-to-door from non-attorneys when the plaintiff represents that he would recuse himself from any proceeding in which a contributor is a party, and (3) the solicitation for a political organization or candidate clause was unconstitutional to the extent it prevents the plaintiff from soliciting funds for his own campaign. *Wersal v. Sexton* (U.S. 8th Circuit July 29, 2010).

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* The **Mississippi** Supreme Court suspended for 1 year without pay a former judge who made disparaging remarks during his re-election campaign about Caucasian officials and their African-American appointees before a predominantly African-American political organization. *Commission on Judicial Performance v. Osborne*, 11 So. 3d 107 (Mississippi 2009). Referring to the appointment of 2 African-Americans to the Greenwood Election Commission by a Caucasian mayor, the judge stated: "White folks don't praise you unless you're a damn fool. Unless they think they can use you. If you have your own mind and know what you're doing, they don't want you around." The court held that, although the judge was campaigning for re-election, his "inflammatory" and "invidious" statements were not protected political speech under the First Amendment. The court found that "Judge Osborne's commentary on Caucasian officials and their African-American appointees in his jurisdiction is not worthy of being deemed a matter of legitimate political concern in his reelection, but merely an expression of his personal animosity." Noting that the judge did not limit his remarks to expressing "his disdain for the local Caucasian mayor and his African-American appointees," the court distinguished *Republican Party of Minnesota v. White* because the judge's "disparaging insults went well beyond . . . expressing views on disputed legal and political issues and discussing the qualifications of the judicial office for which Judge Osborne was campaigning."

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* Missouri was one of only approximately 9 states that had the "announce clause" in its code at the time of the *White* decision. In an order, the **Missouri** Supreme Court stated that, in consideration of the *White* decision, the "announce clause" would not be enforced but that the other campaign speech provisions (the pledges and promises rule and the prohibition on misrepresentations) in the code "shall otherwise remain in full force and effect." The court also stated, "recusal, or other remedial action, may nonetheless be required of any judge in cases that involve an issue about which the judge has announced his or her views as otherwise may be appropriate under the Code of Judicial Conduct."

In May 2006, the Missouri Supreme Court amended the state's code of judicial conduct to delete the prohibition on judicial candidates announcing views on disputed legal issues, to allow candidates to solicit and accept campaign funds (except in a courthouse or on courthouse grounds), and to make a written campaign solicitation for campaign funds of any person or group, but to prohibit candidates from soliciting in person campaign funds from persons likely to appear before the judge. The new provision on campaign fund-raising provides:

> A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates shall not solicit or accept campaign funds in a courthouse or on courthouse grounds. Such candidate shall not solicit in person campaign funds from persons likely to appear before the judge. A candidate may make a written campaign solicitation for campaign funds of any person or group, including any person or group likely to appear before the judge.

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* In September 2004, the **Nevada** Supreme Court amended the state's code of judicial conduct to adopt the changes made by the ABA to the model code in 2003. On December 5, 2006, the Nevada Supreme Court denied a petition by a district judge that would have amended the state code of judicial conduct to add the model code provision prohibiting judicial candidates from personally soliciting campaign contributions, finding that the proposed limitation was unconstitutional.

* In September 2007, the Nevada Supreme Court amended the code of judicial conduct to prohibit a judicial candidate from raising funds if he or she is not opposed and to make other changes. The amendments also added the clause "a candidate is not prohibited from accepting or soliciting contributions from attorneys who appear before the court or from parties with matters pending before the court," and deleted the statement that "though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under Section 3E." In addition, the amendments allow a judge subject to public election to at any time to be a member of a political organization, make a public declaration of candidacy, make a public speech or appearance or speak to gatherings on his or her own behalf, and appear in newspaper, television, and other media. Moreover, following the amendments, a judge when a candidate for judicial office or a judicial candidate may "seek, accept or use endorsements or publicly stated support for his or her candidacy from any person or organization other than a partisan political organization."

* In a subsequent advisory opinion, the Nevada Standing Committee on Judicial Ethics & Election Practices stated that the changes to the code of judicial conduct "suggest that, in matters related to judicial campaigns where there is no direct violation of a relevant Canon . . . the Committee should be reluctant to conclude that otherwise permissible conduct is an implied violation of the relevant Canon." *Nevada Advisory Opinion JE07-013*.

