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Sexual Harassment: Recent Cases

A judge's conduct does not necessarily have to rise to the level of sexual harassment under the legal definition to violate the code of judicial conduct. For example, a review tribunal appointed by the Texas Supreme Court in a judicial discipline case noted that, although all forms of behavior that cross the legal threshold of sexual harassment would constitute judicial misconduct, many forms of offensive interpersonal behavior that violate the code of judicial conduct may not meet the legal definition of sexual

harassment. *In re Barr*, 13 S.W.3d 525 (Review Tribunal Appointed by the Texas Supreme Court 1998).

Gender bias in general, and sexual harassment in particular, is personally offensive, extraordinarily invasive, psychologically damaging, and deeply embarrassing to the intended victim. . . . It is insulting, belittling, and inappropriate in an exchange between a judge and attorney and is to be condemned for the simple reason that it is wrong. Sexual harassment in the administration of justice is harmful and offensive

conduct which clearly indicates a lack of respect for the judge's victim, and, by reasonable extension, a lack of respect for the citizens of the State of Texas at large.

Several recent cases illustrate the types of suggestive language, comments on physical appearance, unwelcome touching, and efforts to engage in a relationship that have led to sanctions against many judges. For example, the Pennsylvania Court of Judicial Discipline found that a judge "routinely,

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Remand Decision in *Republican Party of Minnesota v. White* by Cynthia Gray

In the remand of *Republican Party of Minnesota v. White*, the United States Court of Appeals for the 8th Circuit, sitting en banc, held that (1) the clauses in the Minnesota code of judicial conduct prohibiting judges and judicial candidates from identifying themselves as members of a political organization, attending political gatherings, and using endorsements from a political organization were unconstitutional and (2) the clause prohibiting judicial candidates from personally soliciting campaign contributions was unconstitutional insofar as it prohibited soliciting contributions

from large groups and transmitting solicitations above a candidate's signature. *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Circuit 2005). There was one dissent, signed by three judges. (The Supreme Court had remanded the case after holding that Minnesota's canon prohibiting judicial candidates from announcing their views on disputed legal and political issues violated the First Amendment. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).)

The remand majority emphasized that "freedom of association is inherently a part of those liberties protected by

the First Amendment" and that "political speech — speech at the core of the First Amendment — is highly protected." Therefore, the majority applied the strict scrutiny test, described "as an end-and-means test that asks whether the state's purported interest is important enough to justify the restriction it has placed on the speech in question in pursuit of that interest."

Partisan-activities clauses

The Minnesota code defined "political organization" as "an association of

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Recent Advisory Opinions: Court Staff

 A judge should insulate a court clerk from cases in which the clerk's spouse is the prosecuting complainant as an animal control officer. *New York Opinion 00-123.*

 If it is not possible to insulate a court clerk married to a state trooper from cases involving the clerk's spouse, the cases should be transferred to another court. *New York Opinion 99-72.*

 A judge whose court attorney's spouse is a director of a legal services corporation is not disqualified from cases involving other attorneys in that office or required to disclose the relationship, but in cases in which the court attorney's spouse is involved, the judge must disclose the relationship, obtain the consent of the parties to preside, and isolate the court attorney from the case. *New York Opinion 03-30.*

 A family court judge must insulate the judge's court attorney from any involvement in a proceeding in which the attorney previously had been assigned counsel or law guardian, must disclose the attorney's prior involvement, and, if an application for recusal is filed, should exercise discretion in determining whether to recuse. *New York Opinion 99-139.*

 A judge's court attorney need not resign upon declaring his or her candidacy for district attorney. *New York Opinion 04-104.*

 A magistrate's clerk shall not retain her position while seeking the elected office of clerk of court. *South Carolina Opinion 8-04.*

 A judicial law clerk may continue employment while seeking judicial office. *South Carolina Opinion 15-2004.*

 A law clerk who is a judge's personal appointee should not act as treasurer for a political candidate's campaign. *New York Opinion 03-48.*

 A village justice court clerk may not hold the office of village trustee. *New York Opinion 03-21.*

 A judge's court attorney, who is the judge's personal appointee, should not serve as treasurer of the judge's re-election committee. *New York Opinion 00-5.*

 A judge should prohibit the judge's staff from selling goods for charitable or religious purposes during office hours at staff members' desk. *Oklahoma Opinion 01-6.*

 Court employees may voluntarily organize charitable activities and solicit contributions to help the poor as long as those activities are not undertaken at the direction or urging of judges or court managers, the employees act as private persons and do not use or appear to use their official positions, and supervisory employees do not solicit contributions from their subordinates although they may give information about the efforts. *Arizona Opinion 04-1.*

 A judge's administrative assistant may serve on the board of trustees for a school district provided that he or she does not solicit funds. *South Carolina Opinion 3-04.*

