

Recommendations of the Judicial Elections Committee

The MSBA Judicial Elections Committee originally submitted its report to the Board of Governors in December 2003. At the December 5 meeting of the Board consideration of the report, with the exception of one recommendation, was indefinitely postponed. (Recommendation C.4—candidates in contested judicial races should be at the top of the judicial ballot—was adopted.) At this time the sections of the report which follow—Recommendations C.3, C.6, and all of the recommendations in Section D—are being brought back to the Board and recommended for adoption.

C. Statutory and Regulatory Changes to the Current System

3. The Minnesota Code of Judicial Conduct should be amended to require disqualification of a judge who makes a statement during a judicial campaign that raises questions about the judge’s impartiality, and to eliminate the provision found to be unconstitutional in RPM v. White.

Implementation of this recommendation would require that Canons 3 and 5 and the corresponding Comments of the Minnesota Code of Judicial Conduct be amended as follows:

Additions underlined; deletions struck through

CANON 3

A Judge Should Perform the Duties of the Office Impartially and Diligently

...

D. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where:

...

(e) the judge, while 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.

...

CANON 5

A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

A. All Judges and Candidates

...

(3) A candidate for a judicial office, including an incumbent judge:

(a) shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary, and shall encourage family members to adhere to the same standards of political conduct in support of the candidate as apply to candidate;

...

(d) shall not:

- (i) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, or promises or commitments of conduct in office other than that are inconsistent with the faithful and impartial performance of the adjudicative duties of the office; announce his or her views on disputed legal or political issues; or knowingly misrepresent his or her identity, qualifications, present position or other fact, or those of an opponent; and
- (ii) by words or conduct manifest bias or prejudice inappropriate to judicial office.

COMMENTS—CANON 3

...

Terminology: “Impartiality” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

...

COMMENTS—CANON 5

...

Terminology: “Impartiality” denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge.

...

Section 5A(3)(d). Section 5A(3)(d) prohibits a candidate for judicial office from making statements that commit the candidate regarding cases, controversies or issues likely to come before the court. As a corollary, a candidate should emphasize in any public statement the candidate’s duty to uphold the law regardless of his or her personal views. See also Section 3A(8), the general rule on public comment by judges. Section 5A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration. Nor does this Section prohibit an incumbent judge from making private statements to other judges or court personnel in the performance of judicial duties.

These changes are based on proposed changes to the ABA model canons, but unlike the ABA proposals, limit statements strictly to the campaign period between filing for office and the election.

6. The Minnesota Code of Judicial Conduct should be amended to require an education course for all judicial candidates on ethical issues involved in campaigns for judicial office.

Implementation of this recommendation would require amendment of Canon 5 of the Code of Judicial Conduct as follows:

Additions underlined

Canon 5

A Judge or Judicial Candidate Shall Refrain From Political Activity Inappropriate to Judicial Office

A. In General

(4) No earlier than one year prior to and no later than thirty days after filing an affidavit of candidacy with the election authority, a candidate for election to judicial office, including an incumbent judge, shall complete a two-hour course in campaign practices, finance, and ethics approved by the Minnesota Board on Judicial Standards. Within five days of completing the course, the candidate for election to judicial office, including an incumbent judge, shall certify to the Minnesota Board on Judicial Standards his or her completion of the course and understanding of the requirements of the Code of Judicial Conduct.

A course on this topic has been offered in August of even-numbered years, but attendance is presently voluntary. The committee believes that mandatory attendance is preferable.

D. MSBA Action in the Post-White Environment

The committee asks that the recommendations in this section of the report be adopted by the Board of Governors and implemented by the Association. The committee recognizes that it is likely that a number of these recommendations would need to be implemented by an independently funded Political Action Committee.

1. The Minnesota State Bar Association should draft and publish a “position statement,” setting forth the organization’s views relative to both free speech and expectations regarding restricting such speech with respect to judicial candidates.

The position statement should be limited to one page or less, and provide a framework for acceptable speech and conduct. The statement should take a strong stand against a candidate’s “announcing” personal views or opinions regarding controversial issues. The statement should also urge citizens to hold candidates accountable to the standards

enunciated by the MSBA and set forth in Canon 5 of the Code of Judicial Conduct. See recommendation C. 3, above. This recommendation is in line with Recommendation No. 4 of the 1997 MSBA Judicial Elections Task Force Report, which states, “The MSBA should cooperate with the State Board of Judicial Standards, the Office of Lawyers Professional Responsibility, and community organizations to educate candidates and the public about the permissible range of candidate speech in judicial elections.”

2. The position statement should be supported with an outline of recognizable attributes useful in determining a candidate’s qualifications.

Impartiality and independence should be included in the outline. Sample questions for use in interviewing judicial candidates should also be provided each election year. These items should be made available on the MSBA website, and placed in printed pamphlet or news release format. See also recommendation 5 below on development of a “voters’ guide.”

3. The MSBA should prepare and disseminate a press release in each election year republishing the position statement.

Further consideration should be given to preparing such a release as a full-page ad for publication in a statewide or several statewide papers.

4. The MSBA should establish, in each election year, a committee charged with monitoring all contested judicial elections and accepting complaints in those elections.

If a candidate’s actions or speech appear in contravention of the MSBA position statement and/or Canon 5 of the Code of Judicial Conduct, the committee shall recommend appropriate sanctions. The MSBA could consider utilizing the Fair Response Committee for this purpose – this may involve rewriting the scope of the Fair Response Committee’s authority and its internal guidelines.

5. The MSBA should retain the plebiscite, but the process should be conducted electronically.

The committee believes that plebiscites in contested judicial races encourage the election and retention of qualified judges by informing voters of the opinions of those most acquainted with the judiciary. Conducting the plebiscite electronically should reduce costs and cut down on MSBA staff involvement. The electronic process will also allow district bar association participation, which the MSBA should encourage. Contemporaneous with the revision of the plebiscite, the MSBA should provide educational materials to the public, specifically, publication of a “voter’s guide” to judicial elections and candidates. This publication could be produced jointly with other public interest groups such as The League of Women Voters.

6. The MSBA should reconsider implementation of Recommendations 6, 7, 8 and 9 from the 1997 Judicial Elections Task Force Report.

Recommendation No. 6: The MSBA should continue to conduct plebiscites for contested statewide judicial seats, and should endorse the prevailing candidate in the plebiscite if that candidate receives at least 60% of the votes cast.

Recommendation No. 7: The MSBA should launch a three-stage effort to ensure a more informed electorate in judicial races, the goals of this effort should be 1) engaging the press in a dialogue about its role in the process; 2) education of the electorate about judicial seats and about the qualities of a good judge; and 3) education of the electorate about specific candidates and how they are viewed by the Association.

Recommendation No. 8: The MSBA should appoint a committee in each year in which it conducts a judicial plebiscite, the purpose of which would be to educate the media and the electorate of the plebiscite results and any endorsements.

Recommendation No. 9: The MSBA should encourage each of the state's district bar associations to adopt similar procedures regarding the conduct of judicial plebiscites, endorsement of prevailing candidates, and education of the electorate.