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The ABA Model Code Revisions and Judicial Campaign Speech: Constitutional and Practical Implications

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THE ABA MODEL CODE REVISIONS AND JUDICIAL CAMPAIGN SPEECH: CONSTITUTIONAL AND PRACTICAL IMPLICATIONS

Honorable Howland W. Abramson and Gary Lee[1]

I. INTRODUCTION

On June 27, 2002 in *Republican Party of Minnesota v. White*,[2] the United States Supreme Court held that a provision of

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[2] 536 U.S. 765 (2002). While running for associate justice of the Minnesota Supreme Court, Gregory Wersal distributed literature criticizing several of the court's decisions. Thereafter, he sought a declaration that the announce clause of the Minnesota Code of Judicial Conduct violated the First Amendment because Wersal was prevented from voicing his views on issues such as crime, welfare, and abortion out of concern that he might violate the announce clause. *Id.* at

the Minnesota Code of Judicial Conduct that prohibited a judicial candidate, including an incumbent judge, from "announc[ing] his or her views on disputed legal or political issues," violated the First Amendment of the United States Constitution. That provision was adopted from the American Bar Association (ABA) 1972 Model Code of Judicial Conduct.[3] In *White*, the ABA filed an amicus curiae brief in favor of the provision;[4] the same day that the United States Supreme Court decided *White*, the president of the ABA issued a statement disagreeing with the decision.[5]

In response to the decision in *White*, an ABA Working Group that included members of the ABA Standing Committee on Judicial Independence and the ABA Standing Committee on Ethics and Professional Responsibility, drafted proposed revisions to the ABA Model Code of Judicial Conduct.[6] In August of 2003, the ABA Working Group submitted its proposed revisions to the ABA House of Delegates. The House of Delegates approved the revisions, making them part of the latest ABA Model Code of Judicial Conduct.

Although the ABA Model Code of Judicial Conduct does

769-70.

[3] *Id.* at 768.

[4] Brief of Amicus Curiae American Bar Association, Republican Party of Minnesota v. White, 536 U.S. 765 (2001) (No. 01-521).

[5] Statement of Robert E. Hirshon, June 27, 2002, *available at* http://www.abanet.org/media/june02/hirshonkellyfinal0627.html (last visited December 20, 2004).

[6] Standing Committee on Judicial Independence et al., American Bar Association, Report to the House of Delegates 7 (2003) [hereinafter 2003 ABA Report], *available at* www.abanet.org/judind/judicialethics/amendments.pdf (last visited December 20, 2004).

not itself have the effect of law, nearly all of the states have adopted some version of the ABA Model Code of Judicial Conduct.[7] Any ABA revisions to the Model Code of Judicial Conduct have the potential for being enacted by any of the states.[8] As an aid to states that may consider whether to adopt the August 2003 revisions, this article will discuss whether certain revisions of the August 2003 revisions to the ABA Model Code of Judicial Conduct violate the First Amendment of the United States Constitution or result in practical problems.[9]

II. THE DEFINITION OF IMPARTIALITY IS IMPRACTICABLE AND TOO BROAD

One of the 2003 revisions to the ABA Model Code of Judicial Conduct adds a definition of impartiality as follows:

> "impartiality" or "impartial" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, *as well as maintaining*

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[7] SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS § 1.02 at nn.19-23 (3d ed. 2000).

[8] As of the writing of this article, four states have adopted the 2003 revisions to the Model Code of Judicial Conduct: 17A Arizona Rev. Stat., Supreme Court Rule 81, ARIZONA CODE OF JUDICIAL CONDUCT; Nevada Rev. Stat., Supreme Court Rules, CODE OF JUDICIAL CONDUCT; New Mexico Stat. Ann., ch. 15, CODE OF JUDICIAL CONDUCT; 52 Minn. Stat. Ann., Minnesota Rules of Court, CODE OF JUDICIAL CONDUCT.