 An association of judicial employees may charge vendors a fee to set up a booth at the association's educational conference to display products or services and permit vendors to sponsor a meal, reception, open house, or similar activity at the conference where their products or services will be discussed as long as no strings are attached to the vendor's support, in particular, no overt or sub rosa agreements that a judicial employee will try to influence a court to use a vendor's products or services. *Ohio Opinion 05-2.*

 A judge may permit the judge's court administrator to organize and preside over a court managers' association conference at which vendors would be invited to demonstrate court-related services and products provided all vendors, even those who are not members of the association, are invited and the association only charges for the actual costs of the vendor fair divided among the vendors participating. The court managers may accept snacks or lunch if the food is made available to all of the attendees and is of nominal value. Vendors may raffle off items to attendees who have entered a drawing provided the items are of nominal value or, if court-related, on the condition that it will be used by the court. Court managers may accept nominally valued items for visiting a vendor's booth and are not required to bring these items to the court for official use but may use them personally. *Washington Opinion 05-2.*

The Center for Judicial Ethics web-site has links to judicial ethics opinions at www.ajs.org/ethics/eth_advis_comm_links.asp. 

Revision of the ABA Model Code of Judicial Conduct

On June 30, 2005, the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct circulated its Preliminary Draft of revisions to the 1990 ABA Model Code of Judicial Conduct. A copy of the preliminary draft is available at <http://www.abanet.org/judicialethics/home.html>.

Over 22 months, the Joint Commission met 9 times and conducted numerous teleconference calls. The Joint Commission sponsored public hearings at which it heard comments from 23 individuals. The Joint Commission periodically posted drafts of proposed revisions to portions of the Model Code on its web-site with requests for comments and suggestions for further revisions. The Joint Commission received written comments

from 25 entities and 300 individuals.

The preliminary draft proposes both format and substantive changes to the 1990 Model Code. The Joint Commission stated that the preliminary draft “is the result of vigorous and informed discussion and debate among the Commission members and advisors” and that “although there was majority support for each of the proposed rules contained in the Preliminary Draft, there was frequent disagreement, ranging from mild to strong, with the voting majority’s formulation of particular proposed rules.” A report released with the preliminary draft describes “all important areas of disagreement and all significant differences between the proposed Rules and the present Code . . . with the expectation that this will stimulate further

consideration and comment”

The Joint Commission requested that all individuals and entities interested in judicial ethics and regulation submit comments and suggestions regarding the preliminary draft. After reviewing the comments and suggestions, the Joint Commission will make additional changes and submit a final report and recommendation to the House of Delegates for consideration at the ABA 2006 Midyear Meeting.

The American Judicature Society made proposals for the revision of the Model Code at the beginning of the Joint Commission’s evaluation and filed comments on the partial draft revisions and the preliminary draft. AJS’s comments are available at http://www.ajs.org/ethics/eth_ABA_commission.asp. 

Judicial Education Requirements

The Louisiana Supreme Court recently sanctioned two justices of the peace for failing to attend mandatory training courses for many years. A state statute requires justices of the peace (who are not required to be lawyers) to attend every other year at least one training course offered for them by the attorney general.

The court removed Judge Cook from office while suspending Judge Chaffin without pay for one year, deferring the suspension on the condition that the judge comply with the training requirements for the remainder of his term. *Compare In re Cook*, 906 So. 2d 420 (Louisiana 2005), with *In re Chaffin*, 906 So. 2d 428 (Louisiana 2005). The court distinguished Chaffin from Cook because Chaffin had appeared before the Judiciary Commission, testified that he had attended some, if not all, of the required courses, and attended the

2005 training course. The court concluded that Chaffin had recognized the seriousness of his misconduct and rehabilitated himself and that his misconduct would not re-occur.

In contrast, noting that Judge Cook had not appeared before the Commission despite a subpoena, the court stated “there is certainly no evidence in this record that [Judge Cook] has made any effort whatsoever to change his conduct.” During the investigation, Judge Cook had asked the Commission’s special counsel whether resigning from office and running again for the same office would get him out of his current dilemma. The court stated that this statement “suggests that respondent would attempt to avoid any responsibility for his misconduct if he could.” The court concluded “the record does not convince this court that Justice of the Peace Cook’s repeated and continuing failure to comply with

the mandatory training requirements . . . will be remedied.” The court noted “there was potentially serious harm to the public as a result of Justice of the Peace Cook’s complete failure to attend justice of the peace training courses, and thereby maintain a minimum of competency and currentness in the law and his legal duties.”

The court emphasized its “concern that justices of the peace, who are not required to be attorneys admitted to the practice of law, nonetheless be sufficiently familiar with the laws of this state, and their duties thereunder, so as to instill confidence in our justice system.” The court noted that the jurisdiction of justice of the peace courts had been increased from \$2,000 to \$3,000 in 1999, and that a justice of the peace “possesses significant authority in both civil and criminal matters.” In

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regularly, frequently, often used crude, coarse, vulgar, offensive and improper language, including the frequent use of the F-word, in conversing with his female staff and others in the course of an ordinary day in the office.” *In re Berkheimer*, Opinion (Pennsylvania Court of Judicial Discipline April 1, 2005), Order (June 28, 2005) (www.cjdpa.org/decisions/index.html). There were, in addition, specific examples of inappropriate comments. In one of the least obscene remarks, the judge shared with his female staff the details of an incident he had had with an unidentified woman, saying they “were hot and heavy into it” and she “ripped the skin” off his back with her fingernails.

