COMMENT OF JAMES MADISON CENTER FOR FREE SPEECH ON JUDICIAL CANON 5.02(d) FOR THE ABA'S JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT

James Bopp, Jr.
Anita Y. Woudenberg
JAMES MADISON CENTER FOR FREE SPEECH
1 South 6th Street
Terre Haute, Indiana 47807
812-232-2434

INTRODUCTION

The ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct has solicited comments to its preliminary draft of the Code. These comments are to be received no later than March 15, 2005. The James Madison Center for Free Speech, by General Counsel James Bopp, Jr.,[1] timely files its comments.

COMMENTS

The ABA proposes to revise Rule 5.02(d) to read as follows:

> Except as otherwise provided in Rules 5.03-5.06, a CANDIDATE for judicial office, including an incumbent JUDGE, shall not, directly or indirectly: . . . (d) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the IMPARTIAL performance of the adjudicative duties of the office; . . .

(emphasis in original). For purposes of analysis, this revision can essentially be broken down into three parts: 1) "with respect to cases, controversies, or issues that are likely to come before the court," 2) "make pledges, promises or commitments," and 3) "that are inconsistent with the impartial performance of the adjudicative duties of the office." Each will be reviewed in turn.

I. Cases, Controversies, or Issues That Are Likely to Come Before the Court

Several problems exist in using this language:

, The modifier "likely to come before the court" is contrary to the

[1] James Bopp, Jr., served as a Special Advisor to the ABA Working Group for First Amendment and Judicial Elections in 2002-2003.

Republican Party of Minnesota v. White, 536 U.S. 765 (2002)[2] decision. As the *White* Court observed, "'there is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction.'" *White*, 536 U.S. at 772 (citing *Buckley v. Illinois Judicial Inquiry Bd.*, 997 F.2d 224, 229 (7th Cir. 1993)). Viewed in this way, this modifier imposes no modification.

, If this modifier is given effect to limit the "pledges and promises" clause, it is then vague. How is a judicial candidate to know what is likely to come before him or her or what is not? This construction may result in chilling judicial candidates' speech.

, The implication of such a modifier is that judicial candidates *can* make pledges or promises in cases *not* likely to come before the court. Judicial candidates are left with a false impression that they can promise particular results in particular cases, provided that the issue is unlikely to come before them.

[2]James Bopp, Jr. served as counsel for Plaintiffs in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002) and argued the case before the U.S. Supreme Court.

, The distinction between issues "likely to come before the court" and other issues is irrelevant to impartiality concerns. Even those who raise a novel or unlikely issue to a judge are entitled to a fair and impartial consideration of that issue. The distinction for judicial candidates and in the canons should be whether judicial candidates are pledging or promising certain results in particular cases, regardless of whether the issue is likely to come before them.

II. Pledges, Promises or Commitments

It is unclear how a pledge or promise is different from a commitment:

, If "commitment" has the same meaning as "promise," then "pledge or promise" would suffice.

, If "commit" is broader because it refers to any suggestions a judicial candidate might make regarding their views or how they might decide cases, then "commitment" is overbroad. It regulates judicial candidate's announced views without being narrowly tailored to the state's interest in impartiality, a regulation which the U.S. Supreme Court has already declared unconstitutional in *White*. As a result, the use of "commits" language is either vague or unconstitutionally overbroad and should not be used.

III. Inconsistent with the Impartial Performance of the Adjudicative Duties of the Office.

This language may be problematic:

, This modifier properly restricts the state's interest in impartiality by defining "impartiality" as "bias towards a party" and "openmindedness," in accordance with *Republican Party of Minnesota v. White*, 536 U.S 765, 775-777 (2002). *See Model Code of Judicial Conduct Terminology* (stating that "'[i]mpartiality' or 'impartial' 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.")

, However, it lacks sufficient concreteness to offer any real direction to judicial candidates on what can be said and not said and is consequently likely to have an unconstitutional chilling effect.

IV. Recommendation: Judges Cannot "Promise Certain Results in Particular Cases"

Canon 5.02(d) should read as follows:

> Except as otherwise provided in Rules 5.03-5.06, a CANDIDATE for judicial office, including an incumbent JUDGE, shall not, directly or indirectly: . . . (d) promise certain results in particular cases; . . .

Changing the language so judicial candidates and incumbent judges cannot "promise certain results in particular cases" sufficiently addresses the state's interest in impartiality in a constitu-

tional manner:

, This proposed language gives judicial candidates sufficient and concrete notice as to what is prohibited under the canons.

, It directly serves the state's interest in impartiality by ensuring fairness to parties and preserving the appearance of open-mindedness of judicial candidates who become judges.

, This formulation appears to be closest to the one proposed by the Plaintiffs in *White*, Brief for Petitioners Republican Party of Minnesota et al, 35-37; Tr. of Oral Arg. 14-16 ("General statements about the law are qualitatively different that 'pledges and promises.' The latter commits the candidate to rule a certain way in a particular case; the former does not."), and by the *amici* supporting Minnesota in *White*, Brief for Brennan Center for Justice at 23 ("All of the parties and *amici* in this case agree that judges should not make explicit promises or commitments to decide particular cases in a particular manner."), vigorously defended by the dissenters in *White*, 536 U.S. at 813 ("[T]he State may constitutionally prohibit judicial candidates from pledging or promising certain results.") (Ginsburg, J.J., dissenting), and commented upon favorably by the *White* majority. *Id.* at 770 ("We know that 'announcing . . . views" on an issue covers

much more than *promising* to decide an issue a particular way."). Most recently, it was supported in *Family Trust Foundation of Kentucky, Inc. v. Wolnitzek,* 345 F. Supp. 2d 672, 696-97 (E.D. Ky. 2004).[3]

CONCLUSION

The ABA's revised Canon 5.02(d) does not sufficiently address the concerns raised in *White*. As proposed, it suffers from vagueness and overbreadth problems. The best formulation that should be adopted by the ABA is prohibiting judicial candidates from "promising certain results in particular cases" as it resolves any vagueness and overbreadth concerns.

Dated: March 14, 2005

[3]James Bopp, Jr., served as counsel for Plaintiffs in this case. The U.S. District Court for the Eastern District of Kentucky issued a *Stipulated Injunction and Order of Dismissal* on February 8, 2005, prohibiting the enforcement of Kentucky's commits clause and pledges and promises clause. The Kentucky Supreme Court is now considering the appropriate replacement for these clauses. Mr. Bopp is participating in oral argument before the Court on May 11, 2005.

Respectfully Submitted,

s/ James Bopp, Jr.
James Bopp, Jr.
Anita Y. Woudenberg
JAMES MADISON CENTER FOR FREE SPEECH
1 South 6th Street
Terre Haute, Indiana 47807
Ph.: 812/232-2434
Fax: 812/235-3685