

FINAL REPORT OF THE COMMISSION ON JUDICIAL ELECTIONS AND ETHICS

CREATION, MEMBERSHIP, AND MISSION

The Commission on Judicial Elections and Ethics was created by the Supreme Court of Wisconsin on March 7, 1997. The Honorable Thomas E. Fairchild of the United States Court of Appeals for the Seventh Circuit was appointed chairperson of the Commission and Professor Charles D. Clausen of Marquette University Law School was appointed as Reporter. The members of the Commission, in addition to the Chair and Reporter, are:

- Attorney Carl Ashley of Milwaukee
- Professor Gordon Baldwin, University of Wisconsin Law School, Madison
- Attorney Linda Balisle of Madison
- Ms. Ruth Clusen of Green Bay
- Fr. Robert Cornell of St. Norbert College, De Pere
- Mr. Tim Cullen of Milwaukee
- Mr. Ron Domini of Madison
- Circuit Judge Timothy Dugan of Milwaukee
- Court of Appeals Judge Charles P. Dykman of Madison
- Ms. Patricia Finder-Stone of De Pere
- Mr. Roger L. Fitzsimonds of Milwaukee
- Circuit Judge Ramona Gonzales of LaCrosse
- Municipal Judge James A. Gramling, Jr., of Milwaukee
- Attorney Michael W. Grebe of Milwaukee
- Circuit Judge Charles D. Heath of Marinette
- Representative Gregory B. Huber of Wausau
- Mr. Fred Luber of Milwaukee
- Attorney John MacIver of Milwaukee
- District Attorney E. Michael McCann of Milwaukee
- Attorney Maureen A. McGinnity of Milwaukee
- Mr. Rod Nilsestuen of Madison
- Circuit Judge Sarah B. O'Brien of Madison
- Senator Mary Panzer of West Bend
- Attorney George K. Steil, Sr. of Janesville
- Ms. Barbara Stein of Milwaukee, and
- Ms. Carol Toussaint of Madison.

The Commission was assigned:

to review the provisions of the Code of Judicial Conduct addressing political and campaign activity of judges and candidates for judicial office, determine the extent to which those provisions adequately address issues relevant to the Wisconsin elective system in selecting members of its non-partisan judiciary, and recommend provisions for inclusion in the Code of Judicial Conduct that would better address the issues to which the current Code's provisions are directed and to address relevant issues the current Code does not address.

In accordance with the court's instructions, the Commission filed an Initial Report on October 27, 1997. In that Initial Report, the Commission undertook to identify the political and campaign issues inherent in the election of non-partisan judges and in the activity of those judges while in office. On June 17, 1998, the supreme court responded to the Initial Report and provided additional instruction to the Commission.

In its response respecting the Initial Report's identification of campaign finance issues, the court asked the Commission to address as threshold questions (a) whether the Code of Judicial Conduct should contain special rules regarding campaign financing for judicial elections and (b) whether it would be unfair, counterproductive, or otherwise undesirable to restrict candidates and their personal committees by campaign finance rules that do not apply also to independent expenditures. The court also instructed the Commission not to pursue as an issue whether there should be limits on a judge's or candidate's contribution to the candidate's own campaign. The court asked the Commission to state its observations and recommendations concerning public financing of judicial elections.

Regarding campaign content issues, the court asked the Commission to address each of the seven issues identified in the Initial Report.

Regarding the Initial Report's identification of issues involving political, civic, and charitable organizations, the court cautioned the Commission that the Commission is not to consider overturning long-standing rules governing judge and judicial candidate conduct, but invited the Commission to examine the identified issues listed in the Initial Report. The court asked the Commission to address how the terms "membership" and "active participation" should be defined. The court instructed the Commission to address each of the issues identified with respect to civic and charitable organizations, but to limit its inquiry to the specified conduct as it relates to "interest groups." The court also asked the Commission to

undertake to define what constitutes an “interest group” and to consider how judicial conduct in relation to them should be regulated.

The court asked the Commission to address the issue of whether part-time municipal judges should be permitted to hold other nonpartisan offices.

The court asked the Commission to address all the endorsement issues identified in the Initial Report.¹

Lastly, the court asked the Commission to consider whether the rules related to judicial elections and ethics should be mandatory or aspirational, whether they should apply with equal vigor to all candidates, and whether they should apply to candidates for judicial appointment as well as candidates for election.

THE COMMISSION’S PROCESS

After receiving the court’s response, our task became to consider further the many issues we had identified in our Initial Report, and to recommend rules where we found regulation appropriate. The Chair requested the Reporter to prepare a survey of the commissioners to ascertain their views on the many issues identified in the Initial Report. The Survey that was drafted consisted of 201 survey items so drafted as to permit “yes”, “no” and “no opinion” responses². Responses to the survey were received from most of the commissioners. Consistent with our experience in earlier meetings of the full Commission and of the three committees, there was a considerable range of opinion among the commissioners. Several commissioners believe the fund-raising, campaign content, and other ethical problems encountered in electing judges and justices cannot be effectively solved, and they would prefer selection by a system often referred to as the Missouri Plan, i.e., appointment by the governor from a list created by a representative panel, and periodic votes by the people on whether the judge should be retained.³ Other commissioners favor a minimum or substantial absence of mandatory rules, believing that the problems encountered in electing judges is simply the price we pay for choosing to elect judges.

¹ The last issue in the endorsement section of the Initial Report related to the issue of a judge becoming a candidate for another elective office during the judge’s term of judicial office. The issue is controlled by SCR 60.01 and the court instructed the Commission not to further consider the matter.

² A copy of the Survey instrument is submitted to the court with this Report.

³ Several other commissioners strongly oppose such a system and for a variety of reasons (for example, because they favor full electoral participation in judicial selection and retention, or because retention elections present the electorate with no alternative candidate).

The Commission reconvened in Madison on January 18, 1999 to discuss the survey results and consider how to proceed further. Varying numbers of commissioners were (and are) of the opinion that regulation would be appropriate to deal with many of the issues identified in our Initial Report but not addressed in the proposed rules we have submitted to the court. Nonetheless, there was (and is) consensus that the Commission should recommend to the court only those rules which have the support of all or of a substantial majority of the commissioners.⁴ Thus, at the January 18, 1999 meeting, the Reporter was instructed to attempt to write tentative draft rules that reflected the will of the Commission insofar as that will was reflected in the responses to the 201 item survey. The commissioners present also decided, largely by consensus, (1) to endorse full public financing of supreme court elections, at least on an experimental basis, and (2) to decline to attempt any regulation with respect to “interest groups.”

The Reporter prepared and distributed tentative draft rules which were discussed at a April 23, 1999 Commission meeting held in the Milwaukee and Madison offices of Quarles & Brady, with the commissioners communicating by teleconferencing equipment. Following that meeting, the Reporter prepared and distributed Tentative Final Drafts of revisions to SCR 60.06 and 60.07 and a Tentative Draft of this Report which were considered by the Commission at a meeting on May 14, 1999 in the Madison and Milwaukee offices of Quarles & Brady. At the May 14 meeting, the commissioners considered, amended, and approved the drafts of the rules and of this Report.⁵ The final submission drafts of proposed rules and of this Report were made after the May 14, 1999 meeting and distributed to the commissioners on May 19.⁶ The Commission’s proposed rules accompany this Report.

