

**REPORT OF THE AD HOC ADVISORY COMMITTEE
TO REVIEW THE MINNESOTA CODE OF JUDICIAL CONDUCT**

C4-85-697

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E. Thomas Sullivan, Chair

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Frederick E. Finch	

David S. Paull
Ex Officio Member

Judy Rehak
Staff

COMMITTEE BACKGROUND

The Committee was established by the Minnesota Supreme Court on January 23, 2007, to study the need for and advisability of further amendments to Canon 5 and other provisions of the Minnesota Code of Judicial Conduct, with consideration of changes that may be included in the new model code considered by the American Bar Association House of Delegates in February 2007.

The Committee was given until September 1, 2007 to file a report. The reporting date was extended by the Court to October 15, 2007. The full Committee met a total of seven times between June and September 2007. The Committee reviewed the previous work of earlier Minnesota Advisory Committees on Judicial Conduct in 2004, 2005, and 2006, the U.S. Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Eighth Circuit Court of Appeals decision on remand in *White*, 416 F. 3rd 738 (8th Cir. 2005) (“*White II*”) and the amendments to the Minnesota Code of Judicial Conduct adopted by the Minnesota Supreme Court in 2004 and 2006.

The Committee received extensive information about the 2007 ABA Model Code of Judicial Conduct and the extensive hearing and commentary process which the American Bar Association employed prior to adopting the 2007 ABA Model Code of Judicial Conduct in February 2007. The Committee carefully considered the provisions of the 2007 Model Code. The Committee formed subcommittees to review each of the four canons of the Model Code to determine whether the Model Code should be adopted in Minnesota and, if so, whether the Model Code should be modified because of circumstances unique to Minnesota. The subcommittees met a total of nine times to consider the application of the 2007 ABA Model Code to Minnesota practices, procedures and prior law.

The Committee scheduled a hearing for public comment on its recommendations and gave notice of that hearing to a variety of public and professional organizations with an interest in judicial ethics. The notice was also published on the Minnesota Judicial Branch web site. The Committee received two written comments and public testimony from two attorneys at an October 17, 2007 public hearing. The public comments were considered and incorporated, as appropriate, in the Committee recommendations.

COMMITTEE RECOMMENDATION

In the interest of developing a uniform body of interpretation on issues concerning judicial ethics and a clear statement of enforceable standards, the Committee recommends the adoption of the 2007 ABA Model Code of Judicial Conduct as modified to reflect Minnesota’s practices, procedures and circumstances.

RECOMMENDATIONS - REVISIONS TO THE 2007 ABA MODEL CODE OF JUDICIAL CONDUCT FOR ADOPTION IN MINNESOTA

BACKGROUND

The following text is a summary of the changes recommended by the Committee to the 2007 ABA Model Code of Judicial Conduct for adoption in Minnesota. The 2007 ABA Model Code consists of four Canons, numbered Rules under each Canon, and Comments that follow and explain each Rule. Scope and Terminology sections provide additional guidance in interpreting and applying the Code. An Application Section establishes when the various Rules apply to a judge or judicial candidate. This report discusses the rationale for the changes to the 2007 ABA Model Code (hereinafter “Model Code”) proposed for Minnesota by Model Code section. Following the summary is a legislative text of the proposed Minnesota Code of Judicial Conduct, showing the changes made to the Model Code. New language is indicated by underline and deletions by ~~strikeout~~. The report also includes a side-by-side comparison of the proposed Minnesota Code of Judicial Conduct and the current Minnesota Code of Judicial Conduct.

I. TERMINOLOGY

The Committee recommends several amendments to the Terminology Section of the Model Code. These include a change in the definition of “contribution” to conform to state campaign finance law, replacement of the term “domestic partner” throughout the Model Code with specific language indicating coverage in appropriate Model Code sections including the definition of “economic interest”, the addition of a definition of “leader in a political organization” to provide clarity, and removal of the types of elections inapplicable in Minnesota from the definition of “public election.” Each of the first three changes is discussed more fully below.

