

Supplemental Comments James Madison Center for Free Speech
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SUMMARY

Rules 2.11(c) and 5.01(m) and Rule 2.12(5)

The James Madison Center argues that Rules 2.11(c) and 5.01(m) and Rule 2.12(5) raise serious First Amendment concerns. In support it cites a number of recent court decisions at various levels that cast doubt on the constitutionality of these provisions.

Rule 2.12(5)

The Center argues that Rule 2.12(5) is far too restrictive in view of current federal law. Prior expressions of views on issues that then came before administrative adjudicators did not require disqualification. Due process does not require recusal for having expressed a view on an issue, it requires trial before an unbiased judge. Additionally and most vitally they find Rule 2.12(5) is unconstitutional under the case *Republican Party v. White*, 2005 U.S. App. LEXIS 15864 (8th Cir. Aug. 2, 2005). The scope of the prohibition of Rule 2.12(5) on expressing an opinion on issues is virtually identical to the announce clause struck down in *White*, Rule 2.12(5) is virtually certain to be found unconstitutional if adopted.

They state that a narrower construction can be fashioned to serve the interest in judicial impartiality. Requiring recusal of judges who have pledged or promised "certain results in a particular case" is a more narrowly tailored construction that would adequately serve the State's interest in impartiality. This would preserve the State's interest in an open-minded judge without also forbidding privileged speech.

The James Madison Center for Free Speech finds that the ABA has taken the narrowest possible reading of the *White* case and its progeny. "The original ABA Working Group "believe[d] that the decision [in *White*] can and should be read narrowly, leaving the door open for the drafting of campaign ethics restrictions that will pass constitutional muster." They criticize the proposed rule saying "The Preliminary Draft claimed that "judicial elections differ greatly from elections for other types of office," and then (the ABA) proceeded to make only the most negligible changes in the scope of regulation of judicial campaigns in Canon 5 and attempted to salvage its regulation of viewpoint expression by judicial candidates by adding the unprecedented threat of disqualification."