CAMPAIGN FINANCE

THE COMMISSION RECOMMENDS FULL PUBLIC FINANCING OF SUPREME COURT ELECTIONS AS SOON AS PRACTICABLE, FULL PUBLIC FINANCING OF COURT OF APPEALS ELECTIONS THEREAFTER, AND SERIOUS CONSIDERATION OF PUBLIC FINANCING OF JUDICIAL ELECTIONS FOR ALL COURTS OF RECORD.

⁴ Accordingly, we have not proposed rules supported only by a bare majority of the commissioners.

⁵ At this meeting, the commissioners also expanded their recommendation concerning public financing of judicial races to include campaigns for the court of appeals and for other courts of record. See page 5, *infra*.

⁶ Any commissioner who wished to prepare a Separate Statement for submission with this Report was invited to submit the statement to the Reporter by May 27, 1999.

In their responses to the Survey of Commissioners, the commissioners were rather evenly divided on the general issue of public financing of judicial elections.⁷ Substantial support exists, however, for full public financing of supreme court and court of appeals races. The cost of statewide races has escalated dramatically over the last several elections, almost certainly exceeding \$1 million for the last race and \$867,000 for the preceding race. This fact places enormous strain on the candidates and their committees and other supporters to raise money from all available sources: personal resources, individual contributors (many of whom will be lawyers), and interest groups. The fundraising inevitably raises questions of bias and partiality and judicial independence which tend to undermine public confidence in the integrity of judicial officers and judicial process. The potential of independent expenditures by special interest groups, some of them single issue advocacy groups, creates additional financial challenges for judicial candidates, especially at the state-wide level. Court of Appeals races are not so expensive as supreme court races, but candidates for these judgeships must contend with escalating costs of media in high population areas, the costs of campaigning in many different counties, or both. The need for public financing at the state-wide level is perceived by a majority of the commissioners to be immediate and urgent. For the reasons stated above and in the following paragraph of this report, the majority of the commissioners also believe that serious consideration should be given to public financing of all judicial campaigns for courts of record.

THE CODE OF JUDICIAL CONDUCT SHOULD CONTAIN SPECIAL RULES REGARDING CAMPAIGN FINANCING FOR JUDICIAL ELECTIONS.

The Commission believes that a central problem with an elected judiciary is the difficulty of preserving both the fact and the appearance of judicial independence. Judicial independence is essential, not for the sake of the holders of judicial office, but for public confidence in the integrity of the judicial process and in the Rule of Law. The Commission notes, with regret, that across the nation and in Wisconsin, judicial election campaigns are becoming more expensive, more combative, and more driven by professional media and political consultants. The need to raise money to finance a contested judicial election is, for most judges at least, a curse. Soliciting money from others, most of whom will be lawyers who practice in the court to

⁷ Question 42 in the Survey simply inquired: "Do you favor some form of public financing of judicial election campaigns? If so, on a separate response sheet or in a cover letter returning the survey response sheet, please indicate what kind of plan you favor." The Survey did not inquire separately with respect to supreme court races, court of appeals races, and other judicial races.

which the candidate seeks election, inevitably compromises the judicial candidates' appearance of independence. *Pro tanto*, the public's confidence in the impartiality, integrity, and independence of the courts is compromised. Candidates for legislative and executive offices are free to raise money from contributors with relative freedom from reputational harm and accusation of impropriety. Indeed, the ability to generate broad-based financial support from the electorate may be considered a sign of widespread public approval of a partisan candidate. Judges are in a different position. They cannot realistically expect to generate broad public financial support for judicial campaigns. The same requirements of impartiality and independence that support public respect for the judiciary work at cross purposes when it comes to raising campaign money. The judge ought not appeal to any "special" interest. The judge ought not promise behavior in office other than the impartial fulfillment of his or her oath to apply the law fairly and impartially. As a practical matter, the judge's campaign treasury must be nourished mainly by the judge's own funds and by funds contributed by those with a professional interest in the administration of justice, i. e., mostly lawyers. The knowing solicitation or acceptance of campaign contributions from litigants with cases before the court to which election is sought would create insuperable problems in terms of perceptions of bias, undue influence, and coercion that are unacceptable in our system of justice. Rules will not make the inherent problems go away but rules can help to avoid unnecessary erosion of public confidence in the honor, integrity and impartiality of the judiciary.

JUDICIAL CANDIDATES AND THEIR COMMITTEES SHOULD BE SUBJECT TO CAMPAIGN FINANCE RULES EVEN THOUGH THE RULES MAY NOT APPLY TO INDEPENDENT EXPENDITURES.

In its Initial Report, the Commission noted

A recurring focus of discussion during the Commission's deliberations was the growing impact in election processes of independent expenditures by advocacy groups or even individuals. Restrictions on judicial candidates and their committees that would be justifiable if only the candidates and committees were active in the election process may be unfair, counterproductive, or otherwise undesirable if substantial independent expenditures are made in an attempt to influence the outcome of the election. If independent expenditures are beyond the reach of the court's regulatory powers, under *Buckley v. Valeo*, or if it is in any event undesirable to attempt to regulate independent expenditures, care must be taken in

crafting any rules applicable only to candidates and their committees. . .

Initial Report, p. 5-6

A substantial majority of the commissioners share the view that, as a policy matter, campaign finance rules that are applicable to judicial candidates and their committees should also apply to individuals or groups making independent expenditures. The Commission has concluded that it cannot effectively navigate the shoals of the First Amendment in this area. A majority of the commissioners believe that even if rules cannot or do not apply to independent expenditures, it is not unfair, counterproductive, or otherwise undesirable to restrict candidates and their committees. As is reflected in the proposed SCR 60.06(5), however, a majority of the commissioners are not in favor of extensive regulation of campaign finance.

THERE SHOULD BE NO LIMITS ON CONTRIBUTIONS BY LAWYERS OTHER THAN THOSE PRESCRIBED GENERALLY BY THE LEGISLATURE.⁸

Although a sizable minority of the commissioners favors limitations on the amount of lawyer contributions to judicial campaigns, the majority of the commissioners favor no restriction on the amount of money that may be contributed by a lawyer other than limits on campaign contributions generally applicable under §11.26, Wis. Stats. The Beilfuss/DeWitt recommendation to the court was that judicial campaign committees could accept “reasonable” contributions from lawyers, a provision also found in the 1990 ABA Model Code [§ 5C(2)]. A majority of the commissioners believe that the dollar limitations found in §11.26, Wis. Stats., are themselves reasonable, and that relying on dollar limitations on lawyers’ (and others’) contributions is preferable to reliance on an indeterminate “reasonable” standard.