[9] Currently, the ABA is in the process of making comprehensive revisions to its Model Code of Judicial Conduct. *See* http://www.abanet.org/judicialethics/drafts.html (last visited December 20, 2004). The 2003 revisions to the Model Code of Judicial Conduct Canons 3B(10) and 3E(1)(f) are the same as the most recent draft, the preliminary draft of June, 2004, Canons 2.11(b) and 2.12(F), respectively. As of the writing of this article, the ABA has not yet proposed a draft for 2003 revisions to the Model Code of Judicial Conduct Canons 5A(3)(a) and 5A(3)(d) or for the definition of impartiality.

> *an open mind in considering issues that may come before the judge.*[10]

Before the revision, the term "impartiality" was not defined. The revision is a response to the discussion in the majority opinion in *White*. The *White* Court observed that the Minnesota Code of Judicial Conduct and the ABA Code of Judicial Conduct did not define "impartiality," and considered three possible meanings of "impartiality" to determine whether the announce clause was "narrowly tailored . . . to serve . . . a compelling state interest."[11] One of the meanings included "openmindedness" and "remain[ing] open to persuasion."[12] The majority opinion noted that before becoming a judge and later as a judge, when a person serves as an author, teacher, speaker, or judge, a person often makes statements on issues that the person will confront once on the bench.[13] Under the Minnesota Code of Judicial Conduct, a judge was permitted to make statements about the law before and after the election (unless litigation pertaining to that issue was pending), but was not permitted to announce his or her views during the election. The majority criticized the announce clause as "so woefully underinclusive" in serving openmindedness as to make it "a challenge to the credulous" that it

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[10] MODEL CODE OF JUDICIAL CONDUCT (2003), Terminology section (emphasis added). The term "impartiality" or "impartial" is used in Model Code of Judicial Conduct Canon 2 and its comment, Canon 3B(10) and its comment, Canon 3E(1), Canon 5A(3)(a), and Canon 5A(3)(d)(i). *Available at* www.abanet.org/cpr/mcjc/pream_ term.html (last visited December 20, 2004).

[11] *White*, 536 U.S. at 775.

[12] *Id.* at 778.

[13] *Id.* at 779.

served that purpose.[14] Because that meaning of "impartiality" was so underinclusive, the Court could not justify the ban on campaign statements that announced a candidate's views on legal issues.

By revising the ABA Model Code of Judicial Conduct to expressly define "impartiality" as including openmindedness, the ABA attempted to eliminate the possibility that a future court would hold, like the majority in *White,* that "impartiality does not adequately serve the interest of openmindedness." When the new definition of "impartiality" is considered in conjunction with the provision of the ABA Model Code of Judicial Conduct disqualifying a judge from sitting on a case if the judge's impartiality "might reasonably be questioned,"[15] it is evident that the definition of impartiality is too broad.

For example, a judge who has written an opinion on a legal issue probably does not have an open mind on the issue. After a judge has held a certain statute constitutional, it is not likely that the judge has an open mind on that issue unless some fact or law has changed since the judge's decision or a significant amount of time has passed. At the very least it can "reasonably be questioned" whether the judge does have an open mind.

However, determining that such a judge lacks impartiality and, thus, is subject to disqualification from sitting on such a case represents a radical departure from the current practice. This is not sound policy. Under existing law, a judge who has decided a legal

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[14] *Id.* at 780.

[15] MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1) (2003).

question, such as the constitutionality of a statute, is not disqualified from hearing another case presenting the same legal question.[16]

Moreover, a policy requiring disqualification would impose an administrative burden on the court to assign a judge who has not written such an opinion to sit on the case. For example, if all members of an appellate panel have ruled on a legal issue, the next time that legal issue is presented, the court would have to convene a panel without any of those judges. That may involve assembling a panel just for that particular case or disrupt the composition of panels that are based on other factors such as the geographical location or the senior status of the judge. Additionally, if only one member of the appellate court has not ruled on the issue, there would be a question of whether the other members of the court may sit. Under the rule of necessity, if all judges of a court would otherwise be disqualified, all may sit.[17]

While teaching, a judge may make statements disagreeing or agreeing with precedent. A judge may also testify at a public hearing or consult with an executive or legislative body urging a change in the law or may make statements while serving on a governmental committee or commission.[18] A party may subsequently cite such statements to support an argument that the judge does not have an open mind on an issue.

