

JUDICIAL ETHICS COMMITTEE

Advisory Opinion No. 05-03 December 8, 2005

The Judicial Ethics Committee has received the following inquiry:

What effect does the case of Republican Party of Minnesota v. White, 536 U.S. 765 (2002), have on Canon 5A(3)(d), the Pledges/Promises Provision of the Tennessee Code of Judicial Conduct?

DISCUSSION

Canon 5A(3) of the Canons of Judicial Ethics provides as follows:

1. A candidate for a judicial office shall not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office. *Canon 5A(3)(d)(i)*

2. A candidate for a judicial office shall not make statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court. *Canon 5A(3)(d)(ii)*

3. A candidate for a judicial office shall not knowingly misrepresent the identity, qualifications, present position, or any other fact concerning the candidate or an opponent. *Canon 5A(3)(d)(iii)*

4. A candidate for a judicial office may respond to personal attacks or attacks on the candidate's record so long as the response does not violate Canon 5A(3)(d). *Canon 5A(3)(e)*

On October 11, 2005, the Tennessee Supreme Court, responding to the free speech recognition for judicial candidates of White, replaced the previous commentary to Canon 5A(3)(d) with the following:

Commentary. – A judge's obligation to avoid prejudice is well established. Under the First Amendment and in light of the voters' right to have information about an elective candidate's views, judicial ethics rules may not prohibit judicial candidates from announcing their views on disputed legal and political issues. Canon 5(A)(3)(d) does not proscribe a candidate's public expression of personal views on disputed issues. To ensure that voters understand a judge's duty to uphold the Constitution and laws of Tennessee where the law differs from the candidate's personal beliefs, however, candidates are encouraged to emphasize their duty to uphold the law

regardless of personal views.

Some speech restrictions are indispensable to maintaining the integrity, impartiality, and independence of the judiciary. The state has a compelling interest in enforcing these restrictions. Thus, under Canon 5(A)(3)(d) it remains improper for a judicial candidate to make pledges, promises or commitments regarding pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific positions of law, that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases that would fall within the scope of the pledge, promise or commitment. To fall within the proscription of this rule the statement by the candidate must pertain to matters likely to come before the court on which the candidate would serve, if elected. Statements by a candidate that would have this effect are inconsistent with the obligation of all judges to perform impartially the adjudicative duties of office.

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

Additionally, judicial candidates must keep in mind that, in stating their position as to an issue, they may later be required to disqualify themselves pursuant to Canon 3(E)(1) should that issue subsequently arise in a proceeding before them and, because of the position taken by the judge while a candidate, the judge's impartiality might reasonably be questioned.

Canon 5(A)(3)(d) does not prohibit a candidate for judicial office from making public statements concerning improvements to the legal system or to the administration of justice.

Certain terms used in this commentary should be defined. "Impartiality" or "impartial" denotes the condition of being without bias or prejudice in favor of, or against, particular parties or classes of parties, or their representatives, and of maintaining an open mind in considering issues that may come before the judge. "Independence" denotes a judge's freedom from influence, guidance or controls other than those established by law. "Integrity" denotes probity, fairness, honesty, uprightness and soundness of character. A "candidate for judicial office" describes a person seeking

judicial office. A person becomes a candidate for judicial office as soon as he or she makes a public announcement of candidacy, declares or files as a candidate with the election or appointment authority, authorizes or engages in solicitation of contributions or support, or is nominated for election or appointment to office.

As is stated in the new commentary to Canon 5A(3)(d), other provisions of the Canons of Judicial Ethics are relevant to the exercise of the right to free speech by judicial candidates. Accordingly, in stating their positions on disputed social and legal issues as well as in other areas, judicial candidates must be mindful that disqualification motions may be filed when those or related issues arise in the judge's court. Canon 3E(1) states, in part, that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." The commentary to this section details, in part, the information which judges must disclose when presented with an issue on which they publicly have taken a position or expressed their beliefs:

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Thus, a judge has an affirmative duty to disclose information which might be relevant to possible disqualification, even though such a request, in the judge's mind, would be without merit.

The procedure to be utilized when judges must disqualify themselves was detailed in Judicial Ethics Opinion 04-01:

If the trial judge concludes that he/she must be disqualified because the judge's impartiality might reasonably be questioned . . . , the trial judge may, in accord with Rule 10, Canon 3F "disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification." The Comment to this section explains efforts which the judge must make to insure that he/she does not influence the parties' determinations as to the judge's disqualification:

A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

CONCLUSION

The free speech rights of judicial candidates permit them to take positions on various matters, including disputed legal and social issues. However, in doing so, the candidate should be mindful of the language of the commentary to Canon 5A(3)(d) that “some speech restrictions are indispensable to maintaining the integrity, impartiality, and independence of the judiciary,” and “[t]he state has a compelling interest in enforcing these restrictions.” Accordingly, candidates should not “make pledges, promises or commitments regarding pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific propositions of law, that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases that would fall within the scope of the pledge, promise or commitment.”

FOR THE COMMITTEE:

ALAN E. GLENN, JUDGE

CONCUR:

CHANCELLOR THOMAS R. FRIERSON, II
JUDGE CHERYL A. BLACKBURN
JUDGE JAMES F. RUSSELL
JUDGE BETTY THOMAS MOORE (Not Participating)