

## LEGAL NOTES

### 2006 Judicial Election Litigation: A Post-*White* Update

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The 2006 election cycle was not the first in the world after *Republican Party of Minnesota v. White*, the 2002 decision in which the U.S. Supreme Court struck down state canons prohibiting a judicial candidate from “announc[ing] his or her views on disputed legal or political issues” (*White*, at 770). However, 2006 was the election cycle in which much of *White* came into its own, both as a matter of litigation and as a matter of political impact. Seven cases, including two that pertained to prior elections, were pending at the end of 2006; six of the seven pertained to the use of questionnaires by interest groups directed to judicial candidates.

These questionnaires often provided form answers as to why judicial candidates were declining to answer certain questions. Some candidates declined to answer, but did so on their own terms and for their own reasons. Other candidates declined using the prepared language—language that became in many cases the heart of subsequent lawsuits related to the canons. At first, the language alone proved insufficient to sustain to lawsuits, mostly because of issues related to standing to sue. As the questionnaires became more tailored, and the questioners began to incorporate judicial candidates as co-plaintiffs, standing became less of an issue.

In the oldest pending case, *Indiana Right to Life Inc vs. Shepard* (2004), the lead plaintiff sent its “2004 Right to Life Judicial Candidate Questionnaire” to all judicial candidates. Only two candidates responded in full, with most other candidates declining to answer, based on either the Indiana Canon of Judicial Conduct or advice from the counsel to the state’s Commission on Judicial Qualifications. Plaintiffs sued, seeking injunctions against Indiana’s canons forbidding judicial candidates from pledging or promising (“pledges-or-promises clause”) anything regarding cases “likely to come before the court.” The same canon also prohibited candidates from committing or appearing to do so (“commit clause”) with respect to future cases. The rule that required the recusal or disqualification of judges in cases where their impartiality might reasonably be questioned (“recusal clause”) was also at issue.

The U.S. District Court for the Northern District of Indiana held in November 2006 that the pledges-or-promises clause did serve a compelling state interest of “impartiality” in the courts (*Shepard*, at 886), although neither plaintiff nor defendant could agree on the exact nature of that impartiality. However, the pledges-or-promises clause was found to be overly broad and vague, as well as de facto like the announce clause struck down in *White*. The court did offer a solution: the state could narrow the existing language to prohibit pledges or promises of “certain results in a particular case” (*Shepard*, at 889).

The district court upheld the canon pertaining to recusal. While both parties agreed the clause served a compelling state interest, the court sided with the defendants and ruled it was narrowly tailored. The court concluded by ordering each party to bear its own costs. An appeal was filed with the Seventh Circuit, but the appeal has been stayed pending a determination by the trial court regarding a motion by plaintiffs for attorneys' fees.

In a similar case, *Pennsylvania Family Institute, Inc vs. Black* (2005), the court came to slightly different conclusions. Here there also was a survey sent to judicial candidates (the "2005 Pennsylvania Family Institute Judicial Candidate Questionnaire"). However, in the Pennsylvania survey, there was a direct citation to the *White* case and an encouragement that should candidates feel "fearful" they would run afoul of the canons, they "should seek an advisory opinion" from the "Pennsylvania Judicial Conduct Board or the Pennsylvania Lawyers' Disciplinary Board." Moreover, each question included a "decline to answer\*" with the asterisk footnote specifically spelling out that the candidate was not answering because of the Pennsylvania Canon of Judicial Conduct's "pledges-or-promises," "commit," or "recusal" clauses (*Black*, at 9).

Some candidates refused to check the prewritten "decline to answer\*" statement and instead drafted their own reasons for not responding. Several candidates, as many as eleven depending on the question, did check "decline to answer\*." Plaintiffs used their own footnote as the basis for their efforts at obtaining an injunction against the canons.