Moreover, on approximately five occasions, after summoning his female staff to his office without explanation, the judge showed them pictures of naked women displayed on his computer. The staff members reacted with disgust and repeatedly refused to look at the pictures. *See also In re Gordon*, 917 P.2d 627 (California 1996) (judge mailed to staff members at the courthouse postcards with pictures of a scantily-clad woman and an orangutan in a sexually-suggestive pose); *Inquiry Concerning Litson*, Order (Kansas Commission on Judicial Qualifications June 20, 1997) (judge displayed pictures of nude women on computer screen in the courthouse); *In re Ford*, 674 N.W.2d 147 (Michigan 2004) (judge used court computer to access sexually explicit web-site on the Internet during working hours); *In re Trudel*, 638 N.W.2d 405 (Michigan 2002) (judge altered screen saver message on subordinate’s computer screen that read “Ginger Rogers did everything Fred Astaire did, but

backwards and in high heels,” to “Ginger Rogers did everything Fred Astaire did, but on her back and in high heels”); *Harris v. Smartt*, 57 P.3d 58 (Montana 2002) (judge accessed sexually explicit images on a county computer and monitor).

Efforts at sexual relationship

Among other examples of inappropriate behavior, the California Com-

mission on Judicial Performance found that, in pressing an attorney who regularly appeared before him for a lunch appointment, a judge had failed to maintain and personally observe high standards of conduct. *Inquiry Concerning Harris*, Decision and Order (California Commission on Judicial Performance March 23, 2005) (cjp.ca.gov/pubdisc.htm). After complimenting a deputy public defender on her good work and discussing her background, the judge said he enjoyed talking with her and that he would be happy to have lunch with her. The deputy public defender replied that she would be in trial forever, but the judge pressed her. She declined lunch again, saying she “just ate peanuts,” to which the judge replied that he would check with her boss to make sure she was in trial. *See also Public Admonishment of Hiber* (California Commission on Judicial Performance October 23, 1998) (judge repeatedly asked clerk to spend time with him outside of court hours; called her at home on weekends; kissed her on the mouth; brought flow-

ers to her home when she was ill; gave her numerous letters, notes, and greeting cards; frequently interrupted her while she was working to discuss matters not related to work; persisted in inviting her to lunch despite her refusals; asked her to spend time with him outside of court hours; and gave her gifts); *In re McAllister*, 646 So. 2d 173 (Florida 1994) (judge remarked on her assistant’s figure and sex life; told her about her own personal life; asked her to go to lunch every day and told her to cancel her other plans; and invited her out for drinks after work on numerous occasions and to a judicial conference); *In re Spurlock*, Order (Illinois Courts Commission December 3, 2001) (judge sought company of several assistant prosecutors for drinks or dinner; gave out his phone number and sought theirs; persistently sought to be alone with them by inviting them to chambers; and ignored their refusals); *In the Matter of Shaw*, 747 N.E.2d 1272 (New York 2001) (judge on numerous occasions made inappropriate remarks to secretary about her physical appearance; asked her details about her sex life with her husband; after her divorce, told her she should be dating, should be having sex, and should be having sex with him; and inappropriately touched her numerous times without her consent); *In re Cicchetti*, 743 A.2d 431 (Pennsylvania 2000) (judge repeatedly called probation officer into his robing room and spoke to her about personal matters; frequently and repeatedly importuned her to get together with him; persistently endeavored to coerce her to engage in a sexual relationship with him; made her job difficult when she refused to do so; stated that he could have her father fired from his job

“[M]any forms of offensive interpersonal behavior that violate the code of judicial conduct may not meet the legal definition of sexual harassment.”

with the state and intimated that he would do so unless she agreed to get together).

The other examples of inappropriate conduct in *Harris*:

- When he encountered a female staff member in exercise clothes after her lunchtime workout and she apologized for her attire, the judge placed his hands on her face and said “You’re so cute.”
- When a public defender said her client wanted a jury trial, the judge told her the guilty plea would only be a technicality and “doesn’t really matter.” When she told the judge it did matter because her client was not guilty, the judge responded, “The real reason is that [the defendant] wants to sit next to you for three days.” The Commission found that the comments “in the context they were made could raise questions in the mind of an objective observer about the judge’s impartiality in the case.”
- At the weapons screening area of the courthouse, the judge approached two female security officers, placed his hands against the wall, and asked if they were going to search him. The judge then asked if he could choose who would search him and said he wanted to be searched in cham-

bers. At the time, 30 to 35 people were in line, and the judge’s conduct delayed others waiting for security clearance. The Commission found that it was inappropriate for the judge to make fun of an event that the public is expected to take seriously and that the judge’s conduct was not suitable for a judicial officer in a public setting. This incident occurred after the judge had been counseled by the supervising judge about his conduct toward women.