JUDGES, JUDGES-ELECT, AND NONINCUMBENT CANDIDATES FOR JUDICIAL OFFICE SHOULD BE PROHIBITED FROM PERSONALLY SOLICITING OR ACCEPTING CAMPAIGN CONTRIBUTIONS.

A substantial majority of the commissioners are of the view that a judge ought not personally to solicit campaign contributions from anyone. One who has or seeks judicial power ought not be seen with his or her hand out to contributors. The most likely targets of campaign solicitation are too

⁸ This paragraph responds to the issue that the court restated as: “Should judges, judicial candidates, and personal committees be limited on the amount of contributions they may accept from lawyers?”

likely to be subject to perceptions of undue influence or coercion on the part of the judge or would-be judge. The dignity, honor, and independence that should attend and characterize the judiciary would be badly impaired by judges' doing their own campaign fund-raising.

CAMPAIGN COMMITTEES SHOULD BE PERMITTED TO SOLICIT AND ACCEPT LAWFUL CONTRIBUTIONS TO JUDICIAL CAMPAIGNS FROM LAWYERS AND OTHER CONTRIBUTORS. CONTRIBUTIONS SHOULD NOT KNOWINGLY BE SOLICITED OR ACCEPTED FROM LITIGANTS WITH MATTERS BEFORE THE COURT TO WHICH ELECTION IS SOUGHT.

By reason of experience or professional associations or both, lawyers are often better able to assess judicial qualifications in candidates for judicial office. Because of their professional interest in the administration of justice, lawyers are also the most likely contributors to judicial election campaigns which are becoming increasingly expensive (in some cases alarmingly so). Restricting contributions from lawyers would remove from the judicial campaign finance picture the potential contributors who are both the best informed and the most likely to contribute. It would also tend to restrict potential candidates for judicial office to those who can fund their campaigns from their own wealth without resort to broad-based financial and other support. Candidates who may have outstanding qualifications for judicial office but little personal wealth would be less likely to offer themselves to the electorate for public service.

A substantial majority of the commissioners share the belief that litigants with matters before the court to which election is sought ought not to be solicited for contributions, nor should contributions be accepted from such contributors. Both the solicitation and acceptance of contributions from current litigants would be at best unseemly. Worse, it would create undesirable pressure on their adversaries to make "compensating contributions" and inevitably raise questions as to the impartiality of the recipient of such contributions, perhaps leading to wasteful disqualifications or recusals. On the other hand, the commissioners are aware of the fact that many Wisconsin courts have crowded dockets that change every day as new cases are filed and others are dismissed. The commissioners are also aware that the names of the "real parties in interest" (economically or otherwise) in many cases may not appear on the papers filed in court. It is not expected that candidates will have to cull docket lists and case files to identify all litigants before the court and to crosscheck the information against mailing lists and contributors lists. The Commission believes that a rule prohibiting the knowing solicitation or acceptance of contributions from litigants with matters before the court is sufficient.

A number of the commissioners, though not a majority, share the view that contributions should not be solicited or accepted from lawyers with current cases before the court to which election is sought. The majority disfavor restricting solicitation and acceptance of contributions by lawyers for the reasons stated on the preceding page. There is a danger of both the perceptions of and the reality of coercion and undue influence when a lawyer with a matter before the court is solicited for a campaign contribution, but the danger is lessened by the requirement that such a solicitation may not be made by the judge himself or herself, but only by the committee. Under the rule proposed by the Commission, the judge may serve on his or her committee, but should avoid direct involvement in its fundraising efforts. The commissioners were almost evenly divided on the issue whether judges and candidates ought to be prohibited from serving on their own committees, but a solid majority favored a rule that exhorted such judges and candidates to avoid direct involvement in the committee's fundraising efforts.

THE COMMISSION DISFAVORS RULES RESTRICTING MEMBERSHIP ON CAMPAIGN COMMITTEES OR THE CHOICE OF CAMPAIGN CONSULTANTS OR MANAGERS.

Among the issues identified by the Commission in its Initial Report was whether rules should limit membership on personal campaign committees or the choice of campaign consultants or managers so as to avoid the identification of judges or judicial candidates with political partisans or advocacy groups. Judicial elections in Wisconsin are nonpartisan. Political partisanship in judges is viewed as a serious threat to judicial independence and to the fact and appearance of judicial impartiality. Hence the rules restricting political activities by judges⁹ and the proposed rules restricting political activities by candidates for judicial office.¹⁰ The nonpartisan nature of a judicial campaign may be compromised by the composition of personal campaign committees and by the choice of campaign managers and consultants. The same may be true with respect to persons closely identified with controversial political issues likely to come before the court. Nonetheless, the substantial majority of the commissioners disfavor regulation in this area. The great majority, if not all, candidates for judicial office in Wisconsin seek to obtain broad nonpartisan and bipartisan support for their candidacies. Some supporters (and committee members and consultants and managers) may be associated with one political party or interest group while other supporters may be associated with competing groups. Identification with particular parties or interest groups often works against the interests of candidates and is not considered by the majority of

⁹ See SCR 60.06(2)

¹⁰ See pp. 16-20, *infra*.

commissioners to be a problem inviting regulatory control by the court. It should be noted that the issues addressed under this heading are not unrelated to the issues involving endorsements. The substantial majority of the commissioners disfavored restrictions on endorsements.

SPECIAL RULES ON DISQUALIFICATION OR RECUSAL ARE NOT RECOMMENDED.

It is unknown to what extent judges recuse themselves from matters because of campaign activities by lawyers or litigants. Recusals are not litigated; only refusals to recuse are litigated. Furthermore, judges who recuse themselves are not required to state the reason for recusal. Recusal generally is governed by SCR 60.04(4)¹¹ which requires recusal under certain specified circumstances and also “when reasonable well-informed persons knowledgeable about judicial ethics standards and the justice system and aware of the facts and circumstances the judge knows or reasonably should know would reasonably question the judge’s ability to be impartial.” The Commission’s Initial Report pointed out that this test may be so imprecise in the campaign financing and support area as to be unhelpful, both to judges and to litigants and their attorneys.¹² The Beilfuss/DeWitt committee stated in its Commentary to its proposed Section 5C(2): “Though not prohibited, campaign contributions of which a judge has knowledge, made by lawyers or others who appear before the judge, may be relevant to disqualification under [the committee’s version of SCR 60.04(4)].” The Commission agrees with this statement in the Beilfuss/DeWitt committee. The commissioners are divided, however, on the general issue of whether special rules are required with respect to disqualification or recusal based on campaign contributions or campaign activities. It should be noted that a substantial majority of the commissioners disfavored a rule that would require disqualification or recusal when an attorney or litigant has contributed more than a specified dollar amount to the judge or judge’s opponent. A substantial majority also disfavored a rule that would require disqualification or recusal when an attorney or litigant has served as a member of the judge’s campaign committee or the committee of the judge’s opponent. Thus, no new rule is proposed.