The U.S. District Court for the Middle District of Pennsylvania determined that none of the three plaintiffs, Pennsylvania Family Institute and two Pennsylvania voters, had standing to challenge the canons. The court further determined that standing could only be had if the plaintiffs could find, as with other judicial canon cases, "a judicial candidate [who] was also a plaintiff or made an affirmative statement that he or she would engage in speech but for the judicial canons" (*Black*, at 16). The prewritten footnote "may be sufficient to establish that the candidates believed that the judicial canons prevented them from providing those answers, they fail to establish that any of the candidates would have provided the answers *but for* the judicial canons" (*Black*, at 18, emphasis in original). As in the Indiana case, parties were directed to bear their own costs, a ruling that prompted an immediate motion to alter the judgment regarding attorneys' fees. The matter was appealed in December 2005 to the Third Circuit and, as with the Indiana case, is stayed until the trial court decides on the fee issue.

Standing again proved to be an insurmountable challenge in *Carey vs. Wornitzek* (2006), where the plaintiff was a candidate for election to the Supreme Court of Kentucky. Unlike the cases in which the issue was candidates answering questions from others, Carey formulated his own list of questions that he intended to publish on his Web site. He also intended to ask the judicial candidates running against him the questions and to publish their answers on his Web site as well. Carey also intended to solicit funds personally, to declare his party affiliation, to engage actively in partisan political activity, and to obtain endorsements from other political officials. Carey believed

all these actions might violate various canons, and he cited all of the above as well as Kentucky's "pledges-or-promises," "commit," and "recusal" clauses in his complaint.

The U.S. District Court for the Eastern District of Kentucky held that, as to Carey's seeking the endorsement of other political officials, the canons were silent; they prohibited only the endorsement by the judge or judicial candidate of another person. The court also found that an Ethics Committee e-mail advising Carey not to seek the endorsement of others was not sufficient to trigger jurisdiction, as the Ethics Committee was advisory only and had no enforcement capacity with respect to the canons. Carey was, however, successful with respect to the issue of personal solicitation of funds for his campaign, and the court enjoined enforcement of that particular rule. The defendants were unable to persuade the court on the issue of corruption and favoritism for contributors because, as the court noted, "non-contributors can easily be identified either directly by [fund-raising] committee members or indirectly through a process of elimination" (*Wolnitzek*, at 53).

Carey was also able to persuade the court, consistent with the Eighth Circuit decision in *White II* (2005), to enjoin enforcement of the canons that prohibited partisan political activity and a candidate's identification of his partisan affiliation. However, the court dismissed Carey's claims against "pledges or promises," "commit," and "recusal" provisions, because he "never identified any particular statements he intends to make that he believes will subject him to sanctions" (*Wolnitzek*, at 34). The court held that because simply asking questions does not in and of itself subject a candidate to those clauses, Carey lacked standing and the court lacked jurisdiction in these matters. Moreover, because Carey had not yet obtained and published the answers, there was no basis for his concern or fear of sanction for violation of the canons. Nor was there an issue of recusal for the answers he had at that point only intended to make. In lieu of an appeal, Carey filed an amended complaint in November 2006 that sought to address many of the standing issues that led to the dismissal or denial of most of his original complaint.

Standing once again proved to be a challenge to the complainant in *Wolfson vs. Brammer* (2006). Wolfson, after declaring and filing his candidacy as an Arizona justice of the peace, made a series of presentations in favor of an initiative on the state's ballot to declare marriage to be the union of one man and one woman. In addition, he had attended a series of picnics sponsored by state and local Democratic organizations, and had placed on his Web site a series of photos from those picnics with Wolfson standing next to various elected officials. Wolfson asked for an advisory opinion from the Arizona Judicial Ethics Advisory Committee that, in light of *White*, his activities were acceptable. Counsel for the committee assured Wolfson by telephone that they were but that a formal written opinion would take some time to be prepared.

Wolfson commenced his court action in the U.S. District Court for the District of Arizona on October 3, two days before absentee ballots were issued and days before the formal written opinion by the committee was made public. The complaint sought to strike down the "pledges-or-promises," "commit," and "recusal" canons. In addition,

Wolfson targeted prohibitions on the judicial candidate's making speeches for a political organization or candidate, publicly endorsing other candidates, personal soliciting of funds, contributing to political organizations, and participating in other elections. Finally, Wolfson argued against the canon requiring judicial candidates to encourage family members to adhere to the same canons with respect to political conduct.