Contribution

The Model Code definition of contribution includes “in-kind contributions, such as goods, professional or volunteer services, advertising, and other types of assistance, which if obtained by the recipient otherwise, would require a financial expenditure.” The Committee noted that Minn. Stat. § 10A. 01, governing political campaign financing excludes from the definition of contribution “services provided without compensation by an individual volunteering personal time on behalf of a candidate, ... or the publishing or broadcasting of news items or editorial comments by the news media.” The Committee recommends conforming the Code definition to that provision.

Domestic partner

The Committee discussed several alternatives to the definition of “domestic partner” in connection with situations in which a judge could reasonably be expected to recuse himself or herself from a case and other situations where a personal relationship affects a judge’s conduct. Concerned about the definition of “domestic partner” being underinclusive in scope, the

Committee believes that a member of the judge's household as well as a person with whom a judge has an intimate relationship should be covered by these rules. Rather than propose a single definition, the Committee suggests deleting the definition and inserting phrases descriptive of covered relationships in specific Rules. As a result of this recommendation, language descriptive of covered relationships has been added to the definition of "Economic Interest," Rules 2.11, 2.13, 3.7, 3.8, 3.10, 3.11, 3.13, 3.14, and where necessary applicable comments.

Leader in a political organization

The Committee discussed the need for clarity in the definition of "leader in a political organization." Public comment raised questions about whether the definition was sufficiently inclusive. Disciplinary cases from other jurisdictions where judges or judicial candidates were disciplined for political leadership were examined and resulted in the proposed definition.¹

In order to provide guidance and forestall due process challenges, the Committee recommends the following definition.

"Leader in a political organization" is one who holds an elective, representative, or appointed position in a political organization."

Changes to Rule 4.1A(1) were necessitated as a result of this definition.

II. APPLICATION

The Committee reviewed the Model Code Application Section for conformance to the structure and terminology used in Minnesota to designate the several types of positions in the judicial and executive branches of state government to which the Code of Judicial Conduct would apply. Those positions, with applicable statutory references, have been identified in the Application Section I(B) and Comment 1 to that section. The references in Comment 1 provide the statutory references to the executive branch judges to be covered by the proposed Minnesota Code.

The Committee recommends changes to Application Section III to conform to current Minnesota law which does not provide for part-time elected judges. Further changes to Section III recognize the current Minnesota Code of Judicial Conduct provisions which allow part time service of appointed Child Support Magistrates and Referees who may practice law in a division of the court other than the one in which they serve. The same limitation on practice of law in the division of the court in which a periodic part-time judge serves is also incorporated into Application Section IV(B).

¹ See *In re Blauvelt*, 801 P.2d 235 (Wash. 1990) A judge serving as a delegate to a political party's county convention is a "leader" within the meaning of the Code prohibition. *Mississippi Jud. Performance Comm'n v. Peyton*, 555 So. 2d 1036 (Miss. 1990) A justice court judge was censured for continuing to serve on the county executive committee of the Democratic Party after his election to the bench. See also *In re Katic*, 549 N.E. 2d 1039 (Ind. 1990) A judge was suspended for playing an active leadership role in Democratic Party politics. *In re Maney*, 70 N.Y. 2d 27, 510 N.E. 2d 313 (1987) A judge was removed for openly engaging in long-term struggle for control of Democratic Party leadership.

III. CANON 1

The Committee reviewed Canon 1 of the Model Code and recommends adoption without changes.

IV. CANON 2

The Committee reviewed Canon 2 of the Model Code and recommends adoption without changes except for the deletion of Model Code Rules 2.11(A)(4) and 2.13(B). The Committee considered the primary stricture of impartiality in each Rule to be binding on the judge and adheres to the presumption that a judge would follow the Canon until the contrary is proven.