¹¹ Additionally, § 757.19, Wis. Stats. Sets forth the circumstances under which a judge is required by law to disqualify himself or herself and establishes the procedure for disqualification and waiver.

¹² “Although the test was meant to be objective, one court has noted that it is inherently subjective. (Citations omitted.) That is because the appearance of partiality depends upon one’s standard of observation, which will vary from individual to individual. In reality, there is no objective standard to determine the appearance of partiality, but it is clear that the appearance of partiality is to be decided from the viewpoint of a disinterested observer, and not from the subjective viewpoint of the judge in question.” Shaman, Lubet, and Alfini, JUDICIAL CONDUCT AND ETHICS 144 (1990)

NO NEW RULE IS PROPOSED RESPECTING THE TIMING OF JUDICIAL CAMPAIGN FUNDRAISING.

The ABA Model Code and a number of state codes of judicial conduct restrict the time within which a judicial candidate may solicit and accept campaign funds. The ABA Model Code provides that a candidate's committee may solicit contributions and public support for the candidate's campaign no earlier than one year before an election and no later than ninety days after the last election in which the candidate participates during the election year. The Beilfuss/DeWitt Committee recommended that solicitation of contributions and public support be permitted "for a reasonable period of time before and after the last election in which the candidate participates during the election year." A substantial majority of the commissioners disfavor regulation in this area. There was very little support, for example, for a rule that would restrict campaign fundraising by an incumbent until active opposition develops or for a rule that would prohibit all fundraising after an election. The commissioners were more evenly split on the issue whether fundraising should be prohibited except for a specified period of time before an election and a specified period of time after an election. Thus, no rules are proposed.

NO SPECIAL RULES ARE RECOMMENDED RESPECTING THE USE OF JUDICIAL CAMPAIGN FUNDS.

The Beilfuss/DeWitt Committee recommended a rule similar to the ABA Model Code respecting use of campaign funds: "A candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others."¹³ The Committee added a recommended prohibition on transferring funds already collected for a partisan campaign to a judicial campaign committee or otherwise using such funds for a judicial campaign. The Commission notes that the use of campaign funds has been addressed by the legislature in § 11.25, Wis. Stats. The commissioners were divided on the issue of whether the rules of judicial conduct should address explicitly the proper uses of campaign funds, including excess campaign funds. Thus, no new rule is proposed.

CAMPAIGN CONTENT

THE RULES SHOULD PROHIBIT CAMPAIGN RHETORIC THAT COMMITS OR APPEARS TO COMMIT A CANDIDATE FOR JUDICIAL OFFICE WITH RESPECT TO PARTICULAR CASES, CONTROVERSIES, OR ISSUES LIKELY TO COME BEFORE THE COURT. CAMPAIGN RHETORIC CONCERNING COURT RULES OR

¹³ The Model Code refers to "the private benefit of [the candidate] or his family."

ADMINISTRATIVE PRACTICES AND POLICIES SHOULD NOT BE RESTRICTED.

At least since the 1924 ABA Canons of Judicial Ethics, campaign promises by judicial candidates have been considered problematic. The 1924 Canons proscribed promises appealing to “cupidity or prejudices of the appointing or electing power” and forbade a candidate’s announcing in advance “his conclusions of law on disputed issues to secure class support.” The 1972 Model Code forbade promises of conduct in office “other than the faithful and impartial performance of the duties of the office” and announcing “his views on disputed legal or political issues.” The 1990 Code repeated the proscription of promises other than the faithful and impartial performance of the duties of the office and forbade campaign 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 Beilfuss/DeWitt Committee recommended a rule that proscribed promises that “would appeal to the partisanship of the electorate” and statements that commit or appear to commit a candidate with respect to “cases or controversies that were likely to come before the court.” The Beilfuss/DeWitt Committee omitted the ABA language about “issues” that were likely to come before the court, commenting: “The drafters specifically omitted the words “or issues” in the ABA Model Code to allow the voters to receive valuable information in judicial elections.”

A substantial majority of the commissioners favor a rule like the 1990 ABA rule which prohibits campaign rhetoric that “commits or appears to commit” a candidate with respect to particular cases, controversies, or issues likely to come before the court” to which the candidate seeks election or appointment. The Commission would add to that rule, however, a provision that candidates are not prohibited from making statements of position concerning court rules or administrative practices or policies.

THE RULES GOVERNING JUDICIAL ELECTIONS SHOULD EXPLICITLY PROHIBIT MISREPRESENTATIONS BY CANDIDATES, AS WELL AS RHETORIC THAT IS KNOWINGLY MISLEADING OR KNOWINGLY LIKELY TO CONFUSE THE ELECTORATE WITH RESPECT TO THE PROPER ROLE OF JUDGES AND LAWYERS IN THE AMERICAN ADVERSARY SYSTEM

Prohibitions of misrepresentations by judicial candidates are commonplace throughout the U. S. Difficult issues arise as to whether such prohibitions should be limited in scope or broad. The 1990 ABA Model Code and the Beilfuss/DeWitt Committee recommendation by their express terms prohibited only knowing misrepresentation of “the identity, qualifications, present position or other fact concerning the candidate or an opponent.” SCR

20:8.2(a), on the other hand, prohibits lawyer candidates from making statements “that the lawyer knows to be false or with reckless disregard as to its truth of falsity concerning the qualifications or integrity of a judge . . . or of a candidate for election or appointment to a judicial . . . office.” The New Mexico code omits “knowingly” from its prohibition of misrepresentations by judicial candidates and limits its prohibition to “material facts”. Section 12.05, Wis. Stats., provides: “No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.” Violation may result in a fine not to exceed \$1,000 or imprisonment not more than 6 months, or both.

The Commission proposes a rule [proposed SCR 60.06(a) and (c)] that consists of several elements. The proposed SCR 60.06(a) calls upon every judge, judge-elect, and candidate for judicial office to “maintain, in campaign conduct and otherwise, the dignity appropriate to judicial office.” Conduct amounting to misrepresentation or intentional misleading or confusing of the electorate is presumably not consistent with the dignity appropriate to judicial office.

SCR 60.06(3)[3] deals expressly with misrepresentations or other wrongful statements. The first sentence is hortatory, urging all candidates for judicial office to restrict his or her comments concerning an opposing candidate to matters which are relevant to the opponent’s integrity, impartiality, judicial philosophy and temperament, legal ability and industry.