The court found that, in light of the advisory opinion, Wolfson was in no danger or threat of action against him for his actions to date. Moreover, the court noted that while Wolfson's concern allegedly began in March with the start of his official candidacy, he did not file suit until October. As for the litany of other concerns that the plaintiff included in his complaint, the court noted that he never even attempted to contact the Judicial Ethics Advisory Committee regarding them. In lieu of an appeal, Wolfson filed an amended complaint in December 2006.

The issue of standing in *Kansas Judicial Watch v. Stout* (2006) was resolved by having judges as named plaintiffs; one was a sitting judge up for reelection in 2008, the other vying against an incumbent in 2006, and they specified they "feared discipline under the canons" should they "express [] views on various legal issues" as based on a third-party survey (*Stout*, at 1219). As in Indiana, the survey included boilerplate language that "decline to answer\*" meant the candidate was doing so because of specific canons. One plaintiff-candidate asked the state's Judicial Ethics Advisory Panel for an opinion and was told he was prohibited from answering the survey based on the "pledges-or-promises" and "commit" canons. In addition, the candidate was prohibited from personally soliciting funds directly for his campaign under the canons. Just days before the state's August 1 judicial elections, the U.S. District Court for the District of Kansas issued preliminary injunctions against enforcement of the "pledges or promises" and "commit" clauses as being overly broad and vague. The court held the prohibition on the personal solicitation of funds invalid largely on the basis of the Eighth Circuit's analysis in *White II*, but upheld the recusal clause. Defendants' attempts to have the case certified to the Kansas Supreme Court and to stay the injunctions pending appeal were denied.

Obtaining standing to proceed without the inclusion of a judicial candidate was accomplished in *Florida Family Policy Council vs. Freeman* (2006). As with the other cases, a survey was sent to judicial candidates, in this case by sole plaintiff the Florida Family Policy Council, with boilerplate language attached to the "decline to answer\*" option. The language was only slightly different from the counterpart language in Indiana and Pennsylvania. Rather than simply specifying the canon, the "decline to answer\*" option now involved portions of the text of the rule, plus elaboration and specification as to what (and why) the candidates found objectionable about the canon and the fear they had in answering.

The state's Judicial Ethics Advisory Committee (JEAC) responded to several candidate inquiries by issuing an opinion that specified it was acceptable to answer the survey questions if and only if the candidate "clearly indicates that the answers do not constitute a promise that the candidate will rule a certain way in a case . . . acknowledges the obligation to follow binding legal precedent anywhere it exists [and] does not

appear to endorse any other individual” (JEAC Opinion, 2006-18), In addition, the committee noted that any commentary provided by the candidate on past judicial decisions must be “analytical, informed, respectful, and dignified.” Even with these requirements, the committee warned of the potential need for future recusal based on any answers given. The Florida Family Policy Council revised its survey and redistributed it to the candidates, this time with the committee opinion featured as part of the prewritten language for why the candidate was checking the “decline to answer\*” box.

With the answers to the original and revised surveys in hand, the Florida Family Policy Council commenced an action in the U.S. District Court for the Northern District of Florida to enjoin enforcement of the state’s canons regarding “commit” and recusal. The court rejected the arguments and held that the recusal clause “prohibits speech not at all, and burdens speech only a trifle. . . . There is no right to a biased judge, nor a judge with a closed mind” (*Freeman*, at 11). Plaintiff filed a notice of appeal almost immediately after, but voluntarily dismissed the appeal less than a month later.

Finally, as 2006 came to a close and the 2007 judicial election cycle began, the first of the next series of cases was commenced. Plaintiffs in *Duwe vs. Alexander* (2006), brought in the U.S. District Court for the Western District of Wisconsin, include Wisconsin voters as well as Wisconsin Right to Life, which had sent out a 2006 questionnaire. Of the seven responses returned, one candidate answered a single question, while the other six declined to answer any. Five of the six who provided no answers did so by checking off a box “decline to answer\*” that included a prewritten explanation and citation to specific rules as their reasoning; the sixth candidate wrote his own response but again cited to a specific rule. Those prewritten responses were the basis of the suit.