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[16] *White*, 536 U.S. at 779 ("More common still is a judge's confronting a legal issue on which he has expressed an opinion while on the bench.").

[17] SHAMAN, *supra* note 7, § 4.03 (discussing the issue and citing relevant cases).

[18] *See* ABA MODEL CODE OF JUDICIAL CONDUCT Canons 4A, 4B, 5G (1972); ABA MODEL CODE OF JUDICIAL CONDUCT Canons 4B, 4C(1), 4C(2) (1990).

To avoid these problems, it is suggested that the definition of impartiality be supplemented. For example, "a judge shall not be considered to lack impartiality solely on the basis that the judge has made certain statements about issues while performing judicial duties (such as in a conference with the parties or their counsel, in open court, or in a judicial opinion), teaching, testifying at a public hearing, consulting an executive or legislative body, or serving on a governmental committee or commission."[19]

III. THE REVISIONS TO DISQUALIFICATION ARE UNCONSTITUTIONAL, IMPRACTICABLE, AND TOO BROAD

The 2003 revisions of the ABA Model Code of Judicial Conduct Canon 3 E(1)(f) require disqualification where:

> the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to (i) an issue in the proceeding; or (ii) the controversy in the proceeding.[20]

A. The Revisions to Disqualification Are Too Broad

The analysis above regarding the definition of impartiality also applies here. A judge who has issued an opinion on a legal issue has made a public statement that can be perceived to

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[19] Although a judge's statements in a judicial opinion may result in disqualification, e.g., Haines v. Liggett Group, Inc., 975 F.2d 81, 98 (3d Cir. 1992) (holding that the prologue to a judge's judicial opinion required the judge to be disqualified from the case), these instances are rare. RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION, RECUSAL AND DISQUALIFICATION OF JUDGES § 10.2, at n.6; § 10.7 (1996); SHAMAN, *supra* note 7, § 4.25.

[20] MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(f) (2003).

"commit" or "appear to commit" the judge on that issue. Moreover, the revised Canon 3's phrase "appears to commit" may prove particularly troublesome to judges who teach. For example, in the classroom a judge may state that a particular decision is such a departure from sound policy or past precedent that it ought to be overruled. Such statements could be interpreted as appearing to commit to a particular legal issue.

B. The Revisions to Disqualification Violate the First Amendment

The phrase "appears to commit" in revised Canon 3 as applied to statements made by a candidate violates the First Amendment of the United States Constitution. Before the 2003 revisions to Canon 5 of the ABA Model Code of Judicial Conduct, the 1990 ABA Model Code of Judicial Conduct Canon 5A(3)(d)(ii) prohibited 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." However, the ABA Working Group decided to strike the words "appears to commit" in Canon 5A(3)(d)(ii) because they were "too vague to withstand strict scrutiny analysis."[21] As a consequence, under the 2003 revisions to Canon 5A(3)(d), candidates are permitted to make statements that "appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court," as long as the

[21] 2003 ABA Report 12.

statements are not "pledges, promises or commitments that are inconsistent with the performance of the adjudicative duties of the office."

Even though the phrase "appears to commit" is by the ABA Working Group's own admission "too vague," if elected candidates made previous statements that appeared to commit the candidates on certain issues, they would be disqualified from deciding such cases under revised Canon 3. It is abundantly clear that the intent of the revised disqualification provision is to limit campaign speech. In explaining the revised disqualification provision, the ABA Working Group stated that "[t]he language of this provision reflects the goals of Canon 5A(3)(d)"[22] which pertains to limits on campaign speech. Because another commentator has written a detailed discussion of the unconstitutionality of this disqualification revision to the ABA Model Code of Judicial Conduct, a constitutional analysis will not be undertaken here.[23]

As previously discussed, under the 2003 revised ABA Model Code of Judicial Conduct Canon 3E(1)(f) candidates who engage in the behavior permitted by Canon 5A(3)(d) making

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[22] 2003 ABA Report 11.