The Committee also recommends the retention of the current Minnesota Code of Judicial Conduct Canon 5(B)(2) provision requiring a judicial candidate to take reasonable measures to ensure that the campaign committee does not disclose to the candidate names and responses of those solicited for campaign contributions (which appears in Rule 4.4(B)(4) of the Proposed Minnesota Code. Rules 2.11(A)(4) and 2.13(B) are unnecessary.

Rule 2.11 is the first of several Rules in which the Committee has inserted descriptive phrases identifying additional relationships in which a judge should disqualify himself or herself from consideration of matters. See discussion of “domestic partner” definition above.

V. CANON 3

The Committee reviewed Canon 3. As noted in the discussion of Terminology above, Rules 3.7, 3.8, 3.10, 3.11, 3.13, 3.14 require the insertion of phrases descriptive of relationships included within the coverage of the rule because the underinclusiveness of the domestic partner definition. Those changes are recommended by the committee and are not discussed further in this section. In addition the Committee recommends adoption of the Rules and Comments with the following additional changes which are specifically discussed below.

Rule 3.6

Rule 3.6 prohibits a judge’s affiliation with certain discriminatory organizations. The Model Code provides a list of specific types of discriminatory conduct which are prohibited and uses “invidious discrimination” as the standard. The current Minnesota Code of Judicial Conduct provision on this subject was amended in 2005 by the Minnesota Supreme Court after petition and public hearing. Rather than listing various categories of discrimination as proposed by the Model Code, Minnesota adopted a prohibition against “unlawful discrimination.” The Committee recommends retention of the Minnesota language in this regard as a more flexible and inclusive standard. The proposed Minnesota Rule and the corresponding Comment have been adapted to incorporate the current Minnesota Code language on this issue.

Rule 3.7

Rule 3.7 concerns participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities. The Committee recommends changing Model Code Rule 3.7(A)(2), deleting ~~contribution~~ and inserting funds and services. The Committee proposed change to the Minn. Stat. §10A.01 campaign finance definition of “contribution” does not fit this section. The Committee recommends the substitution of the terms “funds and services” in keeping with the intent of the Model Code’s original definition of contribution.

In keeping with the broader participation in the community for judges envisioned by the Model Code, the Committee further recommends a change to Rule 3.7(A)(5) to permit judges who are participating in educational, religious, charitable, fraternal or civic organizations not conducted for profit, to make recommendations to the organization concerning its fund granting activities. This would permit such activities on behalf of such organizations which are not limited to concern with the law, the legal system or the administration of justice.

The committee further recommends adding Comment 6 recognizing fund raising and grant making on behalf of a religious organization is a lawful exercise of religious freedom.

Rule 3.9

The Committee recommends a modification to the Model Code language of Rule 3.9 to clarify that actively serving judges should not serve as arbitrators or mediators in a private capacity.

The Committee found no problem with the current Minnesota provisions regarding retired judges servicing as mediators and arbitrators. The Committee recommends incorporating current well-established Minnesota provisions regarding retired judges servicing as a mediator or arbitrator into the Model Code.

Rule 3.13

Rule 3.13 concerns acceptance and reporting of gifts, loans, bequests, and other things of value. The Model Code proposed public reporting of all transactions where a judge receives a public testimonial, free invitations for self, a spouse and/or guest to bar-related functions or other activities relating to the law, the legal system, or the administration of justice; or an event associated with any of the judge’s educational, religious, charitable, fraternal or civil activities permitted by the Code if the same invitation is offered to nonjudges under the same conditions and circumstances. Minnesota does not currently require public reporting of these activities. The Committee found no problems with the current Minnesota provisions. The Committee recommends adopting the Model Code provision with deletion of the public reporting requirements of Rule 3.13(c) except gifts valued in excess of \$150.00 and not otherwise described by the rules, which are covered by paragraph (10).

Rule 3.14

Rule 3.14 governs reimbursement of expenses and waivers of fees or charges. In accord with its findings and recommendations in Rule 3.13, the Committee found no problems with current Minnesota provisions regulating this area. The Committee recommends deletion of Model Rule 3.14(C) as unnecessary.