- Upon completion of jury selection in a criminal case, the judge thanked counsel at a sidebar for not exercising a challenge against a female juror because she was “nice to look at.” The Commission found that the comment could raise questions in the mind of an objective observer regarding whether the judge might be motivated by personal interests during the case, even though “the judge may have made the comment as a joke, and was acting in good faith.”

See also *In re Daisy*, 614 S.E.2d 529 (North Carolina 2005) (judge hugged, touched, and engaged in physical contact with judicial assistant and paralegal that could reasonably be interpreted, and was considered by them, to be unwanted, uninvited, and inappropri-

ate); *In the Matter of McGuire*, 685 N.W.2d 748 (North Dakota 2004) (13 incidents established a lengthy pattern of inappropriate comments to and inappropriate physical contact with female employees).

Judges’ comments on or inquiries into the private and personal lives of court staff is another category of conduct that has led to discipline. For example, in *In re Empson*, 562 N.W.2d 817 (Nebraska 1997), the judge twice questioned a court reporter regarding her view of premarital sex, asking if she was making her boyfriend wait until they were married. The judge twice asked an abstractor if she was being good, explaining once, “I’m telling you to be chaste. That’s a decision that you have to make ahead of time, you have to decide to do that ahead of time because if you wait until the heat of the moment it will — you’ll make the wrong decision.” The Nebraska Supreme Court stated, “We fail to see any purpose whatsoever in respondent’s repeated sexual inquiries into the private and personal lives of the persons around him. Such conduct cannot be condoned whatever respondent’s motives.”

Criminal conduct

Sometimes, a judge’s sexual harass-

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Identifying the complainant

Stating it was “not unmindful of the embarrassing nature of these allegations and the resulting effect that these allegations may have on the victims involved,” a review tribunal appointed by the Texas Supreme Court stated in a sexual harassment case it would only identify the women by their initials. *In re Canales*, 113 S.W.3d 56 (Review Tribunal Appointed by the Texas Supreme Court 2003) (inappropriate, unsolicited, sexually suggestive con-

duct toward two young women). Other cases identify the victim of the judge’s conduct simply as an employee. See, e.g., *In the Matter of McGuire*, 685 N.W.2d 748 (North Dakota 2004); *In the Matter of Lee*, 613 S.E.2d 370 (South Carolina 2005); *In re Fritzler*, Order (Washington State Commission on Judicial Conduct February 6, 2004) (www.cjc.state.wa.us). Some cases, however, use the court employee’s full name. See, e.g., *Inquiry Concerning*

Harris, Decision and Order (California Commission on Judicial Performance March 23, 2005) (cjp.ca.gov/pubdisc.htm); *In re Daisy*, 614 S.E.2d 529 (North Carolina 2005); *In re Berkheimer*, Opinion (Pennsylvania Court of Judicial Discipline April 1, 2005), Order (June 28, 2005) (www.cjdpa.org/decisions/index.html)

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ment may constitute not only a violation of the code of judicial conduct but a criminal offense. The South Carolina Supreme Court publicly reprimanded a former judge (the most severe sanction available in that state for a judge who no longer holds judicial office) for inappropriate contact with a female court employee at work that had also led to charges of assault and battery. *In the Matter of Lee*, 613 S.E.2d 370

(South Carolina 2005). The judge had resigned after the employee reported the incident to law enforcement officials and county officials began an inquiry. The judge was charged with simple assault and battery, and, pursuant to a plea agreement, pled guilty to battery and was fined \$250.

The judge said he meant no harm or offense to the employee, that he had intended to engage in jovial activity

with her, and that he regretted his words and actions. When questioned by investigators, other female court employees reported the judge made comments of a sexual nature and unwelcome physical contact. The judge claimed that he did not realize the employees took exception to or were offended by what he intended to be jovial conduct and that he would not have engaged in the conduct had

The code of judicial conduct

The courts and commissions cite a variety of canons in sexual harassment cases, including the general standards of Canons 1 and 2 and those sections of Canon 3 directing a judge to “require order and decorum in proceedings before the judge” and to “be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity,” and prohibiting a judge from manifesting by words or conduct “bias or prejudice, including but not limited to bias or prejudice based upon . . . sex” The 1990 model code of judicial conduct provides in commentary: “A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge’s direction and control.”

The California Supreme Court recently amended its code of judicial conduct based on the conclusion of an advisory committee that a reference to sexual harassment in commentary was not sufficiently explicit and the prohibition should “be strengthened by replacing the language in the Commentary and adding specific language to the Canon itself.” The California code now reads: “A judge shall not engage in speech, gestures,

or other conduct that could reasonably be perceived as sexual harassment.”