[23] Matthew J. Medina, *The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct*, 104 COLUM. L. REV. 1072, 1096-1107 (2004) (arguing that the revisions violate the First Amendment of the United States Constitution by being overbroad and vague). *Cf.* Family Trust Foundation of Kentucky, Inc. v. Wolnitzek, No. CIV.A.6:04-473-DCR, 2004 WL 2697598 (E.D. Ky. Oct. 19, 2004) (ruling on a motion for an injunction, the court held that the plaintiffs were not likely to prevail on their claim that Kentucky's statute and canon, which would require recusal for campaign statements, unconstitutionally chilled candidates from announcing their views).

public statements that "appear to commit" the candidates as to an issue must disqualify themselves if that issue comes before them as judges. Generally, a failure to disqualify can have two consequences: legal and ethical. The legal consequence is a reversal of the judge's decisions; the ethical consequence is the initiation of disciplinary proceedings against the judge, which can result in private discipline, public discipline, suspension, or removal from office.[24] The mere initiation of disciplinary proceedings, even if they are ultimately dismissed, can have adverse consequences, such as substantial legal fees for a defense, unfavorable publicity, and a tainted reputation. Because different standards apply to ethical disqualification and legal disqualification, an erroneous failure to disqualify may result in reversal on appeal, but may not always result in discipline for violating ethics.[25]

The effect of requiring disqualification for campaign statements that appear to commit the candidate will likely be to chill candidates from exercising their First Amendment rights to make campaign statements. Candidates may fear that after the election, they will be disciplined for not disqualifying themselves or for having engaged in conduct causing their disqualification.[26]

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[24] SHAMAN, *supra* note 7, § 13.03. If a judge must consider whether an incorrect judicial decision will subject the judge to discipline, the independence of the judiciary may be impaired. SHAMAN, *supra* note 7, § 4.01; *see* In re Curda, 49 P.3d 255, 261 (Alaska 2002) (multiple legal errors in a single case were not sufficient to require judicial discipline; the standard for determining legal error is different from the standard for determining judicial misconduct).

[25] SHAMAN, *supra* note 7, § 4.01.

[26] Medina, *supra* note 23, at 1097-98. However, one commentator has argued

Judges who have engaged in conduct that cause them to be disqualified from hearing too many cases can be removed from office.[27]

Under the 2003 revisions to the ABA Model Code of Judicial Conduct, candidates could cause their disqualification in many cases that would come before them as trial judges with only a few statements. For example, candidates could declare that they favor abortion, favor the death penalty, favor juries' decisions about the amount of damages, favor fathers' fulfilling their duty to financially support their children, and favor incarceration for drunk driving and selling drugs.

Indeed, it is quite possible that a successful candidate would be required to be disqualified in so many cases that the judge could rarely sit on cases.[28] As a practical matter such a result would deprive the voters of their right to elect a judge. It would also have other social and cultural negative consequences. If a judge were rarely sitting on cases, the judge would risk

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that candidates will not be chilled. For example, candidates can speak on issues that are not likely to come before them as judges and such statements can signal the voters about the candidates' views on other issues that are likely to come before the candidates as judges. Michelle T. Friedland, *Disqualification or Suppression: Due Process and the Response to Judicial Campaign Speech*, 104 COLUM. L. REV. 563, 619-20 (2004).

[27] *See* In re Anderson, 82 P.3d 1134 (Utah 2004). Governmental employees, all of whom were parties or lawyers in child welfare cases, had filed judicial discipline complaints against a judge alleging he did not dispose of the cases in a timely manner. In response, the judge disqualified himself from hearing such cases and filed lawsuits against the attorneys, which the court deemed a demonstration of bias by the judge requiring his removal from subsequent cases involving the attorneys. Because the judge was disqualified from hearing a substantial number of cases that would have been assigned to him, he was removed from office. *Id.* at 1144-45.