The second sentence addresses statements that are true but knowingly misleading or knowingly likely to confuse the public respecting the proper function of judges and lawyers in the American adversary system. The American electorate received an education in statements that are arguably true but intentionally misleading in the recent presidential impeachment proceedings. Whether the electorate is knowingly and intentionally misled by a simple lie or by a craftily parsed truth amounts to a distinction without a difference: the electorate has been knowingly misled. Neither judges nor candidates for judicial office should engage in such conduct. Nor should judicial candidates knowingly engage in campaign rhetoric that is likely to confuse the electorate about the proper role of judges and lawyers in the American adversary system. Campaign literature or ads that urge the public to vote against a candidate because the candidate represents citizens accused of crime wrongly conflates the accused and the attorney, the client and the lawyer. Such campaign rhetoric tends to discourage attorneys from representing citizens entitled by the Constitution to counsel and is likely to lead nonlawyers to think that one who represents a bad person *is* a bad person. Similarly, campaign rhetoric that suggests that voting for a

particular judicial candidate will result in reforms that can only be effected by the legislature or the executive or other agencies or departments of the government is misleading, confusing, and wrong. Such conduct would be proscribed by the second sentence of the proposed SCR 60.06(3)[c].

The third sentence in the proposed rule (with its list of 11 proscribed behaviors) is derived in large measure from the Ohio Code of Judicial Conduct. Both intentional misrepresentations and misrepresentations made with reckless disregard for the truth are proscribed.

The last sentence in the proposed rule is intended to deal with material misrepresentations made not by the candidate or by one authorized by the candidate, but by third parties, e.g., through independent expenditures. If the candidate knows of the misrepresentation, and if the misrepresentation is material, and if the misrepresentation is likely to confuse or mislead the electorate, then the candidate is exhorted to disclaim the statement. The proposed rule expressly provides that candidate's are under no duty to monitor statements made by third parties not subject to the control of the candidate.

TO THE EXTENT PRACTICABLE, THE RULES GOVERNING JUDICIAL ELECTIONS SHOULD SPECIFY WHAT AREAS OF CAMPAIGN SPEECH ARE AND ARE NOT ETHICALLY PERMISSIBLE.

Rules drafted in broad language are necessarily imprecise and provide relatively little guidance to candidates as to what is permissible and what is impermissible campaign speech. Candidates thus speak at their peril when speaking of matters that may be held to be within proscribed areas or outside such areas. In light of the inherent tension between the public good of informing the electorate as to candidate's views and the public good of not creating the appearance of partiality or prejudgment of cases or issues, judicial candidates and the public could benefit from rules that more clearly outline permissible and impermissible areas of campaign speech. The AJS monograph *ELECTING JUSTICE* points out that under the 1972 ABA Model Code, ethics advisory committees suggested that each of the following topics should not be discussed in a judicial campaign: pre-trial release, plea bargaining, sentencing, capital punishment, abortion, gun control, equal rights amendment, drug laws, gambling laws, liquor licensing, dram shop legislation, labor laws, property tax exemptions, regulation of condominiums, court rules, prior court decisions (both of other courts and of the candidate's own court), and "for good measure, specific legal questions and hypothetical legal questions." *Id.* at 86-87. The Beilfuss/DeWitt Committee recommended a rule that proscribed candidates from making statements that appeared to

commit the candidate with respect to “controversies that are likely to come before the court” but permitted, inferentially at least, statements that appeared to commit the candidate with respect to “issues” that were likely to come before the court. It may be questioned whether candidates can reasonably be expected to distinguish the permissible from the impermissible under such a rule.

Chief Judge Richard Posner has written: “Two principles are in conflict and must, to the extent possible, be reconciled. Candidates for public office should be free to express their views on all matters of interest to the electorate. Judges should decide cases in accordance with law rather than with any express or implied commitments that they may have made to their campaign supporters or to others. The roots of both principles lie deep in our constitutional heritage.” *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 227 (7th Cir. 1993). Requiring judicial candidates to reconcile these principles on the hustings on the basis of broadly stated rules such as the ABA rules may disserve both the candidates and the public.

Thus, as an ideal proposition at least, the majority of the commissioners favor rules that identify with some specificity those areas of campaign speech that are ethically permissible and those that are ethically impermissible. The difficulty is in writing such rules. Not only is it nigh impossible to identify all the areas or subjects that might become grist in an election mill, but also the rule-maker must be sensitive to First Amendment concerns. Thus, the Commission submits to the court only the broadly stated rules respecting promises and commitments in the proposed SCR 60.06(3)(b) and the more detailed rules respecting misrepresentations, misleading and confusing rhetoric in the proposed SCR 60.06(3)[c].

**NO SPECIAL RULE IS PROPOSED RESPECTING CAMPAIGN
SPEECH ABOUT DECISIONS OF A SITTING JUDGE OR DECISIONS
OF AN APPELLATE COURT.**

A substantial majority of the commissioners disfavours proposing rules specifically addressing campaign speech about decisions of a sitting judge or decisions of an appellate court. This issue is inherently problematic. Some observers argue that incumbent judges are especially vulnerable to unfair or misleading campaign attacks focusing only on, e.g., one unpopular decision or opinion.¹⁴ The problem, they argue, is exacerbated if the sitting judge is prohibited from commenting on the case because it is still pending in some

¹⁴ Unpopularity of a particular judicial decision is never relevant to the desired judicial qualities of integrity, impartiality, judicial temperament, legal ability or industry. Although it may be possible to point to a judge’s decisions which taken together demonstrate a judicial philosophy with which an opponent can legitimately differ, this will be rare.

respect or likely to come before the judge again in some form.¹⁵ Others argue that elections of judges are meaningless if candidates cannot take issue with the acts of an incumbent. Rules limiting campaign speech addressing decisions of a sitting judge will inevitably be seen as unfairly favoring incumbents. On the other hand, permitting challengers of sitting judges a free hand in attacking decisions of sitting judges (and of appellate courts) implicates the provisions of proposed SCR 60.06(3)(b) prohibiting candidates from making commitments in advance with respect to particular cases, controversies, or legal issues likely to come before the court. These issues implicate the tension between reasonably informing the electorate of differences between candidate and the need to preserve judicial independence and impartiality, qualities no less important in an elected judiciary than in an appointed one. Because of the difficulty or impossibility of accommodating these often conflicting goals by rule, a majority of the commissioners prefer to propose no special rules but to rely on the general provisions of proposed SCR 60.06(3)(b).

OTHER POLITICAL ACTIVITIES

A. POLITICAL ORGANIZATIONS

Judges, candidates for judicial office and judges-elect should be prohibited from membership in a political party during the term of office or when a candidate or judge-elect; office holding or leadership of a political party during the term of office or when a candidate or judge-elect; and active participation in the affairs of a political party during the term of office or when a candidate.