In 2000, the Kansas Supreme Court adopted text that provides: “A judge shall refrain from speech, gestures or other conduct that could be perceived by a reasonable person as harassment based upon race, color, religion, gender, national origin, age, disability, or sexual orientation, and shall require the same standard of conduct of others subject to the judge’s direction and control.” In addition, it added commentary stating:

“Harassment” is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, disability, or sexual orientation, or that of his/her relatives, friends, or associates.

“Harassing conduct” includes, but is not limited to, the following: (i) Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to race, color, religion, gender, national origin, age, disability, or sexual orientation, and (ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of gender and that is placed on walls, bulletin boards, or elsewhere on the premises, or circulated in the workplace, and (iii) sexual advances, requests

for sexual favors, and other verbal or physical conduct of a sexual nature that are unwelcome, regardless of gender.

In the current model code revision process, AJS has proposed that the model code be revised to provide in text: “A judge shall not engage in sexual harassment and shall require the same standard of conduct of others subject to the judge’s direction and control.” AJS proposed that “sexual harassment” be defined to include but not be “limited to sexual advances, requests for sexual favors, comments about physical attributes, repeated and unwanted attempts at a romantic relationship, sexual gestures, offensive or suggestive remarks, sexually explicit questions, improper touching, lewd and vulgar language, suggestive or explicit pictures or images, and other verbal or physical conduct of a sexual nature that is unwelcome, regardless of gender. A judge’s conduct may constitute sexual harassment under this Rule regardless whether the judge’s conduct constitutes sexual harassment as defined under state or federal law.” The ABA Joint Commission’s preliminary report did not include a reference to sexual harassment in the text or the commentary, although there is a general reference to harassment in the commentary.

he known. *See also In re Ford*, 674 N.W.2d 147 (Michigan 2004) (no contest plea to aggravated assault for grabbing court employee, kissing her, and rubbing her breasts).

Consensual sexual relationship

Based on a stipulation and agreement, the Washington State Commission on Judicial Conduct censured a former judge for a consensual sexual relationship with a court employee. *In re Fritzler*, Order (Washington State Commission on Judicial Conduct February 6, 2004) (www.cjc.state.wa.us). The judge had resigned shortly after the formal charges were filed.

The judge stayed with the court employee in hotel rooms in and outside of the state, in various locations over a period of time, and had intimate physical contact with her. Their relationship led to rumors and perceived

favoritism that disrupted the orderly administration of the court workplace and adversely affected morale for court employees, administrators, and other judges. Other judges warned Judge Fritzler that the relationship created an appearance of impropriety and favoritism that was destructive to the court's reputation and its smooth operation. In 1996, the Commission had censured the same judge for a consensual sexual relationship with a different court employee even though he continued to preside over matters in which the employee's spouse was attorney of record and the relationship disrupted the administration of the court. *In re Fritzler*, Order (Washington State Commission on Judicial Conduct, August 9, 1996).

Among the aggravating circumstances identified by the Commission in the second case was that the judge had been one of those responsible for

supervising the employee, noting that even consensual, intimate relationships "between individuals of such unequal power and such proximity are, at best, ill-advised, and by their nature may impair the functioning of any work environment." The Commission stated that the relationship was a divisive issue among the court staff and for the bench, emphasizing the "heightening factionalism and antagonisms and the perception of undue favoritism which was destructive to morale at the courthouse." The judge acknowledged his behavior harmed his family, satisfied personal desires, and was destructive to the operation of the court and to its reputation. *See also In re Flanagan*, 690 A.2d 865 (Connecticut 1997), *cert. denied*, 522 U.S. 865 (1998) (judge had consensual sexual relationship with a married court reporter regularly assigned to his courtroom). 

Recent Cases: Campaign Conduct

The Nevada Commission on Judicial Discipline publicly censured a former judge for statements he made to attorneys about campaign contributions during his 2002 re-election campaign, which he lost. The Commission also permanently barred him from serving as a judge in the state. *In the Matter of Sobel*, Imposition of Discipline (July 19, 2005) (www.judicial.state.nv.us/decisionsobel.htm).

In a chambers calendar call in a personal injury case, the judge told two of the attorneys present that they were "okay" because their firms had contributed to his campaign, but told a third attorney that he was "fucked" because he had not yet contributed. The judge also expressed his frustration that someone had filed against him, stating he took it very personally and was not

eligible for retirement benefits. The Commission concluded that while the judge and even some of the attorneys may have believed he "was joking – if ever so badly," the objectively reasonable person would be "hard-pressed to detect the existence of anything truly humorous or ethical about what the Respondent said and how he said it, particularly during a pre-trial conference in a contested matter." During the same conference, the judge also asked one of the attorneys to confirm that he had attended a fund-raiser for the judge's campaign opponent.