Rule 3.15

Rule 3.15 specifies the reporting requirements for extrajudicial compensation, gifts and other things of value. The Committee recommends the retention of the current Minnesota Code of Judicial Conduct reporting requirements with a clarification that income from retirement and deferred compensation plans need not be reported where the judge does not render current or future services in exchange for the income. The Model Code language has been modified to incorporate to the current Minnesota Code language including the current reporting deadline.

VI. CANON 4

The Committee and two subcommittees devoted several meetings to consideration of the possible implications of the U.S. Supreme Court decision in *White* and the Eighth Circuit Court of Appeals decision in *White II*. The Committee found very little elucidating case law to guide its considerations of issues raised in these cases.

The Committee reviewed the Model Code to determine what modifications are required by *White II*. The Committee determined that the Model Code provisions limiting participation in partisan political activities by judges and judicial candidates could be deemed to violate the free speech and association provisions of the First Amendment under the rationale of *White II*.

Rule 4.1 sets forth those activities which are prohibited for a judge or judicial candidate *unless* those activities are specifically permitted by a later Rule or by other applicable law. Rule 4.2(A) requires certain activities on the part of judges participating in a public election, while Rule 4.2(B) permits (unless prohibited by law) certain activities by candidates for elective office. Rule 4.3 permits candidates for appointment to judicial office to engage in specific activities. Rule 4.4 concerns campaign committees. Rule 4.5 concerns judges who become candidates for nonjudicial office.

The Committee recommends the adoption of the Model Code with the following exceptions.

Rule 4.1

The Committee recommends deleting the reference to “hold office in” a political organization in Rule 4.1(A)(1) because office holding is now included in the definition of “leader in a political organization.”

The Committee recommends that Rule 4.1(A)4 retain the prohibition against a judge or judicial candidate soliciting funds for a political organization or candidate for public office. The rationale is that restriction legitimately preserves the impartiality of the judicial office and provides protection from abuse of the judicial office in fund raising activities on behalf of a party or a candidate. The Committee is concerned about the sustainability of prohibitions on candidate engagement in the endorsement process under *White II* and therefore recommends limitation or deletion of prohibitions closely tied to the political endorsement process.

The Committee anticipates that candidates may be required to appear at political caucuses and conventions and may be asked to pay an assessment or make a donation to participate, as are others in attendance. As long as candidates may seek, accept or use endorsements, the Committee considered barriers which precluded candidates from participation an impermissible restriction better addressed through contribution limits in paragraph 4.1(A)(4)(b). The Committee therefore recommends the deletion of the prohibition against the payment of an assessment from Rule 4.1(A)(4)(a).

The Committee recommends limiting contributions by a judge or judicial candidate to a political organization or a candidate to public office to the amount permitted by current Minnesota law for any individual candidate in Rule 4.1(A)(4)(b). Imposing a limit avoids the perception or the reality that a judge or judicial candidate is, by such a donation, buying an endorsement.

The Committee believes that the originally numbered Rules 4.1(A)(5), (6), and (7) are not sustainable under the rationale of *White II* and recommends that they be deleted.

The Committee has renumbered the Code Rules sequentially.

The Committee discussed the impact on the efficiency of the judiciary where judges are continuously campaigning throughout their terms of office. The Committee considered the two year campaign period a reasonable time limitation and therefore recommends proscription of those activities beyond the two year period provided for in Rule 4.2B. [Renumbered provision Rule 4.1A(5).]

The Committee discussed the 2006 amendments to the Minnesota Code of Judicial Conduct which modified rules restricting personal solicitation of campaign contributions by judges in response to *White II*. The Committee determined that recommending a more restrictive regulation of solicitation was likely not sustainable under *White II*. The Committee recommends incorporating the 2006 solicitation provision in Rule 4.2 as a permissible campaign activity within limitations and referenced that permission/limitation in Rule 4.1(A)(8) [Renumbered here as Rule 4.1(A)(6)].