[28] Friedland, *supra* note 26, at 618.

impeachment, would have a reduced chance of winning a subsequent election to remain a judge (such as a retention election), would have a reduced chance of winning a subsequent election to higher judicial office, and would be subject to criticism for collecting a salary and not doing the job. All of these consequences would tend to deter candidates from exercising their First Amendment rights to make statements on issues during a judicial election campaign.

Moreover, the vagueness of the revised Code's phrase "appears to commit" makes it likely that parties to a lawsuit (and perhaps judicial disciplinary authorities) will argue that *any* statement about an issue that a candidate makes "appears to commit" the candidate because the statement is made in an attempt to obtain votes.[29] Indeed, even if a candidate made a disclaimer that such a statement was nevertheless not a promise on how the candidate would decide the issue if elected, the disciplinary authority or litigants could argue that the disclaimer was not genuine. The purpose of such campaign statements is arguably to signal the electorate, purportedly in compliance with the law, of the candidate's intent to so decide the matter if elected. Although such a view would be contrary to the Supreme Court's decision that under the First Amendment candidates can announce their views on disputed legal issues,[30] the candidate would risk later

[29] However, in *White*, the majority opinion states, "one would be naive not to recognize that campaign promises are — by long democratic tradition — the least binding form of human commitment." 536 U.S. at 780.

[30] *White*, 536 U.S. at 788 (holding that a canon of judicial conduct that prohibits

discipline for not disqualifying himself or herself from hearing such cases.

In contrast to the other grounds for disqualification which use more concrete terms,[31] the 2003 revisions concerning disqualification use the vague phrase "appears to commit" as a ground for mandatory disqualification for campaign speech. Whether that phrase should be used in deciding the legal issue of disqualification, which can lead to reversal on appeal, is not addressed in this article. However, when it is used in deciding the ethical issue of disqualification, the prospect of adverse personal consequences of a disciplinary proceeding will have the effect of either chilling the candidate from such campaign speech or causing the judge to disqualify to avoid disciplinary proceedings.

The revised Canon 3's phrase "appears to commit" also applies to candidates who are sitting judges. Sitting judges who are candidates and make statements that arguably "appear to commit" them regarding an issue will be faced with a disqualification motion while they are campaigning.[32] If they do not disqualify themselves, they risk a disciplinary complaint that

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judicial candidates from "announcing their views on disputed legal and political issues violates the First Amendment").

[31] MODEL CODE OF JUDICIAL CONDUCT Canon 3C (1972); MODEL CODE OF JUDICIAL CONDUCT Canon 3E (1990) (listing movement of lawyers between the public and private sector as another ground for disqualification).

[32] Not only does disqualification for a statement that "appears to commit" violate the First Amendment rights of candidates, but as to judges who are not candidates, disqualification for such statements is contrary to existing law which permits a judge to sit on cases in which the judge has strong or even fixed opinions on the law. State v. Perkins, 686 P.2d 1248, 1256 (Ariz. 1984); E. W. THODE, REPORTER'S NOTES TO THE CODE OF JUDICIAL CONDUCT 61 (1973).

will likely impair their election campaign.

C. The Revisions to Disqualification Would Impose Administrative Burdens

Disqualification for statements that appear to commit the candidate would impose a significant burden on court administrators. The administrators would be required to maintain a list of the types of cases judges would be disqualified from hearing and assign cases accordingly.[33]

Moreover, if candidates who make statements about their views are successful in being elected, it is likely that subsequent candidates will also make statements about their views, perhaps on the same issues, to win election. That will increase the number of judges who are disqualified from hearing certain cases and consequently increase the administrative burden.[34]

D. The Revisions to Disqualification Have No Time Limit or Provision for a Change of Circumstances

The revisions to the ABA Model Code of Judicial Conduct

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[33] Although this administrative burden would also apply to campaign statements that commit a candidate on a legal issue, it is not likely that there will be many such campaign statements because the Model Code of Judicial Conduct Canon 5A(3)(d)(i) (1990) prohibits such statements.