In addition, the judge faxed attorney Robert Murdock a letter asking why Murdock had contributed \$3,500 to the judge's opponent's campaign but only \$500 to the judge's campaign, indicating that \$3,500 "buys a lot of important stuff" and that he "would have been and would continue to be so

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Remand Decision in *Republican Party of Minnesota v. White* (continued from page 1)

individuals under whose name a candidate files for partisan office.” The partisan-activities clauses stated that a judge or a candidate for election to judicial office “shall not identify themselves as members of a political organization, except as necessary to vote in an election;” “seek, accept or use endorsements from a political organization;” or attend political gatherings. The clauses did allow a candidate to speak on his or her own behalf at a gathering other than a gathering of a political organization.

The majority recognized that protecting litigants from biased judges is a compelling state interest. However, the majority considered the prohibition on aligning with a particular political party to be designed to keep judges from aligning with particular views on issues and, therefore, concluded it was analogous to the “announce clause” held unconstitutional by the Supreme Court.

However, as the dissent argued, the partisan activities clause regulates “a judicial candidate’s relations with people, and organizations of people, not the candidate’s relations with issues.”

[O]nce the partisan activities clauses are gone, having espoused similar positions on issues will be the least significant aspect of the party’s relationship to its successful candidate; the truly significant point is that the candidate may owe his or her accession to the bench to the litigant before the bar and may be similarly dependent on that litigant for any hope of success in future elections.

The majority also concluded that the partisan-activities clauses were “woefully underinclusive” because the clauses required a candidate “to sweep

under the rug his overt association with a political party for a few months during a judicial campaign” and did not preclude a candidate from associating with political interest groups other than political parties. The majority argued that “the few months a candidate is ostensibly purged of his association with a political party can hardly be expected to suddenly open the mind of a candidate who has engaged

The majority recognized that protecting litigants from biased judges is a compelling state interest.

in years of prior political activity.”

The dissent responded that “any regulation that governed relations with the party before a person had become a candidate would be overly broad, but a regulation that focuses on the campaign period is tailored to address the threat in the time-frame in which the threat is most overt.” Moreover, the restriction applies not just to judicial candidates but to judges so it applies not just to the few months of a campaign but, for a successful candidate, as long as he or she holds judicial office.

The majority also maintained that Minnesota had not shown that association with a political party is a much greater threat than association with other interest groups, specifically mentioning the National Rifle Association, the National Organization for Women, the Christian Coalition, the NAACP, and the AFL-CIO. The majority stated that “associating with an interest group, which by design is usually more narrowly focused on particular issues, conveys a much stronger message of alignment

with particular political views and outcomes”

Based on its holding that the partisan activities clause was under-inclusive, the majority concluded that, contrary to the Minnesota Supreme Court’s representations, the state court had not adopted the clauses to protect judicial impartiality but because the clauses are “remarkably pro-incumbent.” The majority emphasized that “Minnesota has chosen to elect the judges of its courts,” citing the state constitutional provision but failing to cite a 1912 statute that made judicial elections non-partisan. The majority accused the Minnesota

Supreme Court, “without apparent constitutional or statutory authority,” of stepping “into the legislative arena in an attempt to regulate the political climate of statewide elections.”

As the dissent stated, however, the Minnesota Supreme Court adopted the partisan activities clauses “to clarify and formalize Minnesota’s tradition of non-partisan elections and to supplement the guidance given by the non-partisan election statute.” Recognizing that “it would be difficult to draft a workable rule to limit involvement by special interest or other political groups,” the dissent noted the Minnesota Supreme Court’s “institutional experience” with non-partisan judicial elections and evidence before the state court that “parties differ from other interest groups in the degree of symbiosis that exists between candidate and party and in the unique role that political parties play in the workings of the other branches of government.” The dissent condemned the “overinclusive-underinclusive trap” created by the majority: “the two requirements form a Catch 22 situa-

tion, in which a drafter's very effort to avoid overinclusiveness makes the measure vulnerable to attack for underinclusiveness." The dissent argued that, because the case had been before the district court on a motion for summary judgment, the appellate court should remand for further evidence on the issue, noting that the majority did not consider the record before the state court when it most recently re-adopted the restrictions in 2004.

Solicitation clause

Canon 5B(2) of the Minnesota code provided that a candidate "shall not personally solicit or accept campaign contributions or personally solicit publicly stated support." The canon allowed a candidate to establish committees to solicit and accept contributions. In language unique to Minnesota, the canon provided that "such committees shall not disclose to

the candidate the identity of campaign contributors . . . [or] the identity of those who were solicited for contribution . . . and refused such solicitation." The plaintiff challenged the provision only insofar as it prohibited campaign committees from transmitting solicitation messages above the candidate's personal signature and prohibited candidates from personally soliciting contributions from large groups.

The majority stated that a judicial candidate would not be able to trace the source of funds contributed in response to a letter or a request to a large group. Given that Minnesota's version of Canon 5 prevented a candidate from knowing the identity of contributors or even non-contributors, the majority concluded, prohibiting a candidate from making a blanket solicitation to a large group and personally signing a solicitation letter does not advance any interest in either a lack of

bias for or against a party to a case or in the judge's open-mindedness.