A substantial majority of the commissioners favor retaining the existing prohibitions on political party membership, leadership, and active participation by judges. Indeed, the substantial majority believe that the prohibition should be extended to candidates for judicial office during their

¹⁵ AJS' *ELECTING JUSTICE* noted: "Sitting judges are constrained by ethics rules from engaging in *ex parte* communications or commenting on pending or impending cases, and by more general injunction to maintain the integrity, independence and impartiality of the judiciary. Consequently, they are often foreclosed, or believe themselves foreclosed, from discussing their own records in office, either in a positive way or in response to criticism. In reality, sitting judges can say quite a lot about their records in office. . . It is true, nonetheless, that sitting judges labor under a disadvantage when they are criticized for their actions in pending or impending matters." *Id.* At 83.

candidacy and to judges-elect. Extending the prohibition to nonincumbent candidates for judicial office would create a burden on such candidates who, during their candidacy, hold a partisan office, such as assembly person or senator. The proposed rule would require the candidate to resign his or her party membership and to cease participation in party activities and caucuses, and thus may be viewed as a ballot access restriction. In *Clements v. Fashing*, 457 U.S. 957 (1982), the United States Supreme Court held that certain provisions of the Texas constitution which limited a public official's ability to become a candidate for another public office were not violative of the First Amendment or of the equal protection clause of the Fourteenth Amendment.¹⁶

The court asked the Commission to address how the terms "membership" and "active participation" should be defined. The Commission suggests that "membership" should be understood in its common sense of being a formal part of the political organization, carried on its rolls and mailing lists, entitled to be present at meetings of the members and entitled to vote on matters on which members vote, and paying dues. No definition is suggested for "active participation" since the kinds of activities in which a political party member may engage are difficult to enumerate in any comprehensive way. The Commission has proposed SCR 60.06(2) which is based in large measure on the existing rule, but which makes it clear that judges, candidates for judicial office, and judges-elect are not prohibited from attending public events sponsored by political parties or partisan candidates so long as their cost to attend does not constitute a prohibited political contribution.

JUDGES, CANDIDATES FOR JUDICIAL OFFICE, AND JUDGES-ELECT SHOULD BE PROHIBITED FROM SPEAKING PUBLICLY ON BEHALF OF OR IN SUPPORT OF A POLITICAL PARTY OR PARTY CANDIDATE.

A very substantial majority of the commissioners favor prohibiting judges as well as candidates for judicial office and judges-elect from speaking publicly on behalf of or in support of a political party or its candidates. The 1967 Code prohibited judges [but not non-judge candidates or judges-elect] from "publicly endors[ing] or speak[ing] on behalf of [a political party's]

¹⁶ In *Clements*, the Court considered two ballot access limitations in the Texas constitution. The first provided that no judge of any court or other person holding a federal, state, or foreign "lucrative office" shall, during the term for which the person was elected or appointed be eligible for the Texas legislature. The second provided that if any one of certain specified state and county officers becomes a candidate for any state or federal office other than the office then held, at any time when the unexpired term of the office then held shall exceed one year, such candidacy shall constitute an automatic resignation of the office then held.

candidates or platform.” The Beilfuss/DeWitt committee recommendations continued the prohibitions.

JUDGES, CANDIDATES FOR JUDICIAL OFFICE, AND JUDGES-ELECT SHOULD BE PROHIBITED FROM CONTRIBUTING TO A POLITICAL PARTY OR ITS CANDIDATES¹⁷.

A majority of the commissioners favor prohibiting judges, candidates for judicial office, and judges-elect from making contributions to political parties. The commissioners were rather evenly split on the issue whether contributions to partisan candidates should be prohibited.¹⁸

JUDGES, CANDIDATES FOR JUDICIAL OFFICE AND JUDGES-ELECT SHOULD NOT BE PROHIBITED FROM ATTENDING PUBLIC MEETINGS SPONSORED BY A POLITICAL PARTY OR BY A PARTISAN CANDIDATE. IF THE PURCHASE OF A TICKET OR OTHER PAYMENT OF MONEY IS REQUIRED, THE JUDGE OR CANDIDATE FOR JUDICIAL OFFICE OR JUDGE-ELECT MAY PAY NO MORE THAN THE COST OF THE EVENT REASONABLY ALLOCABLE TO HIS OR HER ATTENDANCE.

It is not desirable that judges live lives of seclusion. As public officials and public citizens, it is good for judges to participate in the life of the community. Moreover, if judges are to be elected, it is reasonable that they attend gatherings and functions that voters attend. Many judges are elected in low turnout election years and the most ardent voters are generally those involved with political parties, community groups and charitable organizations. Judicial candidates must seek endorsements from political leaders, community leaders, labor organizations, and other politically active members of the community. Many of these individuals gather at political events, non-judicial campaign events, fundraising dinners for their organization, and charitable events. It has long been the case that “pre-candidates” appear at these events making contacts with potential supporters and campaign workers while making contributions to the organizations. Currently, judges are substantially prohibited from engaging in these same activities.

¹⁷ The final draft of the proposed SCR 60.06(2) contains the same prohibition on contributions to partisan candidates that is found in the current rule.

¹⁸ The 1967 Code prohibited judges [but not non-judge candidates] from making *contributions* in support of a political party’s causes. The Beilfuss/DeWitt committee recommendations would have continued the prohibitions except to permit a judge and candidate, when a candidate for election, to purchase tickets for and attend political gatherings.

The Commission proposes a rule that would level the playing field. Judges and nonincumbent candidates alike would be prohibited from engaging in proscribed conduct, while likewise being permitted to attend public events sponsored by political parties or partisan candidates. The rule would require that no part of any money paid for attendance could constitute a prohibited political contribution and the comment to the rule advises attendees to so conduct themselves at such events that their conduct will not be made to appear as an endorsement or other prohibited political activity.¹⁹

JUDGES, CANDIDATES FOR JUDICIAL OFFICE, AND JUDGES-ELECT SHOULD BE PROHIBITED FROM GIVING SPEECHES AT PUBLIC EVENTS SPONSORED BY A POLITICAL PARTY OR PARTISAN CANDIDATE.

In their responses to the Survey, a quite substantial majority of the commissioners favored the prohibition of speeches by judges and judicial candidates at partisan events.²⁰ The Survey item to which the commissioners were responding, however, did not define “speeches”.²¹ It should be noted that there is nothing in the proposed SCR 60.06(2) itself that broadly prohibits judges and judicial candidates from speaking at party-sponsored public events. Proposed SCR 60.06(2)(d) specifically prohibits judges and judicial candidates and judges-elect from publicly endorsing or speaking on behalf of a party’s candidates or platforms. Proposed SCR 60.06(2)(b) prohibits them from “participating” in the “affairs . . . or activities of a political party or of a candidate for partisan office”, but the concluding sentences of proposed SCR 60.06(2) would permit judges and candidates for judicial office and judges-elect to attend “as a member of the public” and at cost public events sponsored by a political party or partisan candidate. The commissioners discussed the question of what if any public comments or greetings, of a nonpartisan nature, a judge or judicial candidate may make at such a gathering, but did not attempt to draft a rule governing this conduct beyond the strictures of SCR 60.06(2)d). The proposed rule would cover nonincumbent candidates for judicial office and judges-elect. There was no

¹⁹ “In states that explicitly prohibit or restrict endorsements, the real problem has been to determine what constitutes an “endorsement.” A public statement of support for another candidate clearly qualifies, but less direct statements, and some actions, can constitute endorsements as well. Advisory bodies appear to agree that a judicial candidate’s simple appearance at a political function held for another candidate does not constitute an improper endorsement, but any greater involvement has raised objections. . . Between the extremes of passive attendance and active participation in the campaign events of others lies a large gray area of activity whose ethical status remains uncertain.” *ELECTING JUSTICE* at 95.