[34] It may be that eventually all of the judges on a court would be disqualified from hearing certain cases. If that occurs, under the rule of necessity, all judges would then be qualified to sit on a case. MODEL CODE OF JUDICIAL CONDUCT Canon 3E, commentary (1990); SHAMAN, *supra* note 7, § 4.03; FLAMM, *supra* note 19, §§ 1.2.4, 20.2; LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3 OF THE CODE OF JUDICIAL CONDUCT 8 (2d. ed. 1992). This scenario is quite possible, particularly in those courts that have a small number of judges.

Canon 3E(1) also require disqualification as to statements that commit or appear to commit the candidate with respect to an issue or controversy without any consideration of how long ago the statements were made or whether circumstances have changed. If a candidate made a public statement that committed or appeared to commit the candidate to a legal issue, disqualification should not be required if the passage of time or other circumstances would indicate that the candidate is not in fact biased or prejudiced about that issue, or if the appearance of bias or prejudice has been eliminated.

The law has recognized that the appearance of partiality may diminish over time. For example, after a certain amount of time has passed, a judge may hear a case in which the judge's former law firm or campaign contributor represents one of the parties.[35] A judge's views about legal issues may also change over time. As a judge gains experience or as other aspects of an issue become known or discussed, a judge's view about a legal issue may change, especially, but not only, if the underlying legal theory has changed in the meantime.[36]

A candidate may make campaign statements in one election and in the next election, years later, the candidate may disavow such campaign statements. For example, a candidate in one

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[35] *See, e.g.*, ILL. SUP. CT. R. 63(C)(1)(c) (requiring disqualification if within the past three years a judge practiced law with lawyer for a party); MODEL CODE OF JUDICIAL CONDUCT Canon 3E(1)(e) (1999) (permitting jurisdictions to specify a time limit for disqualification for a campaign contribution).

[36] *E.g.*, Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting).

election may state that the death penalty should be imposed whenever a person intentionally causes another's death. In the next election, the candidate may state that considering that there have been many persons who were sentenced to death who have been found by DNA evidence to not have committed the crime, whether the death penalty should be imposed depends upon the circumstances, such as whether there is physical evidence proving the accused perpetrated the crime. However, because there is no time limit on the 2003 revision to the disqualification provisions, after the second election the judge would still be disqualified from sitting on death penalty cases.

Under the disqualification provisions of the 1990 ABA Model Code of Judicial Conduct, the parties may waive the right to disqualification.[37] If the parties have waived the disqualification in a matter involving an issue to which the judge appeared to commit during a campaign and the judge then decided the issue in a way that was the opposite from the way the campaign statement appeared to indicate, subsequent parties could still insist on disqualification.

E. The Revisions to Disqualification Favor Appointed Judges over Elected Judges

Canon 5 of the ABA Model Code of Judicial Conduct prohibits candidates from making certain statements without distinguishing between whether they are private or public statements. In contrast, the revisions to Canon 3 of the ABA

[37] MODEL CODE OF JUDICIAL CONDUCT Canon 3F (1990).

Model Code of Judicial Conduct limit disqualification to "public statements." An analysis of the revisions to Canon 3 demonstrates that they have the effect of treating appointed judges more favorably than elected judges. The ABA favors the appointment of judges rather than the election of judges, and encourages bar associations in jurisdictions that elect judges to bring about the selection of judges.[38]

Under the ABA Model Code of Judicial Conduct, the term "candidate" applies both to persons seeking an appointment and persons seeking election to judicial office.[39] Judicial appointments involve selection by a nominating commission, an executive, and/or a legislative body, and sometimes also confirmation by a legislative body.[40] Any of the participants in selecting or confirming the candidate can ask the candidate in private for the candidate's views on legal issues and the candidate can make statements that "appear to commit" or even commit the candidate as to those issues.[41] In fact that has been done.[42] The practice of

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[38] *White*, 536 U.S. at 787.

[39] MODEL CODE OF JUDICIAL CONDUCT (1990), Terminology section, definition of "candidate."

