

CONDUCT OF JUDICIAL ELECTIONS - BACKGROUND MEMORANDUM

House Concurrent Resolution No. 3014 (attached as an appendix) directs a study of judicial elections and recent federal court decisions affecting the conduct of judicial elections. Testimony in support of the resolution indicated that recent federal court decisions will have an impact on how judicial candidates campaign and solicit funds thus creating a need for a study.

COURTS IN NORTH DAKOTA

The North Dakota judicial system consists of the Supreme Court, court of appeals, district courts, and municipal courts. The Supreme Court is the highest court in the state of North Dakota. This court is composed of five justices elected in a nonpartisan election for 10-year terms. Each justice must be a licensed attorney and a citizen of the United States and North Dakota.

One member of the Supreme Court is selected as Chief Justice by the justices of the Supreme Court and the judges of the district courts. The Chief Justice's term is five years. The chief justice's duties include presiding over Supreme Court conferences, representing the judiciary at official state functions, and serving as the administrative head of the judicial system.

The Court of Appeals hears only the cases assigned to it by the Supreme Court. The court of appeals is composed of three judges chosen from among active and retired district court judges, retired justices of the Supreme Court, and attorneys. Temporary court of appeals judges are assigned by the Supreme Court for up to one year. The Supreme Court assigns cases to the court of appeals from among those cases filed with the Supreme Court.

The district courts are the courts of general jurisdiction in North Dakota. The office of district judge is an elected position filled every six years by nonpartisan election held in the district in which the judge will serve. The district courts have original and general jurisdiction in all cases, including criminal felony and misdemeanor cases, and general jurisdiction for civil cases. The district courts also serve as the juvenile courts in the state and have exclusive and original jurisdiction over any minor who is alleged to be unruly, delinquent, or deprived. The state is divided into seven judicial districts. In each judicial district a presiding judge, who is selected by the other judges in the district, supervises court services of all courts in the district. There is a district court in each of the state's 53 counties. All of the judicial districts are served by a court administrator or administrative assistant who works with governmental agencies,

budget, facilities, records management, personnel, and contract administration.

Municipal courts in North Dakota have jurisdiction of all violations of municipal ordinances, with some exceptions. All municipal judges in North Dakota are part time and are elected by the people for four-year terms.

JUDICIAL CONDUCT

The American Bar Association adopted the first Canons of Judicial Ethics in 1924. These first canons were advisory in nature and were intended to act as a guide for judicial behavior. In 1972 the American Bar Association promulgated the Model Code of Judicial Conduct which specified a mandatory and enforceable standard of conduct and behavior. This Code of Judicial Conduct was meant to aid the states in adopting their own rules of conduct for sitting judges as well as judicial candidates. Today most states that have an elected judiciary have approved campaign restrictions based on the Model Code, specifically Canon 5. This canon was revised in 1990 due to concerns that certain language was unconstitutionally overbroad. Many states, including North Dakota, updated their code accordingly, but some states, such as Minnesota, chose not to. Regardless of which version of the Model Code, if any, a state's judicial code is based upon, all 39 states that have elections for judicial positions have statutory regulations of conduct during campaigns.

The states that have elections for judicial positions are Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

North Dakota, like most states, has a code of judicial ethics that restricts candidates seeking election as a judge from discussing issues that could come before them if elected. North Dakota Century Code Section 27-23-03(3) empowers the North Dakota Supreme Court, upon the recommendation of the Commission on Judicial Conduct, to censure or remove a judge for action that constitutes willful violation of North Dakota Rules of Judicial Conduct. *Judicial Conduct Comm'n v. Wilson*, 461 N.W.2d 105 (N.D. 1990).

COURT DECISIONS

In June 2002 the United States Supreme Court handed down its first ruling regarding judicial elections. A 5-4 majority in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) held that part of the Minnesota Code of Judicial Conduct was unconstitutional as violating the First Amendment of the United States Constitution. A similar provision in the North Dakota Code of Judicial Conduct was challenged in *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005). Both cases are summarized below.

Republican Party of Minnesota v. White

In 1996 Gregory Wersal ran for associate justice of the Minnesota Supreme Court. He distributed literature critical of several Minnesota Supreme Court decisions. An ethics complaint was filed against him; however, the board that was to review the complaint dismissed the charges. In 1998 Wersal ran again for the same office. This time Wersal preemptively filed suit in federal district court against Suzanne White, the chairman of the Minnesota Board on Judicial Standards, charging that the "announce clause" limited his right to free speech and made a mockery of the election process by denying him the ability to wage a meaningful campaign. The "announce clause" states that "[a] candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues." The Republican Party of Minnesota joined in the lawsuit, arguing that the restrictions prevented the party from learning Wersal's views on the issues and thus opposing or supporting his candidacy. The district court found that the announce clause did not violate the constitution. Wersal appealed to the United States Court of Appeals for the Eighth Circuit, and the circuit court affirmed the district court's decision. Wersal filed a writ of certiorari to the United States Supreme Court, which was granted.