²⁰ A small majority of those responding to the Survey of Commissioners favored a rule that would permit speech-making so long as all candidates were invited to address the gathering.

²¹ For example, item 91 inquired: “Should judges be prohibited from giving speeches at party sponsored public meetings?” See also items 92-94.

substantial support for having different rules obtain in election years and non-election years.

B. CIVIC AND CHARITABLE ORGANIZATIONS

THE COMMISSION PROPOSES NO SPECIAL RULES FOR INTEREST GROUP ACTIVITIES.

In the Initial Report, the Commission noted that although the supreme court had not asked the Commission to consider SCR 60.05 relating to extra-judicial activities in civic and charitable organizations, some of those organizations may have controversial legal or political agendas that would raise concerns similar to those raised by a judge's involvement in political organizations.²² Subject to certain exceptions not germane here, SCR 60.05[3][c] permits judges to serve as officers, directors, trustees or nonlegal advisors of "nonprofit educational, religious, charitable, fraternal, sororal, or civic organizations." Issue advocacy groups are typically nonprofit and have educational missions. While a substantial majority of the commissioners believe that serious problems could arise from a judge's activities in some kinds of interest groups, the general rule stated in SCR 60.05(1), requiring a judge so to conduct his or her extrajudicial activities so they do not cast reasonable doubt on the judge's capacity to act impartially, demean the judicial office, or interfere with the proper performance of judicial duties, is sufficient. The Commission makes special note of the difficulty of defining the concept of "interest groups" in a way that is useful and of drawing regulatory and ethical lines in this area of extra-judicial activity. Accordingly, the Commission proposes no rules in addition to SCR 6.005(1) with respect to extrajudicial activities in interest groups.

THE COMMISSION PROPOSES NO CHANGE IN THE PROHIBITION OF PART-TIME MUNICIPAL JUDGES' HOLDING OTHER NONPARTISAN OFFICES.

In the responses to the Survey of Commissioners, a majority of the commissioners favored permitting part-time municipal judges to hold other nonpartisan office. The office that was mentioned early on in the Commission's work was that of school board member. At the April 23, 1999 meeting of the Commission, however, the commissioners present noted that there are a number of nonpartisan offices in Wisconsin government and that there would be a palpable potential for conflicting interests and roles with a

²² The 1990 ABA Model Code defines "political organization" as "a political party or other group, the *principal purpose* of which is to further the election or appointment of candidates to political office." Civic and charitable organizations typically do not have such a principal purpose.

municipal judge simultaneously holding different offices. There is also a potential for a municipal judge to use or exploit his or her judicial office in seeking the other nonpartisan office. Thus, no change is proposed.

CAMPAIGN ACTIVITIES

ENDORSEMENTS

JUDGES AND CANDIDATES FOR JUDICIAL OFFICE SHOULD BE PERMITTED TO SOLICIT AND ACCEPT ENDORSEMENTS FROM OTHER JUDGES, OTHER PUBLIC OFFICE HOLDERS, LAWYERS, AND INTEREST GROUPS. JUDGES AND CANDIDATES FOR JUDICIAL OFFICE (AND THEIR COMMITTEES) SHOULD BE PROHIBITED FROM KNOWINGLY SOLICITING OR ACCEPTING ENDORSEMENTS FROM LITIGANTS WITH CASES CURRENTLY BEFORE THE COURT TO WHICH ELECTION IS SOUGHT.

The current Code of Judicial Conduct and its 1967 predecessor are silent on the issues of whose endorsement a judge or judicial candidate may solicit or accept. In practice, judges have been endorsed by other judges, partisan and nonpartisan public office holders, lawyers, and organizations, including special interest groups. The Commission considered a wide variety of issues related to the solicitation and acceptance of endorsements. As a general matter, the Commission proposes no change from current practice, except to recommend an explicit prohibition of knowing solicitation or acceptance of an endorsement from a litigant with a matter currently before the court to which the candidate seeks election.

The Commission was rather evenly split on the issue whether a judge or candidate for judicial office should be prohibited from soliciting an endorsement from partisan office holders, and from lawyers who have matters currently before the court to which the judge or candidate seeks election, and from interest groups.²³ In those areas where a clear majority favoring rule-making did not exist, no new rules were proposed. Even in these areas where perhaps half of the commissioners favored restrictions on

²³ “Another questionable source of endorsements are special interest groups. Acceptance of the endorsement . . . of a group such as Right to Life may be construed as a pledge of conduct in office, and therefore place a candidate in violation of [ABA 1990 Model Code] Canon 5A(3)(d)(I). A New York State Bar Association opinion states that a judicial candidate may accept the endorsement . . . of the Right to Life Party provided he or she refrains from expressing a view on abortion and further provided that the endorsement . . . is not conditioned on the candidate’s view on that topic.” Shaman, Lubet, and Alfini, *JUDICIAL CONDUCT AND ETHICS* 382 (2d ed. 1995).

solicitation, considerably fewer favored any restriction on accepting endorsements or requiring disavowal of unsolicited endorsements.

JUDGES AND CANDIDATES FOR JUDICIAL OFFICE SHOULD BE PERMITTED PERSONALLY TO SOLICIT ENDORSEMENTS, SUBJECT TO THE PROHIBITION RESPECTING LITIGANTS WITH CASES BEFORE THE COURT.

The commissioners were rather evenly divided on the issue whether a judge should be prohibited from seeking endorsements personally, rather than through his or her committee.²⁴ Thus no rule is proposed.

JUDGES, CANDIDATES FOR JUDICIAL OFFICE, AND JUDGES-ELECT SHOULD NOT BE PERMITTED TO ENDORSE PARTISAN CANDIDATES FOR OTHER OFFICES. NO RESTRICTION IS PROPOSED WITH RESPECT TO ENDORSEMENTS OF OTHER JUDGES AND CANDIDATES FOR OTHER NONPARTISAN OFFICES.

Both the current and the proposed SCR60.06(2) prohibit judges from endorsing partisan candidates.²⁵ The proposed rule extends the prohibition to candidates for judicial office and judges-elect. There is a widely held belief that in the 1999 supreme court campaign public endorsement of candidates by present justices tended to damage the standing of the supreme court in the eyes of the public. Although some members of the Commission favor a rule making it unethical for any judge to make a public endorsement in a campaign for election to any judicial position, such a rule does not have the support of a substantial majority of the Commission, and for that reason has not been included in the proposed rules.

JUDGES, CANDIDATES FOR JUDICIAL OFFICE, AND JUDGES-ELECT SHOULD NOT BE PERMITTED TO CONTRIBUTE TO PARTISAN CANDIDATES FOR OTHER OFFICES. NO RESTRICTION IS PROPOSED WITH RESPECT TO CONTRIBUTIONS TO THE CAMPAIGNS OF OTHER JUDGES AND CANDIDATES FOR OTHER NONPARTISAN OFFICES.