* * *
* In August 2004, the **New Mexico** Supreme Court amended the state's code of judicial conduct to adopt the 2003 revisions to the ABA model code of judicial conduct. In addition, the court created an action allowing a candidate to challenge a violation by the candidate's opponent in a judicial election campaign by filing a complaint in a state district court.

* Granting a petition filed by the Commission on Judicial Standards based on stipulated findings of fact, the New Mexico Supreme Court ordered that a judge be formally reprimanded for endorsing a mayor for re-election and authorizing the use of his name in an endorsement that was published in the local newspaper. *Inquiry Concerning Vincent*, 172 P.3d 605 (New Mexico 2007). Rejecting the judge's argument that his endorsement was constitutionally protected speech, the court concluded that, "taken as a whole, our Code of Judicial Conduct, which includes the endorsement clause . . . , is carefully and narrowly drawn to serve the compelling state interest in a judiciary that is impartial in fact and in appearance."

* * *
* Rejecting a First Amendment challenge to the New York code based on *White*, the **New York** Court of Appeals censured a judge for pro-prosecutorial rhetoric in his campaign statements. *In the Matter of Watson*, 794 N.E.2d 1 (New York 2003).

* Rejecting a First Amendment challenge to the New York code based on *White*, the New York Court of Appeals accepted the censure of a judge who had, among other misconduct, participated as a panelist in a political party's screening interviews of political candidates; appeared at the party's "phone bank" for a candidate for the county legislature and made phone calls on behalf of the candidate; and made a lump sum payment to a political party. *In the Matter of Raab*, 793 N.E.2d 1287 (New York 2003).

* The U.S. Court of Appeals for the 2nd Circuit vacated the judgment of the District Court for the Northern District of New York holding several provisions of the New York code of judicial conduct unconstitutional and remanded with instructions that the District Court abstain from exercising jurisdiction over the plaintiff's action. *Spargo v. State Commission on Judicial Conduct*, 351 F.3d 65 (2nd Circuit 2003).

* In February 2006, the Chief Administrator of the New York Courts, with the approval of the Court of Appeals, adopted amendments and additions to the code of judicial conduct addressing judicial campaign conduct and campaign ethics, judicial qualifications commissions, and electronic campaign finance disclosure filings. Among other amendments, both judges and judicial candidates are prohibited from making "pledges or promises of conduct in office that are inconsistent with the impartial performance of the adjudicative duties of the office" and "with respect to cases, controversies or issues that are likely to come before the court, mak[ing] commitments that are inconsistent with the impartial performance of the adjudicative duties of the

office." If a judge, while a judge or candidate, violated that prohibition, the judge would be disqualified from a case.

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* In April 2003, the **North Carolina** Supreme Court amended the code of judicial conduct to eliminate every restriction on the political and campaign conduct of judges and judicial candidates except the prohibition on a candidate "intentionally and knowingly misrepresent[ing] his identity or qualifications." The amended code eliminated the restriction on personal solicitation of campaign contributions and expressly allows candidates to personally solicit campaign funds and request public support from anyone for his or her own campaign.

* Dismissing a complaint, the North Carolina Judicial Standards Commission found that a judge's solicitation of an endorsement from an attorney in his chambers during a break in court proceedings did not warrant a recommendation that the judge be sanctioned. Noting that Canon 7B(4) contains no limitations upon the manner and place where such solicitations may be made, the Commission stated it "strongly disapproves" of the judge's conduct, but concluded that the judge's conduct did not warrant a recommendation that the judge be censured or removed from office. *In re Graham*, Order (North Carolina Judicial Standards Commission October 2005).

* The North Carolina Court of Appeals affirmed the State Bar's reprimand of a judicial candidate for referring to herself as "Madame Justice" on her campaign web-site even though she has never been a member of the judiciary. *The North Carolina State Bar v. Hunter* (North Carolina Court of Appeals June 1, 2010). The Court rejected the candidate's argument that her use of "Madame Justice" was a false statement negligently made or a true statement that was misleading or deceptive. Therefore, the Court held that, "as applied to the facts before us, Canon 7(C)(3) does not violate the First Amendment, and is narrowly tailored to protect a compelling government interest -- the integrity of judicial elections -- by a prohibition against misrepresenting a judicial candidate's identity or qualifications for the office sought, and requires actual malice, a knowing and intentional misrepresentation of fact."