In *Republican Party of Minnesota v. White*, the United States Supreme Court struck down the campaign ethics rule prohibiting judicial candidates from announcing their views. The Supreme Court held that the portion of Canon 5A of the Minnesota Code of Judicial Conduct which provided that a "candidate for a judicial office, including an incumbent judge" shall not "announce his or her views on disputed legal or political issues," violates the First Amendment. Using strict scrutiny, Justice Scalia, writing for the majority, found the "announce clause" was not narrowly tailored to serve the asserted compelling state interest in the judiciary's impartiality. Justices Scalia, Rehnquist, O'Connor, Kennedy, and Thomas were in the majority. Justice Stevens filed a dissenting opinion, in which Souter, Ginsburg, and Breyer joined. Justice Ginsburg filed a dissenting opinion, in which Stevens, Souter, and Breyer joined.

The Supreme Court then remanded the case to the Eighth Circuit Court of Appeals to determine what effect, if any, its decision would have on the rest of the plaintiff's challenge. A three-judge panel of the Eighth Circuit issued a decision and found that some of the candidates' speech prohibitions were unconstitutional but upheld others. *Republican Party of Minnesota v. White*, 361 F.3d 1035 (8th Cir. 2004). The Eighth Circuit vacated the panel decision and decided to hear the case *en banc*.

On August 2, 2005, in the remand of *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) the Eighth Circuit held that:

- Minnesota Code of Judicial Conduct Canons 5A(1) and 5B(1), which prohibit judges or judicial candidates from identifying themselves "as members of a political organization," attending political gatherings, and seeking, accepting, or using endorsements from a political organization are unconstitutional; and
- Minnesota Code of Judicial Conduct Canon 5B(2), which prohibits a judicial candidate from personally soliciting campaign contributions is unconstitutional insofar as it prohibits a judicial candidate from soliciting contributions from large groups and transmitting solicitations above the candidate's personal signature, to the extent of the plaintiffs' challenge.

North Dakota Code of Judicial Conduct Canons 5A and 5B contain language that is substantially similar to Minnesota's "partisan-activities clause" and "solicitation clause."

Cases that have relied on *White* to invalidate canons include *Weaver v. Bonner*, 309 F.3d 1312, 1319-21 (11th Cir. 2002) (Georgia's solicitation clause and canon prohibiting judicial candidates from making false or misleading statements in their campaigns); *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d (D.N.D. 2005) (North Dakota's commit and pledges or promises clauses); *Spargo v. New York State Comm'n on Judicial Conduct*, 244 F. Supp. 2d 72, 92 (N.D.N.Y.) (New York canons restricting partisan political activity of judges and judicial candidates), vacated by 351 F.3d 65 (2d Cir. 2003), and cert. denied, 124 S. Ct. 2812 (2004); *Smith v. Phillips*, No. 02 CV 111, 2002 WL 1870038 (W.D. Tex. Aug. 6, 2002) (Texas canon forbidding judicial candidates from making certain statements); *Miss. Comm'n on Judicial Performance v. Wilkerson*, 876 So.2d 1006, 1016 (Miss. 2004) (Mississippi canon interpreted as prohibiting judge from making discriminatory public statements). Other post-*White* cases that have upheld canons include *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003) (New York's partisan political activity clauses); *In re Watson*, 794 N.E.2d 1 (N.Y. 2003) (New York's "pledges or promises" clause); *In re Kinsey*, 842 So.2d 77, 86-87 (Fla. 2003)

(Florida "pledges or promises" and "commit" clauses); and *In re Dunleavy*, 838 A.2d 338, 350-51 (Me. 2003) (Maine canons prohibiting judges from engaging in certain political activities).

**North Dakota Family
Alliance, Inc. v. Bader**

In *North Dakota Family Alliance, Inc. v. Bader*, 361 F. Supp. 2d 1021 (D.N.D. 2005), United States District Judge Dan Hovland held that the "pledges and promises clause" and the "commit clause" of the North Dakota Code of Judicial Conduct Canon 5A unconstitutionally restrict speech. The judicial canon at issue in this case was Canon 5A(3)(d)(i) and (ii) of the North Dakota Code of Judicial Conduct, which provides, in part, as follows:

- 3) A candidate for a judicial office:
 - (d) shall not:
 - (i) make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;
 - (ii) 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.