The dissent questioned whether strict scrutiny should be applied to the solicitation clause, noting a less strict standard is applied to campaign contribution limitations. Moreover, the dissent stated, there is a place for limited deference to the judgment of the state even in a strict scrutiny analysis. The dissent advanced anti-corruption as an interest supporting the solicitation restriction and argued that "allowing those responsible for the various branches of government to contract obligations inconsistent with the discharge of their public duties" is a threat that "the government may (1) seek to prevent . . . before it happens and (2) act against . . . in intermediate forms that are more subtle than bribery and explicit agreements."

(continued on page 10)

Other campaign developments

Granting summary judgment in a suit challenging two provisions of the code of judicial conduct, the United States District Court for the District of Alaska held that a judge in Alaska who is standing for retention may not be prohibited by the code of judicial conduct from responding to questionnaires or surveys. *Alaska Right to Life Political Action Committee v. Feldman*, 380 F. Supp. 1080 (2005). The Commission has appealed the decision to the 9th Circuit.

The district court concluded that:

[T]he "pledges and promises clause" and the "commitment clause" found in the Alaska Code of Judicial Conduct, when viewed as mandatory as opposed to advisory, prohibit the same type of constitutionally-protected speech guaranteed by the United States Supreme Court in

Republican Party of Minnesota v. White, 536 U.S. 765 (2002). As a result, the Court concludes Canon 5A(3)(d)(i) and (ii) of the Alaska Code of Judicial Conduct: (1) impermissibly prohibits judges standing for retention from announcing their views on disputed political, legal, and social issues; and (2) "impermissibly burdens free speech and violates the First Amendment of the Constitution." Simply stated, Canon 5A(3)(d)(i) and (ii), while arguably setting forth laudable standards, is not necessary to achieve the State's objective of ensuing impartiality of judges.

Stating that the difference between Alaska's retention elections and partisan elections "is of little consequence," the court recognized "that it is highly conceivable that a judge standing for retention has yet to hear a case containing any and/or all issue(s)

raised in Plaintiffs' questionnaire(s)." The court did make clear that nothing in its opinion "requires any judge standing for retention to respond to any questionnaires or surveys. Indeed, there may be good reason not to do so, but this is a matter that is better left to the sound discretion of each judge."

This case is one of four filed by right-to-life groups based on judicial candidates' refusal to respond to questionnaires. The lawsuits in Kentucky and North Dakota have also been successful. *See Family Trust Foundation of Kentucky v. Wolnitzek*, 345 F. Supp. 2d 672 (U.S. District Court for the Eastern District of Kentucky 2004); *North Dakota Family Alliance v. Bader*, 361 F. Supp. 2d 1021 (U.S. District Court for the District of North Dakota 2005). The Indiana case is still pending.

Remand Decision in *Republican Party of Minnesota v. White* (continued from page 9)

The dissent noted that the majority seemed “to implicitly approve the concept of the campaign committee as a barrier between contributors and the judge or would-be judge” but that the majority’s under-inclusiveness analysis “contains the seeds to strike the whole scheme.” The dissent stated, “if each detail of the scheme must be proved as critical, rather than as forming a part of a scheme that works, then each detail, and therefore the scheme as a whole, is foredoomed.”

The dissent concluded:

Preserving the integrity of a state’s courts

and those courts’ reputation for integrity is an interest that lies at the very heart of a state’s ability to provide an effective government for its people. The word “compelling” is hardly vivid enough to convey its importance. The questions of whether that interest is threatened by partisan judicial election campaigns and personal solicitation of campaign contributions, and whether the measures Minnesota has adopted were crafted to address only the most virulent threats to that interest, are in part factual questions, which we should not decide on summary judgment. Finally, the Court today adopts an approach to

strict scrutiny that would deny the states the ability to defend their compelling interests, no matter how urgent the threat.



A cumulative description of developments following the Supreme Court decision in Republican Party of Minnesota v. White is at www.ajs.org/ethics/eth_learnmore.asp. In addition, the Center for Judicial Ethics tracks campaign speech developments 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.

Recent Cases: Campaign Conduct (continued from page 7)

grateful for such a large contribution.” Murdock stated that he found the letter offensive and asked the judge to recuse from a case Murdock had before him. The judge continued to ask about the disparity in contributions but indicated he would recuse himself.

Similarly, the Washington State Commission on Judicial Conduct found that a judge’s statements to an attorney about a campaign sign could reasonably be perceived as an attempt to exert influence over the attorney. In late August 2004, after a traffic infraction hearing was concluded and court was adjourned, the judge asked one of the attorneys involved in the hearing why a campaign sign endorsing the judge’s opponent was displayed in the yard in front of the attorney’s law office and whether the display meant the attorney was supporting the judge’s opponent. The conversation was cordial, but it occurred in the judge’s courtroom, while the judge was on the bench, wearing his judicial robe, and immediately following a hearing in which the attorney had participated. Pursuant to the judge’s agreement, the Commission reprimanded the judge for the conversation as well as for appear-

ing to personally solicit campaign contributions in three e-mails from his campaign committee and contributing \$75 to a congressional campaign. *In re Krouse*, Stipulation, Agreement, and Order (Washington State Commission on Judicial Conduct May 5, 2005) (www.cjc.state.wa.us).

