

## MEMORANDUM

To: Mark I. Harrison, Chair  
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

From: Ray McKoski, Circuit Judge, Lake County, Illinois

Date: February 10, 2006

Subject: Comments Concerning Rule 5.01 of the Final Draft Report of the Joint Commission's Proposed Model Code of Judicial Conduct.

### INTRODUCTION

This memorandum will address a judge's obligation to restrict, or attempt to restrict, the independent political activities of the judge's family members. Specifically, paragraphs [6], [19], and [20] of the Comment to Rule 5.01 will be discussed.

### DISCUSSION

#### A.

The last sentence of paragraph [6] of the Comment to Rule 5.01 provides:

To avoid public misunderstanding, moreover, a judge or candidate for judicial office must take, and must require the family member to take, reasonable steps to avoid any implication that the judge endorses the family member's candidacy or other political activity (Emphasis added).

A code of judicial conduct can require a judge to act in a manner so as to avoid the public perception that the judge endorses a spouse's candidacy or political activity. However, a code of judicial conduct cannot invest a judge with authority to "require"<sup>1</sup> a family member to act in a particular manner.

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<sup>1</sup> The ordinary meaning of the term "require" "embodies the notion of demand or compulsion." *Antwerpen Dodge v. Herb Gordon Auto World*, 699 A.2d 1209,1219 (Md. App. 1997). For example, *Funk & Wagnall's New International Dictionary* 1071 (2000) defines "require" as, "to demand authoritatively; insist upon; to command; order." This is the meaning that "require" takes on in Rule 5.01 and in other Rules of the Final Draft Report of the ABA Model Code of Judicial Conduct (2005). See e.g., Rule 2.02 (C) ("A judge shall require lawyers in proceedings before the judge to refrain from manifesting bias, prejudice...") and Rule 2.08(A) ("A judge shall require order and decorum in proceedings before the judge."). If a different meaning of the term "require" is intended in paragraph [6] a definition should be included in the Terminology section of the Code or in the Comment to Rule 5.01.

Imposing a duty on a judge to “require” family members to take steps to avoid any implication that the judge endorses a family member’s candidacy or other political activity is problematic for several reasons.

First, codes of judicial conduct do not, and cannot, regulate the independent political activity of a judge’s family members.<sup>2</sup> If the Code cannot govern the political activities of a family member, how can the Code invest a judge with authority to restrict a family member’s political activities? Simply put, neither the Code nor any constitutional, statutory or regulatory enactment authorizes a judge to control, direct, or forbid an independent political act of a family member. A judge wields awesome, superior, and complete authority over persons appearing at the bench but not at the dinner table. See Lisa Milord, *The Development of the ABA Judicial Code* 13 (1992) (Judge should not be disciplined for misconduct on the part of persons not subject to the judge’s control); *International Association of Firefighters v. City of Ferguson*, 283 F.3d 969 (8<sup>th</sup> Cir. 2002) (husband has no legal right to prevent wife from issuing checks on a joint account to any payee she sees fit including political candidates) and *Horstkoetter v. Department of Public Safety*, 159 F.3d 1265 (10<sup>th</sup> Cir. 1998) (state trooper cannot be disciplined for failing to remove a political sign placed by spouse on jointly owned property because a government regulation cannot require what property law does not allow).

Second, the fact that a judge lacks authority to require a spouse or other family member to conform their conduct to the Code’s requirements appears to be recognized in Canon 4 of the Final Draft Report of the ABA Model Code of Judicial Conduct (2005). For example, Rule 4.10(B) does not direct a judge to “require” family members to abide by gift provisions applicable to the judge, but only directs the judge to “urge” family members to refrain from soliciting or accepting gifts that the judge is prohibited from soliciting or accepting. Likewise, Rule 4.08 does not mandate that a judge “require” family members to avoid financial transactions that appear to exploit the judge’s position but only suggests that the judge “should discourage” family members from engaging in such financial dealings. See Paragraph [2] of the Comment to Rule 4.08.

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<sup>2</sup> See Paragraph [20] of the Comment to Rule 5.01 of the Final Draft Report of the ABA Model Code of Judicial Conduct (2005) (“This Code applies only to judges and candidates for judicial office.”). See also Wisconsin Judicial Conduct Advisory Committee Opinion No. 97-2 (“... the Code does not address political activities of a judge’s spouse, nor could it in view of the First Amendment.”); Arizona Judicial Ethics Advisory Committee Opinion No. 03-05 (“But Canon 5A, which relates to political conduct in general, only applies to judges and judicial candidates, not their spouses or other family members.”); Indiana Commission on Judicial Qualifications Opinion No. 2-93 (“Judicial spouses are not personally bound by the Code of Judicial Conduct and its restrictions on political activities.”); Massachusetts Committee on Judicial Ethics Opinion No. 98-4 (“the Canon referring to political activity addresses only the judge’s conduct.”); U.S. Judicial Conference, Committee on Codes of Conduct Opinion No. 53 (last revised 1-16-98) (“The Code of Conduct does not govern the conduct of a judge’s spouse.”).

Third, any requirement that a judge seek to influence or control the behavior of a spouse or other family member must be narrowly tailored. Lisa Milord, *The Development of the ABA Judicial Code* 49 (1992). Requiring a judge to “urge” or “discourage” certain conduct on the part of family members is a narrowly tailored approach to influencing a family member’s independent conduct. On the other hand, compelling a judge to “require” a family member to act in a certain way is not narrowly tailored. This is especially true when the judge is directed to “require” an individual to forego a type of expression that is at the heart of the First Amendment.