Since other provisions of state law and Judicial Branch Personnel Policies restrict the use of court personnel, facilities and resources in political campaign activity, the Committee recommends adopting those restrictions rather than imposing the absolute prohibition of the Model Code in Rule 4.1(A)(10)[Renumbered here as Rule 4.1(A)(8)].

Comment 3 to Rule 4.1 has been amended to clarify that participation by a judge or judicial candidate in a political caucus does not violate Rule 4.1(A)(1-3). Representational positions would be inconsistent in the Committee's view with an independent and impartial judiciary and the comment reflects that view.

The numerical references throughout Canon 4 and in the comments have been conformed to the Committee recommendations.

Rule 4.2

The Committee recommends adoption of Rule 4.2 of the Model Code with the following changes.

Rule 4.2(A) has been amended by striking the various types of public elections as unnecessary.

The current Minnesota Code limitation requiring a judge or judicial candidate to take reasonable measures to shield him or herself from knowing the identity of those who contribute or refuse to contribute to a candidate's campaign committee has been added to Rule 4.2(A) as a new paragraph (5).

Rule 4.2(B) provides for a period of two years prior to the first applicable primary election for the candidate to engage in specified campaign activities. The committee discussed various time frames with a goal that judges should not be engaged perpetually in campaign activities during the term of office. The committee further recognized that a level playing field in terms of campaign restrictions is desirable for all candidates for judicial office. Two years appears to be reasonable.

Model Rule 4.2 permits certain political activities only during an election campaign, such as attendance at and purchase of tickets to political dinners and events, seeking and using endorsements. Because of the *White II* decision these have been modified and moved to Rule 4.1 or deleted altogether.

The 2006 amendments to the Minnesota Code of Judicial Conduct provision dealing with solicitation of campaign contributions have been incorporated as Rule 4.2(B)(7) for the reasons stated in the discussion of Rule 4.1.

The Comments have been amended to conform to the Rule changes.

Rule 4.3

This Rule governs activities of candidates for appointive judicial office. Because of *White II*, the Committee recommended deletion from Rule 4.3(B) of the prohibition of endorsements from partisan political organizations and replacing that provision with one which relies on the appointing authority or the nominating commission to set rules for the process.

Rule 4.4

This Rule governs the campaign committee of a judicial candidate. The Committee has recommended several changes to the Model Code provision. The Committee recommends insertion of a \$2000 limit on campaign contributions from any individual or organization in an election year and \$500 in a non election year. This is the maximum amount specified currently under state law for the governor/and lieutenant governor. The Committee also recommends deletion of the reference to “reasonable” campaign contributions as unnecessary with the imposition of aggregate campaign contribution limits.

As stated above the Committee is recommending a period of two year before the applicable primary election and 90 days following the last election in which the candidate participated for soliciting and accepting campaign contributions as a reasonable period of time for campaign fund solicitation. The goal of the recommendation is to allow judges to direct time to the duties of the office rather than engage in perpetual fund raising by limiting fund raising to a reasonable period of time. The second goal is to provide a level playing field for all candidates for the judicial office by imposing the same time limitation on the incumbent and the challengers.

The proposed amendment to Rule 4.4(B)(3) recognizes that Minnesota campaign finance law already imposes reporting requirements on candidates for judicial office and requires judicial candidates to comply with those requirements.

The proposed addition of Rule 4.4(B)(4) imposes the current Minnesota Code of Judicial Conduct nondisclosure requirement on the campaign committee.

Rule 4.5

The Committee recommends adding a comment which provides the Minnesota legal framework for resignation upon becoming a candidate for a nonjudicial office. See Comment 3.

COMMITTEE RECOMMENDATION

After considerable deliberation, the Ad Hoc Advisory Committee to Review the Minnesota Code of Judicial Conduct recommends the adoption of the attached 2007 ABA Model Code of Judicial Conduct with revisions specifically addressing policies, practices and procedures in Minnesota.

Respectfully submitted,

E. Thomas Sullivan
Chair