Recommendation

In its decision, the Nevada Commission noted that “campaign activities by judges involving attorneys should be carried out with great caution. In soliciting donations, endorsements or political organization help from attorneys, judges can easily place attorneys in a position where the attorneys feel coerced. Attorneys may be concerned for their pending and future cases . . . and believe that there is an obligation to give such help, if their clients are to be assured fair treatment by the judge.” The Commission stated that judges should not “engage in any communication with attorneys within the courtroom, courthouse or even in chambers during the course of any judicial proceeding, whether formal or informal, which can reasonably be construed to be soliciting campaign help from such

attorney or anyone closely connected with such attorney,” including direct solicitation and any “innuendo or remarks” that could reasonably be construed to be soliciting help or criticizing an attorney for not helping.

In addition, judges should avoid, even during normal campaign activities, soliciting campaign help from attorneys which an objective observer might reasonably construe to be coercive under all of the circumstances. Such circumstances include: 1. an attorney’s pending litigation before such judge, 2. the reasonable likelihood of future litigation before such judge, 3. the monetary amount of litigation before such judge involving such attorney, and 4. the serious nature of court proceedings before such judge involving such attorney or his law firm.

Judges should not pressure attorneys for campaign help, nor communicate directly or by intimation that an attorney should not help an opponent of such judge, under circumstances that an attorney might reasonably believe that he or his clients’ interests before such judge might be negatively affected by failure to comply with the judge’s request for campaign assistance.



Judicial Education Requirements *(continued from page 3)*

judicial discipline proceedings, the court has “rejected defenses by justices of the peace who claimed to lack legal training and be ignorant of the law.” The court stated, “our citizens who come before justices of the peace in this state expect and deserve a justice of the peace who is reasonably versed in the laws he or she will apply in deciding . . . matters that may in some instances be very minor in total dollar amounts, but which may very likely be critical to the parties.”

Similarly, in *In the Matter of Holcomb*, 418 S.E.2d 63 (Georgia 1992), the Georgia Supreme Court removed a magistrate who had failed to complete the required training for magistrates for 1991. The Judicial Qualifications Commission had notified the magistrate in October 1991 of his failure and given him an opportunity to explain whether the failure was caused by facts beyond his control. As of January 1992, the Commission had not received a response and sent the magistrate a letter directing him to attend a February training session, but the magistrate did not attend the session. The court adopted the Commission’s recommendation that he be removed.

The Texas State Commission on Judicial Conduct has also sanctioned municipal court judges or justices of the peace for failing to obtain the mandatory hours of judicial education. If the judge comes into compliance after being notified of a complaint, the Commission publicly admonishes the judge. If the judge fails to obtain the necessary hours even after being noti-

fied of Commission proceedings, the Commission negotiates a voluntary agreement to resign in lieu of disciplinary action. Compare *Public Admonition of Dodier* (Texas State Commission on Judicial Conduct October 23, 2002) with *In re Hart*, Voluntary Agreement to Resign from Judicial Offense in Lieu of Disciplinary Action (Texas State Commission on Judicial Conduct December 5, 2002).

“The challenge of maintaining judicial competence requires ongoing education of judges in the application of legal principles and the art of judging in order to meet the needs of a changing society.”

Failure to maintain competence

The Texas Commission found that a failure to obtain mandatory education is a violation of canons requiring a judge to “respect and comply with the law,” to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary,” and to “be faithful to the law and . . . maintain professional competence in it.” In addition, the Louisiana court found a violation of the requirement that a judge “participate in establishing, maintaining, and enforcing, and . . . personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved.”

In 2002, the Washington Supreme Court amended the state’s code of judicial conduct to provide that “judges should be faithful to the law and main-

tain professional competence in it, and comply with the continuing judicial education requirements” At the same time, the court adopted a rule requiring judicial officers to complete 45 credit hours of judicial education every three years. At least six must be about judicial ethics. In addition, a new judge must attend and complete the Washington Judicial College program within 12 months of initial appointment or election. Each judge is

required to report annually to the administrative office of the courts the judge’s “progress toward the judicial education requirements . . . during the previous calendar year.”

The preamble to the Washington rule explains:

The protection of the rights of free citizens depends upon the existence of an

independent and competent judiciary. The challenge of maintaining judicial competence requires ongoing education of judges in the application of legal principles and the art of judging in order to meet the needs of a changing society. This rule establishes the minimum requirements for continuing education of judicial officers.

Similarly, the Arizona code of judicial conduct provides that “a judge shall participate actively in judicial education programs and shall complete mandatory judicial education requirements. 

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