* * *

* Granting the plaintiffs' motion for summary judgment, the U.S. District Court for the District of **North Dakota** held that the pledges, promises, and commits clause of the state's code of judicial conduct was unconstitutional; however, the court rejected the plaintiffs' argument that the code's recusal requirement was unconstitutional. *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (District of North Dakota 2005).

* Effective January 2006, the North Dakota Supreme Court adopted the definition of "impartiality" and the restrictions on speech by judges and judicial candidates from the 2003 amendments in the ABA model code and deleted the restriction on statements that

“appear to commit” candidates from its code of judicial conduct. In addition, the court adopted commentary that states:

> [2] The compelling interests of the state supporting the restrictions imposed under Section 5A(3)(d) are recognized and supported by several provisions of the North Dakota Constitution, specifically with respect to ensuring the citizens of this state due process of law, N.D. Const. art. I, §§ 9 and 12; equal protection of the law, N.D. Const. art. I, § 21; open courts, N.D. Const. art. I, § 9; and justice without sale, denial, or delay, N.D. Const. art. I, § 9. Further, because of circumstances found in this state, it is necessary to protect those interests by placing the least restrictive limits on the free speech of candidates and judges possible. North Dakota is a geographically large state with a largely rural, sparse population and a small number of appellate judges and general jurisdiction trial judges. North Dakota also has a very liberal statute providing for a change of judge upon demand, N.D. Cent. Code § 29-15-21. Within a relative short period of time, each of these judges will have been subject to election. Without Section 5A(3)(d), it is reasonably foreseeable that on a particular issue every judge in the state could have pledged, promised, or made a commitment that may be considered inconsistent with the impartial performance of the judge’s adjudicative duties. The limitations imposed under Section 5A(3)(d) are necessary as disqualification under Canon 3E alone may not sufficiently protect the interests described in this comment. See also the limitations imposed under Canon 3B(10).
>
> [3] The state also has a compelling interest in maintaining the integrity, independence, and impartiality of the judiciary, thus enhancing public confidence in the justice system. In furtherance of this interest, judges and candidates for judicial office should be free from political influence, taking into account the methods of selecting judges and the constitutional provisions governing free speech and expressive association. In order to advance the state’s compelling interests, Canon 5A imposes restrictions on the political and campaign activities of all sitting judges and all candidates for judicial office. In all events, a candidate for judicial office should maintain the dignity appropriate to judicial office.
>
> [4] A judge’s obligation to avoid prejudgment is well established. Under the First Amendment and in light of the voters’ right to have information about an elective candidate’s views, judicial ethics provisions may not prohibit judicial candidates from announcing their views on disputed legal and political questions. Canon 5A(3)(d), which applies the prohibitions of Canon 3B(10) to all candidates for judicial office, does not proscribe a candidate’s public expression of personal views on disputed issues. To ensure that voters understand a judge’s duty to uphold the Constitution and laws of this state where the law differs from the candidate’s personal belief, however, candidates are encouraged to emphasize their duty to uphold the law regardless of their personal views.

[5] Some speech restrictions are indispensable to maintaining the integrity, impartiality, and independence of the judiciary. The state has a compelling interest in enforcing these restrictions. Thus, under this Canon it remains improper for a judicial candidate to make pledges, promises, or commitments regarding specific classes of cases, specific litigants or classes of litigants, or specific propositions of law that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases that would fall within the scope of the pledge, promise, or commitment. To fall within the proscription of this Canon the statement by the candidate must pertain to matters likely to come before the court on which the candidate would serve, if elected. Statements by a candidate that would have this effect are inconsistent with the obligation of all judges to perform impartially the adjudicative duties of the office.

[6] Candidates for judicial office often receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations seeking to learn the candidates' views on disputed or controversial legal or political issues. Section 5A(3)(d) does not generally prohibit candidates from responding to this kind of inquiry, but candidates should proceed with caution if they choose to respond. Depending on the wording of the questions and the format provided for answering, a candidate's response might constitute pledges, promises, or commitments to perform the adjudicative duties of the office other than in an impartial way. In order to avoid violating Section 5A(3)(d), therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views.

* * *

* The **Ohio** Supreme Court Board of Commissioners on Grievances and Discipline issued an advisory opinion about the effect of *White*. In *Ohio Advisory Opinion 02-8* (www.sconet.state.oh.us/boc/Advisory_Opinions/), the Board noted that the Ohio code does not contain the "announce clause" and that the Court in *White* did not directly address the pledges and promises provision or the commitments provision. The Board issued 11 campaign speech guidelines for judicial candidates.