It is suggested that the word “require” in paragraph [6] be replaced with the word “urge” or the word “request.”

B.

Paragraph [19] of the Comment to Rule 5.01 provides:

A candidate for judicial office, including a sitting judge, must take reasonable steps to ensure, to the extent practicable, that members of the candidate’s family adhere to the same standards of political and campaign conduct as apply to the candidate. Candidates must also require court personnel and other employees under their direction and control to refrain from doing on the candidate’s behalf what the candidate is prohibited by this Code from doing.

The first sentence of paragraph [19] is intended to require judicial candidates to take steps to ensure that family members comply with the same standards of political and campaign conduct that apply to the candidate whenever family members engage in political or campaign activity in support of the candidate. Apparently, through inadvertence a limiting phrase such as, “in support of the candidate” or “on behalf of the candidate,” is not included in the first sentence of paragraph [19]. The omission appears to be unintended because the limiting phrase, “on the candidate’s behalf,” does appear in the second sentence of paragraph [19] and the limiting phrase, “on behalf of the candidate,” appears in Rule 5.01(B). Without a limiting phrase, the first sentence of paragraph [19] obligates a judge to take steps to ensure a family member’s compliance with Code restrictions even if the family member’s political or campaign activity is in support of someone other than the judge.

The first sentence of paragraph [19] could be clarified by adding the phrase, “in support of the candidate,” as follows:

[19] A candidate for judicial office, including a sitting judge, must take reasonable steps to ensure, to the extent practicable, that members of the candidate’s family adhere to the same standards of political and campaign conduct in support of the candidate as apply to the candidate.

C.

Paragraph [20] of the Comment to Rule 5.01 provides:

This Code applies only to judges and candidates for judicial office. Accordingly, nothing in this Code should be construed to limit the political or campaign activities of anyone else, so long as those activities are conducted separately, and without explicit or implied encouragement by the judge or candidate for judicial office.

The use of the phrase “so long as” in paragraph [20] implies that the political activities of a non-judge can be restricted if the activities are not conducted separately from the judge or are conducted with the judge’s encouragement. This is not accurate. The Code cannot limit the conduct of a non-judge even where the conduct is performed at the judge’s request. The Code can serve as a basis for disciplining a judge for making the request but cannot serve as a basis for enjoining or punishing a non-judge.

Another difficulty with paragraph [20] is that it appears to prohibit private conversations among immediate family members if the substance or tone of the conversation can be construed as “implied encouragement” of the family member to engage in political activity. A judge should be prohibited from engaging a surrogate to conduct political activity on the judge’s behalf. At the same time, however, a judge should be free to give advice, especially to a spouse or child, concerning the family member’s contemplated foray into politics. See e.g. Massachusetts Committee on Judicial Ethics Opinion No. 2003-8 (judge permitted to privately advise son on his political campaign).

For these reasons it is suggested that paragraph [20] be amended to provide as follows:

This Code applies only to judges and candidates for judicial office. Accordingly, nothing in this Code should be construed to limit the political or campaign activities of anyone else.

Finally, assuming that paragraph [20] retains its present form, the word “separately” should be replaced with the word “independently.” An “independent” act connotes an act performed of one’s own free will and not under the influence of another. See *Blacks Law Dictionary* 785 (8<sup>th</sup> ed. 2004). The concept of exercising one’s own judgment free from the influence or control of a judge more accurately reflects the basis for the Code provision. The use of the word “separately” could be misleading in the context of the right of a family member to use jointly owned property for the expression of political views. For example, a spouse’s independent political act of posting a campaign sign in the yard of a jointly owned marital home is permissible even though the yard is not the spouse’s “separate” property. See *Horstkoetter V. Department of Public Safety*, 159 F.3d 1265 (10<sup>th</sup> Cir. 1998) (state trooper cannot be disciplined for failing to remove a political sign placed by spouse on jointly owned property because a governmental

regulation cannot require what property law does not allow) and *Wrzesinski v. Danielson*, 231 F. Supp. 2d 611 (W.D. Mich. 2002) (discharge of court employee because the employee's spouse displayed a political sign on joint property violates the First Amendment). Likewise, a spouse's independent act of writing a check payable to a political candidate on a jointly held bank account is permissible even though the bank account is not "separate" from the judge. See *International Association of Firefighters v. City of Ferguson, supra*. The independent nature of the family member's act rather than the separate nature of the act should be controlling.

### CONCLUSION

A.

A judge does not have authority to "require" a family member to take reasonable steps to avoid the implication that a judge endorses a family member's candidacy or other political activity. Therefore, the word "require" in line eight of paragraph [6] of the Comment to Rule 5.01 should be replaced with the word "urge" or the word "request".

B.

The limiting phrase "in support of the candidate" should be inserted immediately after the word "conduct" in the fourth line of paragraph [19] of the Comment to Rule 5.01. Adding this phrase will make it clear that a candidate only has a duty to take steps to ensure that family members conform their campaign and political conduct to the requirements of the Code when the campaign or political conduct is performed on behalf of the candidate.

C.

It is suggested that a period replace the comma after the word "else" in line three of paragraph [20] of the Comment to Rule 5.01 and that the remainder of the sentence be deleted. Alternatively, the word "independently" should be substituted for the word "separately" in line four of paragraph [20].

Respectfully submitted,

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