

ABA AND JUDICIAL CONDUCT

Comply with 'White'

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Canon 5 of the American Bar Association Model Code of Judicial Conduct proposes a framework for states to adopt to govern the political activity of judges and judicial candidates. The philosophical slant of the canon, consistent with long-standing ABA policy, is that judges and judicial candidates should eschew politics. The current proposal for a new Canon 5, released in December 2005 by the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, continues in this philosophical tradition.

Recent case law, however, including the ground-breaking decision of the U.S. Supreme Court in *Republican Party of Minnesota v. White*, the 8th U.S. Circuit Court of Appeals' en banc decision upon the remand of *White*, and the Supreme Court's denial of a writ of certiorari from that decision, calls into question both the validity and the constitutionality of Canon 5's underlying philosophy. In *White I*, the Supreme Court struck down, as unconstitutional on First Amendment grounds, the "announce clause" contained in Minnesota's Code of Judicial Conduct, which barred a "candidate for a judicial office" from "announc[ing] his or her views on disputed legal or political issues." The court held the clause to be inconsistent with basic political freedoms of the American democratic system.

The 8th Circuit, in its decision following remand from the Supreme Court in *White* (*White II*), struck down as unconstitutional the "partisan-activities" and "solicitation" clauses of the Minnesota Code of Judicial Conduct. The Supreme Court denied certiorari in *White II*. James Bopp Jr., counsel for the prevailing parties in *White*, has said that the ABA and state supreme courts have chosen "defiance over compliance," and are ignoring federal constitutional law.

Proposed Final Draft of Canon 5, posted for public comment by the joint commission, is consistent with the ABA's well-entrenched party line opposing the politicization of judicial selection. Thus, the joint commission has chosen to play the role of an enabler, fully supporting the ABA's policy of discouraging judicial elections, instead of recognizing the problematic and anachronistic viewpoint of current Canon 5 and proposing changes that would be consistent with governing constitutional law.

What's behind ABA's policies?

Those states that elect judges have chosen both the benefits and the detriments of that process. If we accept, and if the ABA is willing to recognize, the validity of that choice, then why does the ABA perpetuate its policy, as reflected in Model Canon 5, against judicial elections? Some say

that the institutional bias, and perhaps hubris, of the ABA lie behind these policies. Others say that the membership of the ABA, which disproportionately reflects the attitudes and beliefs of large-firm urban lawyers, drives these policies. And others simply believe that the ABA, despite its attempts to include well-informed, knowledgeable and diverse members on its committees, commissions and task forces, has nevertheless failed to include all diverse, legitimate and informed views on the subject. Therefore, these believers assert, the groups involved in promulgating the Model Code are ignorant of the realities and reasons for the choice of some jurisdictions to elect their judges.

Does the ABA do the judicial disciplinary authorities in U.S. jurisdictions a disservice when it ignores the serious constitutional issues regarding free speech generated by *White I* and *White II*? State judicial discipline programs incur a substantial cost in defending litigation challenging the constitutionality of their codes of judicial conduct, based on the ABA Model Code. That cost will continue if the current proposed draft is adopted. The judicial discipline system in Minnesota may face serious financial woes if attorney fees are ultimately awarded to the prevailing party in *White*.

The majority of voters in judicial elections base their decisions on the candidates' stated or perceived position on single issues, such as abortion rights or criminal justice. Restraining political speech in a jurisdiction that chooses to elect its judges is inconsistent with that choice. It makes no sense to limit the political activities of judges who are elected to office. We are deluding ourselves if we think that once elected to the bench, judges should and do divorce themselves from their political identities.

When discussing separation of powers, let us not forget that the population of all three branches reflects the will of the people exercised through the electoral process, regardless of the different forms that process may take. When choosing to value one process over another, is the ABA, through its politics, truly "protecting liberty" and "preserving justice," as it claims in its motto?

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