* Dissolving an injunction that enjoined enforcement of three provisions of the Ohio code of judicial conduct related to judicial campaign conduct, the U.S. Court of Appeals for the 6th Circuit held that the District Court should have abstained from exercising its jurisdiction in this case. *O'Nell v. Coughlan*, 511 F.3d 638 (6th Circuit 2008). The challenged canons provide that "after the day of the primary election, a judicial candidate shall not identify himself or herself in advertising as a member of or affiliated with a political party," that judicial campaign materials and ads may not "use the term 'judge' when a judge is a candidate for another judicial office and does not indicate the court on which the judge currently serves," and that judges and judicial candidates shall "maintain the dignity appropriate to judicial office." The prohibition was retained in a new code of

judicial conduct effective March 1, 2009. In the new code, the Ohio Supreme Court also adopted the 2003 ABA amendments to the model code.

* In July 2010, the American Federation of State, County, and Municipal Employees, the Ohio Democratic Party; and three judicial candidates filed a federal lawsuit challenging the Ohio statutes and code of judicial conduct provisions that require judicial candidates in general elections be listed without political party affiliation on "non-partisan" ballots and prohibit candidates from personally soliciting campaign contributions. The plaintiffs also asked for a temporary restraining order.

On August 11, 2010, the Ohio Supreme Court amended the code of judicial conduct, effective August 12, to allow judges and judicial candidates to disclose their political party affiliations and to allow personal solicitation of campaign contributions by judicial candidates through "a general request for campaign contributions when speaking to an audience of twenty or more individuals" or by signing "letters soliciting campaign contributions if the letters are for distribution by the judicial candidate's campaign committee and the letters direct contributions to be sent to the campaign committee and not to the judicial candidate" (www.supremecourt.ohio.gov/PIO/news/2010/ruleAmend_081110.aspAug. 11, 2010). The Court explained that it took the action in response to a decision by the U.S. Sixth Circuit Court of Appeals that struck down similar rules in Kentucky. *Carey v. Wolnitzek* (6th Circuit July 13, 2010). The amended code includes a new comment that states, "although these [party] affiliations and others may be communicated to the electorate, a judicial candidate should consider the effect that partisanship has on the principles of judicial independence, integrity, and impartiality." A new comment to the amended solicitation clause states:

> These limitations protect four vital interests: (1) avoiding the appearance of coercion or quid pro quo, especially when a judicial candidate engages in a one-on-one solicitation of a lawyer or party who appears before the court; (2) preserving both the appearance and reality of an impartial, independent, and noncorrupt judiciary; (3) ensuring the public's right to due process and fairness; and (4) furthering the public trust and confidence in the impartiality of the judicial decision-maker. Rule 4.4(A) recognizes that some forms of solicitation are less coercive and less intrusive than others and permits a candidate to engage in solicitations that are less personal and directed at a wider audience.

* * *

* The **Oklahoma** Supreme Court adopted some of the 2003 amendments to the model code. As amended, the Oklahoma code, effective March 1, 2006, will prohibit both judges and judicial candidates from making "with respect to cases, controversies or issues that are likely to come before the court, . . . pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office" and will disqualify a judge from a case if the judge "while a judge or candidate for judicial office, . . . made a public statement that commits, or appears to commit, the judge with

respect to an issue in the proceeding or the controversy in the proceeding." The Oklahoma court did not adopt the commentary, amendments to Canon 1, or definition of impartiality included in the 2003 ABA amendments.

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* In November 2002, the **Pennsylvania** Supreme Court deleted the "announce clause" from the state code of judicial conduct and substituted the "commit clause" from the ABA 1990 model code. In March 2008, the court amended the commit clause to delete the phrase "appear to commit." Thus, Canon 7B(1)(c) now reads: "Candidates, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; make statements that commit the candidate with respect to cases, controversies or issues that are likely to come before the court; or misrepresent their identity, qualifications, present position, or other fact."

* The U.S. District Court for the Middle District of Pennsylvania dismissed a First Amendment challenge to the revised clause, finding that the plaintiffs lacked standing to seek declaratory or injunctive relief and the allegations requesting compensatory relief were barred by the doctrines of sovereign and qualified immunity. *Democracy Rising v. Celluci*, 603 F. Supp. 2d 780 (Middle District of Pennsylvania 2009), *affirmed*, (3rd Circuit May 14, 2010).