One candidate asked the Wisconsin Judicial Conduct Advisory Committee for an advisory opinion about the rules in light of *White* but was told the committee was “not authorized to determine the constitutional validity of the Code of Judicial Conduct.” Wisconsin Right to Life, which intended on sending a similar survey to candidates for the 2007 judicial races, filed suit on December 29, 2006, just two days before the deadline for candidates to file. The complaint specifies that an undisclosed judicial candidate wants to answer their questions but fears doing so because of the existing rules pertaining to “pledge or promises,” “commit or appear to commit,” and recusal. Briefing is ongoing.

Most telling in terms of these issues is the evolution of the method to provide standing and recognizable claims in lawsuits that occur after candidates decline to answer these surveys. A case in point was a lawsuit that never happened in Tennessee. Having learned from *Pennsylvania Family Institute, Inc vs. Black* that the existing boilerplate “decline\*” or “decline to answer\*” language was sufficient to sustain a lawsuit with the right plaintiffs, the Family Action Center of Tennessee released their own version of the survey in 2006. They adhered closely to the language developed in Pennsylvania and upheld in *Black* that the *Tennessee* version includes the following for candidates who “decline\*” to respond to certain questions:

This response indicates that I believe that I am prohibited from answering this question by Canon 7(B)(1)(c) of the *Pennsylvania* Canons of Judicial Conduct, which states that judicial candidates may not “make pledges or promises of conduct in office” or “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,” and that I will have to disqualify myself as a judge in any proceeding concerning this matter on account of Canon 3(C)(1) because my “impartiality might reasonably be questioned” if I answered this question (emphasis added).

The mistake and ambiguity of referring to Pennsylvania canons amid a Tennessee judicial race may help explain why there was no lawsuit in Tennessee, as occurred with nearly identical language in *Stout* (at 1218) in 2006. However, it does indicate that, having found the right combination of language as upheld in *Black*, plaintiffs to overcome the issues of standing as in *Stout*, and claims from *White* and its progeny, the next election cycle will be one in which the federal courts are once again petitioned to strike down state judicial canons. **jsj**

#### REFERENCES

- Family Action Council of Tennessee (2006). “Voters’ Guide Questionnaire for Judicial Candidates.” [http://www.factn.org/documents/Tennessee\\_3.pdf](http://www.factn.org/documents/Tennessee_3.pdf) (accessed May 1, 2007)
- Florida Judicial Ethics Advisory Committee (2006). Opinion 2006-18. <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2006/2006-18.html> (accessed May 1, 2007)

#### CASES CITED

- Carey vs. Wolnitzek*, 2006 U.S. Dist. LEXIS 73869 (E.D. Ky., Oct. 10, 2006).
- Duwe vs. Alexander*, (W.D. Wisconsin, 06cv0766, filed Dec. 29, 2006).
- Florida Family Policy Council v. Freeman* (N.D. Fla., 06cv00395, Order Denying Preliminary Injunction, filed and entered Oct. 10, 2006).
- Indiana Right to Life Inc v. Shepard*, 463 F. Supp. 2d 879 (N.D. Ind., Nov. 14, 2006).
- Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (D. Kan. 2006), 455 F. Supp. 2d 1258 (D. Kan 2006).
- Pennsylvania Family Institute, Inc v. Black*, 2005 U.S. Dist. LEXIS 29735 (M.D. Pa. 2005).
- Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).
- Republican Party of Minnesota v. White* (“White II”), 416 F.3d 878 (8th Cir. 2005), cert. denied sub nom. *Dimick v. Republican Party*, 126 S. Ct. 1165 (2006).
- Wolfson v. Brammer*, 2006 U.S. Dist. LEXIS 80770 (D. Ariz., Nov. 3, 2006).