[40] American Judicature Society, *Judicial Selection in the States, Appellate and General Jurisdiction Courts, "Summary of Initial Selection Methods,"* at http://www.ajs.org/js/SummaryInitialSelection.pdf (last visited December 20, 2004); U. S. CONST. art. II, § 2, cl. 2 (establishing that the president nominates federal judges with the advice and consent of the Senate); HENRY J. ABRAHAM, ET AL., JUDICIAL SELECTION: MERIT, IDEOLOGY, AND POLITICS 25-27 (1990) (discussing the use of a nominating commission); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 38-39 (1997) (discussing the use of a nominating commission).

[41] ABRAHAM, *supra* note 40, at 26.

[42] GOLDMAN, *supra* note 40, at 305 (discussing a National Public Radio report which found that several women candidates for judgeships were asked for their

participants who only select or confirm candidates who hold certain views is often described as imposing a "litmus test." It is certain that candidates who are appointed or confirmed under those circumstances have "passed" the test.

For example, in the federal judicial appointment process the candidate may have a private interview with the executive branch officials responsible for nominating candidates. The private interview reportedly may include a discussion of the candidate's reasoning in deciding various issues, such as federalism, separation of powers, statutory and constitutional interpretation, and how a candidate would rule on an abortion case.[43] Senators, who are responsible for confirming judicial nominees, may also question the candidate in private about the candidate's views on legal issues that he or she may face as a judge.[44] Examples of the type of questions senators may ask candidates in private may be evident from senators' public questions about the candidate's views on legal issues that the

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personal views on abortion, and if an abortion case came before them in court, how would they rule).

[43] GOLDMAN, *supra* note 40, at 303-05.

[44] *E.g.*, *Confirmation Hearing on the Nomination of Charles W. Pickering, Sr. to be Circuit Judge for the Fifth Circuit: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. 121 (2002) [hereinafter *Confirmation Hearing*]. To help avoid improper questioning, the American Judicature Society recommends that interviews of a candidate be conducted only when all of the members of a nominating commission are present. HANDBOOK FOR JUDICIAL NOMINATING COMMISSIONERS 132 (2d ed. American Judicature Society), *available at* http://www.ajs.org/selection/docs/ JNC_Handbk-Ch7.pdf (last visited December 20, 2004). Recently a candidate for the United States Senate stated that he would be inclined to vote against confirming a Supreme Court nominee who opposed abortion. Carrie Budoff, *Senate Bidders go on the Offensive*, PHILADELPHIA INQUIRER, October 10, 2004, at B1.

candidate may face as a judge. Such questions have included whether the candidate will "strictly adhere" to a particular precedent.[45] The answer to that question, "[a]bsolutely" was a commitment insofar as, at least on its face, it places an insurmountable burden on a party who may seek to distinguish that precedent.[46]

In contrast, in an elective system, candidates can make statements in private to party leaders and interest groups that arguably serve as the candidates' Cyrano de Bergerac in courting the voters. Ultimately, however, the candidate must obtain the votes of the public. To obtain those votes, the candidate may have to directly appeal to the public through public statements.[47] Under the revised disqualification standards, if the candidate makes the same sort of statements in public that an appointed candidate makes in private (statements, for example, that appear to commit the candidate as to issues that the candidate may face as a judge), the appointed candidate would not be required to disqualify, while the elected candidate would.

If the revised Canon 3's requirement of disqualification for

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[45] *Confirmation Hearing*, *supra* note 44, at 131.

[46] *Confirmation Hearing*, *supra* note 44, at 131. If a party believes that a nominating commission has asked a candidate questions that commit a candidate to certain legal issues, the party may attempt to question members of the commission to support the party's disqualification motion. The question of whether the members of the nominating commission would be granted immunity from testifying is beyond the scope of this article.

[47] It is doubtful that a candidate would be required to disqualify solely because of an interest group's endorsement. Such endorsements are on par with the support of a senator who has a litmus test. It is not necessarily known how the endorsement was obtained or how the test was passed. The public policy of transparency is not served by creating a fleet of submarines.

statements that appear to commit the candidate is premised on the idea that such statements reflect the candidate's actual partiality, then disqualification should not be limited to public statements, but should also include private statements. However, if the revised Canon 3's requirement of disqualification for statements that appear to commit the candidate is based on the idea that such statements merely create an *appearance* of partiality, then the limitation of disqualification to public statements makes sense. Only public statements, not private statements, impair the public appearance of impartiality.

