Brennan Center: James Sample and Wendy Weiser, Associate Counsels, Democracy Program. September 15, 2005

The Brennan Center offers suggestions based on the Supreme Court's decision in Republican Party of Minnesota v. White, and the decisions following that opinion. They recommend that the Commission consider a two-tiered approach in which mandatory prohibitions are combined with parallel hortatory guidance. They agree that it remains legitimate for States to impose some measure of binding speech restrictions on candidates for judicial office, but state that clauses such as proposed Canon 5(m) will almost certainly continue to be challenged in court. Therefore, the principal advantage offered by a two-tiered method is that where binding rules are deemed unconstitutional, hortatory guidance is already in place to offer candidates clear, objective ethical guidelines without triggering the heightened scrutiny of First Amendment analysis.