* Vacating a preliminary injunction, the U.S. District Court for the Eastern District of Pennsylvania held that the pledges, promises, and commits clauses, narrowly construed to allow judicial candidates to respond to the plaintiff's questionnaire, were not unconstitutional under the First Amendment. *Pennsylvania Family Institute v. Celluci*, 521 F. Supp. 2d 351 (Eastern District of Pennsylvania 2007).

* Affirming an order dismissing a challenge to Pennsylvania's campaign speech restrictions, the U.S. Court of Appeals for the 3rd Circuit held that an organization that sent questionnaires to judicial candidates lacked standing to challenge provisions of the Pennsylvania code of judicial conduct because it had not established the presence of a willing speaker. *Pennsylvania Family Institute v. Black*, 489 F.3d 156 (3rd Circuit 2007).

* * *

* In December 2005, the **South Dakota** Supreme Court adopted the 2003 changes to the model code. In addition, the South Dakota court amended a sentence in the preamble to read "the Code is not to be construed so as to impinge on the essential independence of judges in making judicial decisions or on judge's or candidates' First Amendment rights of freedom of speech and association but should be construed to protect the due process rights of litigants to impartial courts and to promote public confidence in the judiciary." The court also added commentary warning that "the promises and commitments clause must be narrowly construed and cautiously applied to campaign speech" and that "the

conduct of a judicial campaign and the manner of presentation of any material in any connection with a campaign for judicial office should comport with the dignity and integrity required of that office." Commentary added to the code states:

> Candidates for judicial office often receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations, seeking to learn their views on disputed or controversial legal or political issues. Expressing such views may require a judge's recusal or disqualification. Candidates are generally not prohibited from responding to this kind of inquiry, but candidates should proceed with caution if they choose to respond. Depending on the wording of the questions and the format provided for answering, a candidate's responses might constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way. In order to avoid violating Canon 3, therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views. If elected, such candidate shall be recused from cases where a candidate's responses constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way.

The amended code does require that "a judge or a candidate who answers a written questionnaire seeking the judge's or candidate's views on disputed or controversial legal or political issues shall file a copy of any response with the Clerk of the Supreme Court within ten days of the submission of the questionnaire."

Based on the remand decision by the 8th Circuit in *Republican Party of Minnesota v. White*, the court amended the code to expressly allow a judge or candidate to identify himself or herself as a member of a political party at any time and to speak to gatherings on his or her own behalf at any time. Further, the court eliminated the prohibitions on a judge or judicial candidate acting as a leader in a political organization, attending political gatherings, paying an assessment to or making a contribution to a political organization or candidate, or purchasing tickets for political party dinners or other functions.

Also based on *White II*, the state court eliminated the prohibition on personally soliciting campaign contributions, now expressly allowing candidates to do so, although it encourages candidates to establish campaign committees. The court did establish a $1,000 limit on individual campaign contributions (not including the candidate, the candidate's spouse, or any relative within the third degree of kinship) and a time limit for fund-raising to between January 1 and December 31 of an election year. Commentary provides that contributions "should not be knowingly solicited or accepted from a party . . . to litigation that (a) is before the candidate, (b) may reasonably be expected to come before the candidate if elected, or (c) has come before the candidate so recently that the knowing solicitation or acceptance of funds may give the appearance of improper use of the power or prestige of judicial office," or from anyone "employed by, affiliated with or a member of the immediate family of a party" to such litigation. In addition, commentary

states that “contributions may not be knowingly solicited or accepted from any firm, corporation or other organization that has as one of its purposes the promotion of one side of a legal issue which may reasonably be expected to come before the candidate if elected.” However, commentary allow the solicitation of contributions “from lawyers (including lawyers having cases before, or which may come before, the candidate), provided that the solicitation makes no reference, direct or indirect, to any particular pending or potential litigation.”