On the other hand, it may be preferable for a judge or candidate to disclose his or her views to the public because such disclosure provides litigants with a basis for moving for disqualification. If such views are not disclosed, litigants would not have the opportunity to move for disqualification and require the judge to make a conscious decision on whether the judge is truly impartial.[48]

Although statements that commit a candidate to an issue are prohibited by Canon 5A(3)(d), a candidate for appointment may make private commitments because the candidate may believe such commitments are necessary to be selected for judicial office.

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[48] Mississippi Comm'n on Judicial Performance v. Wilkerson, No 202-JP-02105-SCT, 2004 WL 1471110, at *8 (Miss. July 1, 2004), stating that:

> Allowing—that is to say, forcing—judges to conceal their prejudice against gays and lesbians would surely lead to trials with unsuspecting gays or lesbians appearing before a partial judge. Unaware of the prejudice and not knowing that they should seek recusal, this surely would not work to provide a fair and impartial court to those litigants.

The candidate may not fear discipline for violating Canon 5A (3)(d) because the commitment is private. Statements that commit a candidate to an issue that may come before the candidate as a judge indicate that the candidate is not impartial (which the revised Code defines as including openmindedness). However, the revised Canon 3 requires disqualification for public statements of commitment, but not for private statements of commitment.[49]

The effect of limiting disqualification to public statements is to exalt appearance over reality. As discussed in detail above, revised Canon 3 requires disqualification for public statements that appear to commit a candidate to an issue because such public statements create a public appearance of partiality while private statements do not. In contrast, although both public and private statements that commit candidates with respect to an issue reflect actual partiality instead of just the appearance of partiality, revised Canon 3 only requires disqualification for public statements of commitment.[50]

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[49] That a candidate makes a private statement of commitment to the selecting or confirming officials does not necessarily decrease the likelihood that the commitment will be kept. A candidate has an interest in maintaining a reputation for keeping commitments and some candidates may keep their commitments because they desire to be selected for a higher judicial office in the future. Moreover, a candidate is more likely to keep a commitment to a governor or a senator than to the electorate.

[50] Neither the 1972 Code of Judicial Conduct nor the 1990 Code of Judicial Conduct expressly requires disqualification if the judge has a fixed opinion about a legal issue. In contrast, they both have an express provision requiring disqualification for bias or prejudice concerning a party or a party's lawyer. CODE OF JUDICIAL CONDUCT Canon 3C(1)(a) (1972); CODE OF JUDICIAL CONDUCT Canon 3E(1)(a) (1990). Laws or rules that require judges to disclose their personal financial information are intended in part to provide parties with information they can use for a disqualification motion. The 1972 Code reporter's

Thus, the revised Canon 3's limitation to "public statements," treating appointed judges more favorably than elected judges, is contrary to sound policy.

IV. CONCLUSION

In response to the United States Supreme Court's decision in *Republican Party of Minnesota v. White*,[51] which held that an ABA Model Code of Judicial Conduct provision adopted by Minnesota violated the First Amendment of the United States Constitution, the ABA adopted revisions to the ABA Model Code of Judicial Conduct in 2003. Some of those revisions are not sound. The definition of impartiality is too broad and will impose an administrative burden on a court. It should be revised as suggested above. The revisions to disqualification are too broad, violate the First Amendment, impose administrative burdens, have no time limit, should not apply when there is a change of circumstances, and improperly favor appointed judges over elected judges. Those jurisdictions that will consider adopting the 2003 revisions to the ABA Model Code of Judicial Conduct should give careful consideration to whether the definition of impartiality and disqualification provisions should be adopted.

32, at 61.
[51] 536 U.S. 765; MODEL CODE OF JUDICIAL CONDUCT (2002).