In this case, North Dakota Family Alliance, Inc., a nonprofit educational organization, sought to collect and publish data regarding judicial candidates' political philosophy and stance on disputed legal and political issues by sending a questionnaire to judicial candidates. Many judicial candidates refused to answer the questions on the survey and the candidates cited the relevant canon of ethics. The survey asked the judicial candidate to indicate whether he or she would agree or disagree with certain undecided propositions of state constitutional law. The survey also asked the judicial candidates to identify individuals with whom they share a political and judicial philosophy and to rank their judicial philosophy on constitutional interpretation on a scale ranging from being a "strict constitutionalist" to "a living document approach." In May 2004, prior to the surveys being sent by the North Dakota Family Alliance, Inc., the North Dakota Judicial Ethics Advisory Committee sent a short letter to judicial candidates addressing the United States Supreme Court decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) and its impact on Canon 5. The letter explained that the "announce clause" contained in Minnesota's Code of Judicial Conduct was not present in North Dakota's Code of Judicial Conduct. The letter also suggested that the judicial candidate should be familiar with the *White* case and could request a formal opinion on a specific ethical question.

The district court, in its analysis, stated that in *White*, the Supreme Court held that Minnesota's "announce clause" violated the First Amendment because the canon was not narrowly tailored to serve a compelling state interest. The district court also

noted that the Supreme Court did not address the constitutionality of the "pledges or promises" clause of Minnesota's Canon 5A(3)(d)(i) which is identical to North Dakota's Canon 5A(3)(d)(i) nor did the Supreme Court address the validity of the "commit clause," which is a clause that prohibits a judicial candidate from making statements that commit or appear to commit the candidate with respect to cases, controversies, or issues that are likely to come before the court.

The district court held that if North Dakota's interest ultimately concerns a judge's impartiality toward parties, the language of Canon 5A(3)(d)(i) and (ii) is overbroad and does not reflect that interest. The district court held that like the "announce clause" in *White*, the "pledges and promises clause" and the "commit clause" are too broadly tailored to serve that interest. According to the district court, these clauses forbid the same type of speech that was found to be constitutionally protected in *White*. The court found little distinction between the clauses at issue in *White* and the clauses at issue in this case. The district court concluded that "Canon 5A(3)(d)(i) and (ii) of the North Dakota Code of Judicial Conduct impermissibly burdens free speech and violates the First Amendment of the United States Constitution." According to the district court, "[t]he 'pledges and promises,' and the 'commitment clause,' are essentially de facto 'announce clauses' which were found to be unconstitutional by the United States Supreme Court in *Republican Party of Minnesota v. White*. For the same reasons stated in *White*, the Court finds that these clauses violate the First Amendment."

The district court concluded that there is nothing in its opinion which requires a judicial candidate to respond to a survey in the future; however, the court noted that responding to such a survey may create a serious ethical dilemma that may require recusal at a later date. Finally, the district court concluded that it is clear under *White* that "because North Dakota has chosen to select its judges by popular election, the State may not impermissibly restrict the constitutionally-protected speech of judicial candidates."

In *North Dakota Family Alliance, Inc. v. Bader*, the court also analyzed a challenge to the constitutionality of Canon 3E(1) of the North Dakota Code of Judicial Conduct which relates to the recusal obligations of judges. The canon requires judges to recuse themselves from those proceedings in which impartiality "might reasonably be questioned." The district court concluded that this canon is narrowly tailored to serve a compelling state interest. According to the district court, the recusal provisions in Canon 3E(1) serves the state's interest in impartiality and the canon is narrowly drafted to achieve that interest and, therefore, survives a constitutional challenge.

New election finance and nominating petition laws enacted in 2005 will affect future judicial elections in North Dakota. House Bill No. 1432, which amends North Dakota Century Code Section 16.1-08.1-03.9, provides that district judge candidates are required to file a statement listing campaign contributors who make total contributions of more than \$200, the aggregate amount of contributions from each listed contributor, and the date the last contribution was received from each listed contributor.

Under this legislation, candidates are required to file their finance statements 12 days before any election in which their name appears on the ballot. Candidates are also required to file a followup statement by January 31 of the year following the election. Candidates are required to file year-end statements during any year a contribution was received, even if it was not an election year. Candidates for county and city offices are required to file similar statements under new North Dakota Century Code Sections 16.1-08.1-03.10 and 16.1-08.1-03.11.

In addition, under an amendment to North Dakota Century Code Section 16.1-11-06(2)(a), district judge candidates are required to state on their nominating petition the number of the district judgeship to which they seek election and whether the petition is intended for nomination for an unexpired term of office.

SUGGESTED STUDY APPROACH

The committee, in its study of judicial elections and recent federal court decisions affecting the conduct of judicial elections, may wish to approach this study as follows:

- Receive comments from representatives of the Supreme Court, district judges, and the State Bar Association regarding the issues and concerns raised in the federal court decisions.
- Seek information and recommendations from the State Bar Association's task force regarding the judicial elections decisions and issues.
- Develop recommendations and prepare legislation necessary to implement the recommendations.

ATTACH:1