* * *

* In October 2005, the **Tennessee** Supreme Court replaced the previous commentary to Canon 5A(3)(d) with the following:

> A judge’s obligation to avoid prejudgment is well established. Under the First Amendment and in light of the voters’ right to have information about an elective candidate’s views, judicial ethics rules may not prohibit judicial candidates from announcing their views on disputed legal and political issues. Canon 5(A)(3)(d) does not proscribe a candidate’s public expression of personal views on disputed issues. To ensure that voters understand a judge’s duty to uphold the Constitution and laws of Tennessee where the law differs from the candidate’s personal beliefs, however, candidates are encouraged to emphasize their duty to uphold the law regardless of personal views.
>
> Some speech restrictions are indispensable to maintaining the integrity, impartiality, and independence of the judiciary. The state has a compelling interest in enforcing these restrictions. Thus, under Canon 5(A)(3)(d) it remains improper for a judicial candidate to make pledges, promises or commitments regarding pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific positions of law, that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases that would fall within the scope of the pledge, promise or commitment. To fall within the proscription of this rule the statement by the candidate must pertain to matters likely to come before the court on which the candidate would serve, if elected. Statements by a candidate that would have this effect are inconsistent with the obligation of all judges to perform impartially the adjudicative duties of office.
>
> Candidates for judicial office often receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations seeking to learn their views on disputed or controversial legal or political issues. Canon 5(A)(3)(d) does not generally prohibit candidates from responding to this kind of inquiry, but candidates should proceed with caution if they choose to respond. Depending on the wording of the questions and the format provided for answering, a

> candidate's responses might constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way. In order to avoid violating Canon 5(A)(3)(d), therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views.
>
> Additionally, judicial candidates must keep in mind that, in stating their position as to an issue, they may later be required to disqualify themselves pursuant to Canon 3(E)(1) should that issue subsequently arise in a proceeding before them and, because of the position taken by the judge while a candidate, the judge's impartiality might reasonably be questioned.
>
> Canon 5(A)(3)(d) does not prohibit a candidate for judicial office from making public statements concerning improvements to the legal system or to the administration of justice.

* * *

* In August 2002, the **Texas** Supreme Court amended its code of judicial conduct to strike a provision prohibiting statements indicating an opinion "on any issue that may be subject to judicial interpretation" by the office a judge holds or a candidate seeks (which had been held unconstitutional by a federal court in *Smith v. Phillips* (U.S. District Court for the Western District of Texas August 6, 2002)), to extend the prohibition on public comments on pending cases to apply to judicial candidates as well as judges, and to revise the pledges and promises provision. The new version of the pledges and promises canon states:

> A judge or judicial candidate shall not make pledges or promises of conduct in office regarding pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge.

The court noted that a more extensive study of the rules would be undertaken. One justice joined in approving the amendments but filed a statement noting his doubt that they were sufficient to comply with the First Amendment.

* Dismissing a public admonishment issued by the State Commission on Judicial Conduct, a Special Court of Review appointed by the Texas Supreme Court found that Supreme Court Justice Nathan Hecht did not violate the code of judicial conduct by allowing his name and title to be used by the press and the White House in support of the nomination of Harriet Miers for the office of United States Supreme Court Justice. *In re Hecht*, 213 S.W.3d 547 (Texas Special Court of Review 2006). Because it determined that Justice Hecht did not violate the canons, the court did not undertake a constitutional analysis. A concurring opinion concluded that the justice did

violate the code but that the canons violated the First Amendment.

* The U.S. Court of Appeals for the 5th Circuit held that the Texas State Commission on Judicial Conduct could sanction a judge for using the courtroom, his robe, and state electronic equipment when he held a press conference and sent e-mails about a pending matter in another court, allegations of judicial corruption, and allegations of infidelity against his wife but that the Commission must expunge the censure insofar as it reached the content of the judge's message. *Jenevein v. Willing*, 493 F.3d 551 (5th Circuit 2007). Citing *Republican Party of Minnesota v. White*, the court held that the Commission's interest in preserving the public's faith in the judiciary and litigants' rights to a fair hearing was not advanced by completely shutting down such speech.

* Judge Tom Rickhoff has filed a federal lawsuit alleging an investigation by the Texas State Commission on Judicial Conduct of his re-election campaign is violating his right to free speech. His campaign opponent Barbara Scharf-Zeldes filed a complaint after a June 2009 letter from his campaign claimed she had no trial experience and made other allegations of political underhandedness.

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* The **Utah** Supreme Court adopted the 2003 ABA disqualification provision but adopted a version of the speech clause prohibiting a candidate from making "pledges, promises, or commitments other than the faithful, impartial and diligent performance of judicial duties."

