

Judicial Ethics Advisory Committee

August 22, 2002

Dear Candidate,

The North Dakota Judicial Ethics Advisory Committee has received a number of inquiries regarding the impact of the U.S. Supreme Court decision in [Republican Party of Minnesota v. White, 122 S.Ct. 2528 \(2002\)](#). The White case determined that a part of one of Minnesota's rules regarding conduct of judicial candidates during elections was unconstitutional. This committee can only provide ethics opinions based on actual facts, but we thought it would be helpful to provide you with an overview of what the case did or did not decide.

North Dakota Judicial Elections are primarily guided by Canon 5 of the North Dakota Code of Judicial Conduct. North Dakota does not have the "Announce" clause that the Supreme Court found objectionable in Minnesota's Code of Judicial Conduct. The Announce clause prohibited a candidate from announcing his or her views on disputed legal or political issues. White found the Announce clause to be unconstitutional as a restriction on free speech.

Candidates should note the disqualification provisions of Canon 3E(1) of the North Dakota Code of Judicial Conduct. Any candidate that takes a position on legal or political issues may be required to recuse from a case if her or his impartiality might reasonably be questioned.

Canon 5A(3)(d)(ii) of the North Dakota Code of Judicial Conduct can be termed the "Commit" clause. The clause reads, "[a judicial candidate 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." The Supreme Court mentioned this type of a clause in a footnote in White but offered no opinion on the clause.

The U.S. Supreme Court in White also referred to the "Promise" clause, which is a part of the Code of Judicial Conduct in North Dakota, Minnesota and in most other states. The Court specifically stated that the Promise clause was not challenged in the case and the Court did not express a view on its constitutionality. Canon 5A(3)(d)(i) is North Dakota's Promise clause. It prohibits a candidate from "making pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office."

To summarize, White did not directly address the content of Canon 5 of the North Dakota Code of Judicial Conduct. At least for the upcoming elections candidates for judicial office should look to Canon 5 for guidance on conducting their campaigns. Our committee and others will be looking at Canon 5 in more detail over the next couple of years and the U.S. Supreme Court may be addressing other questions on the conduct of judicial campaigns in the near future.

There are other details in White that you as a candidate should be familiar with. To assist you we have included an excellent analysis of the case prepared by Elaine Ayers of UND Law School,

who serves as an advisor to the committee, and a July 12, 2002, statement from the National Ad Hoc Advisory Committee on Judicial Election Law.

Please contact any of our members if you have questions we may assist you with. We are always available to speak informally with you and we will issue formal opinions if you have specific ethical questions that may be of interest to judicial candidates or sitting judges.

Ronald E. Goodman, Chair
Judicial Ethics Advisory Committee