²⁴ The 1990 ABA Model Code, Canon 5C(1)(b) prohibits judicial candidates, judge and nonjudge, from personally soliciting publicly stated support. The Beilfuss/DeWitt committee recommended that candidates be permitted personally to solicit endorsements, but not contributions. The proposed rule restricted the solicitation of endorsements to “a reasonable period of time before and after” the election and prohibited judges, but not nonjudge candidates, from soliciting endorsements “while engaging in official duties or while in the courthouse.”

²⁵ The Beilfuss/DeWitt proposal would have prohibited public endorsement or opposition of “another candidate for any *nonjudicial office*.”

Both the current and the proposed SCR60.06(2) prohibit judges from making contributions to the campaigns of partisan candidates. The proposed rule extends the prohibition to candidates for judicial office and judges-elect. The majority of the commissioners do not favor restricting judges, candidates for judicial office or judges-elect from making contributions to the campaigns of other judges or of candidates for nonpartisan offices.

**APPLICANTS FOR APPOINTMENT TO A JUDICIAL VACANCY
SHOULD BE BOUND BY ETHICAL RULES.**

A substantial majority of the commissioners share the view that applicants for appointment to a judicial vacancy should be bound by rules applicable to other candidates for judicial office. The code defines “candidate” as “a person seeking *selection* for or retention of a judicial office by means of election *or appointment* who makes a public announcement of candidacy, declares or files as a candidate with the election or *appointment* authority, or authorizes solicitation or acceptance of contributions.”

The Beilfuss/DeWitt proposal prohibited candidates for appointment to judicial office from soliciting or accepting funds to support the candidacy. Additionally, it prohibited “any political activity to secure the appointment” except to permit communications *by the candidate* to the appointing authority and screening committees, and seeking support from *organizations* that regularly make recommendations for appointment. Support could be sought from *individuals* only “to the extent requested or required by” the appointing authority or screening committee. Information concerning the qualifications of the candidate for the judicial office sought could be provided *only* to the appointing authority, screening committee, organizations regularly making recommendations to the appointing authority, and individuals as requested or required by the appointing authority, screening committee, or organization regularly making recommendations. These recommendations parallel the 1990 ABA Model Code provisions.

The Beilfuss/DeWitt committee rejected the Model Code provisions that permitted *non-judge* candidates for appointment to retain an office in a political organization, attend political gatherings, and continue to pay ordinary assessments and ordinary contributions to a political organization or candidate and purchase tickets for political party dinners or other functions. The committee Commentary on the rule noted that the change was intended “to insure that all candidates, judicial and nonjudicial, have the same restrictions on their political activities when they become candidates for judicial appointment.”

The Commission has not proposed special rules for candidates for appointment to judicial office. Such candidates are bound by the provisions of SCR 60.06(2), as well as the other applicable provisions, e. g., SCR 60.06(3).

JUDGES, CANDIDATES FOR JUDICIAL OFFICE, AND JUDGES-ELECT SHOULD BE PERMITTED TO ENDORSE AND WRITE LETTERS OF SUPPORT FOR AN APPLICANT FOR APPOINTMENT TO JUDICIAL OFFICE.

There was almost unanimous agreement on this matter.

NO SPECIAL RULES ARE PROPOSED FOR JUDGES, CANDIDATES FOR JUDICIAL OFFICE OR JUDGES-ELECT WHOSE SPOUSE OR FAMILY MEMBER IS SEEKING OR HOLDS A PARTISAN OR NONPARTISAN ELECTED OFFICE.

The Commission did not devote substantial attention to the problems of the increasing number of judicial office holders with a spouse or close family member holding another elective office.

THE COMMISSION PROPOSES NO DEFINITION OF “ENDORSEMENT”.

In the Initial Report, the Commission invited the court’s attention to the following in the American Judicature Society monograph *ELECTING JUSTICE*:

In states that explicitly prohibit or restrict endorsements, the real problem has been to determine what constitutes an “endorsement.” A public statement of support for another candidate clearly qualifies, but less direct statements, and some actions, can constitute endorsements as well. Advisory bodies appear to agree that a judicial candidate’s simple appearance at a political function held for another candidate does not constitute an improper endorsement, but any greater involvement has raised objections. . . . Between the extremes of passive attendance and active participation in the campaign events of others lies a large gray area of activity whose ethical status remains uncertain.” *ELECTING JUSTICE* at 95.

Because of time constraints and feasibility concerns, the Commission has not attempted to draw ethical lines in the “large gray area”.

Common Issues

THE COMMISSION PROPOSES RULES GOVERNING JUDICIAL ELECTIONS AND ETHICS THAT ARE IN SOME MEASURE MANDATORY AND IN SOME MEASURE HORTATORY AND ASPIRATIONAL.

The rules proposed by the Commission are in the main mandatory, like the other rules in the Code of Judicial Conduct. Proposed SCR 60.06(3)[c] contains two hortatory sentences, one urging that comments concerning an opposing candidate be limited to matters directly related to qualifications for office and one urging disclaiming of materially misleading statements by third parties that are likely to confuse the electorate. In proposed SCR 60.06(4), judges, candidates, and judges-elect are exhorted to avoid direct involvement in their committee's fundraising efforts. Finally, in proposed SCR 60.06(5) judges and candidates for judicial office are exhorted to be mindful of the values underlying SCR 60.03 ["A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."] in soliciting and accepting an endorsement.

THE RULES GOVERNING JUDICIAL ELECTIONS SHOULD APPLY WITH EQUAL VIGOR TO ALL CANDIDATES.

Currently, some rules apply to candidates who are judges but not to candidates who are non-judge lawyers. Candidates who are lawyers are subject to SCR Ch. 20, including SCR 20:8.2(b) and 8.4, but non-lawyers are not. Even the rule that appears to "level the playing field" for judge and non-judge lawyer candidates does so only partially and inadequately. SCR 20:8.2(b) requires lawyer candidates for judicial office to "comply with the *applicable* rules of the code of judicial conduct." The code of judicial conduct defines "candidate" as persons seeking election or appointment to judicial office, whether an incumbent judge or not. Some restrictions, however, apply by their terms only to judge candidates even though the policy or policies sought to be forwarded appear to require compliance by any candidate for judicial office. For example, only candidates who are judges are forbidden to make promises or suggestions of conduct in office which appeal to cupidity or partisanship or to do anything which appears to commit the judge in advance with respect to any particular case or controversy (SCR 60.06(3)). The public interest justifying the rule is found in the need for both the fact and the appearance of integrity and impartiality in the judiciary. No reasonable basis seems to justify treating judge and nonjudge candidates differently with respect to "promise or commit" rules. A substantial majority of the commissioners believe that the rules should apply to judges and nonjudge

candidates alike, as well as to successful nonjudge candidates during the period between their election and their taking office.

Dated this 4th day of June, 1999.

Hon. Thomas E. Fairchild
Chairperson

Professor Charles D. Clausen
Reporter