* * *

* The **Vermont** judicial ethics committee issued an advisory opinion allowing a judge to participate in a peace march, hold an anti-war sign, and sign a petition to the congressional delegation or the town board on issues such as energy independence and funding for a local anti-poverty agency. *Vermont Advisory Opinion 2827-6* (2003) (www.vermontjudiciary.org/Committes/boards/vtjudethicsadcomm.htm). Relying on *White*, the committee stated it "must . . . apply strict scrutiny to an application of the Code which would restrict the free speech rights of a Vermont judge."

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* The **West Virginia** Judicial Investigation Commission publicly admonished a candidate for magistrate for personally soliciting campaign contributions in a letter. *In the Matter of Sheehan* (West Virginia Judicial Investigation Commission June 10, 2008). The candidate has objected to the admonishment, arguing before the Supreme Court of Appeals that the restriction on personal solicitation of contributions is unconstitutional.

* * *

* In an advisory opinion, the **Wisconsin** Supreme Court Judicial Conduct Committee stated that a judge may not express a personal opinion about as to the fairness, efficacy, and wisdom of the death penalty, which is the subject of an advisory referendum on the ballot, noting that constitutional issues related to interpretations of the code are beyond its authority. *Wisconsin Advisory Opinion 06-1R* (www.wicourts.gov/supreme /sc_judcond.jsp).

* In October 2004, the Wisconsin Supreme Court adopted new provisions regarding judicial campaign conduct and other political activities by judges.

* The U.S. District Court for the Western District of Wisconsin held that the prohibition on "a judge, judge-elect, or candidate for judicial office [making] . . . with respect to cases, controversies, or issues that are likely to come before the court, pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office" was not unconstitutional on its face but did not prohibit judicial candidates from responding to a questionnaire from the plaintiff Wisconsin Right to Life, Inc. Further, the court held that the requirement that "a judge shall recuse himself or herself in a proceeding when . . . the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to any of the following: 1. an issue in the proceeding. 2. the controversy in the proceeding" was unconstitutionally overbroad and vague, and indistinguishable from the announce clause. *Duwe v. Alexander*, 490 F. Supp. 2d 968 (Western District of Wisconsin 2007).

* Affirming in part and reversing in part a decision by the Western District of Wisconsin, the U.S. Court of Appeals 7th Circuit overturned the party affiliation ban in the Wisconsin code of judicial conduct but upheld the public endorsement and personal solicitation bans. *Siefert v. Alexander*, 608 F.3d 974 (7th Circuit 2010). The plaintiffs' petition for rehearing en banc was denied on August 31, 2010.

* The Wisconsin Judicial Commission filed a complaint alleging that a campaign advertisement of Supreme Court Justice Michael Gableman contained false statements about the background, qualifications, and experience of his opponent, then-incumbent Justice Louis Butler, that were made knowingly or with reckless disregard for the truth. (Gableman defeated Butler in the April 2008 election.) In decisions entered on June 30, 2010, the Wisconsin Supreme Court split 3/3. *In the Matter of Gableman*, 784 N.W.2d 605 & 784 N.W.2d 631 (Wisconsin 2010). Three justices concluded that Justice Gableman's advertisement "misrepresent[ed] . . . [a] fact concerning . . . an opponent," in violation of the code of judicial conduct, that the statement was made knowingly or with reckless disregard for truth or falsity, and that the First Amendment does not protect knowingly false statements. Those three justices stated that a remand to the Judicial Commission for a jury hearing was required. The other three justices concluded that the ad was "distasteful" but that "the First Amendment prevents the government from stifling speech, even when that speech is distasteful" and that the statements in the campaign advertisement were objectively true and, therefore, did not violate the code of judicial conduct. Those three justices stated that the Commission, or the Commission and Justice

Gableman together, should promptly will file a motion to dismiss the complaint. The Judicial Commission filed a statement of discontinuance in the judicial disciplinary proceedings against Justice Gableman, stating that "due to lack of conclusive resolution of this matter in the opinions issued by the Wisconsin Supreme Court and lacking legislative authority to do otherwise, the Wisconsin Judicial Commission files this statement that it is discontinuing prosecution of the above captioned matter."

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***** The **Wyoming** Supreme Court adopted the disqualification provision from the 2003 ABA amendments but adopted a version of the speech clause that prohibits a candidate from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and "announc[ing] how the judge would rule on any case or issue that might come before the judge."

The Center for Judicial Ethics tracks developments following White, as well as other decisions regarding judicial conduct, in the Judicial Ethics News portion of its web-site, a weekly feature at www.ajs.org/ethics/index.asp.