From: evaluate Judicial Code [CPR-CODECOMM@MAIL.ABANET.ORG] on behalf of Gallagher, Eileen [GallaghE@staff.abanet.org]
Sent: Tuesday, March 15, 2005 4:34 PM
To: CPR-CODECOMM@MAIL.ABANET.ORG
Subject: FW: Comments on Canons from Luther Munford

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From: Tracey Booker (314 J.O.) [mailto:BookerT@phelps.com]
Sent: Tuesday, March 15, 2005 4:35 PM
To: Gallagher, Eileen
Subject: Comments on Canons from Luther Munford

Eileen C. Gallagher
March 15, 2005
American Bar Association
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Dear Ms. Gallagher:

Please forward to the committee the following comments on proposed Canons 1(June 2004), 2(June 2004), and 5(Jan. 2005) of the Model Code of Judicial Conduct.

Canon 2.12 F. The Supreme Court left two avenues open for the ABA to travel down if it wants to minimize the damage political campaigns do to public respect for the judiciary. In my view, the ABA has chosen the wrong one.

Disqualification. The proposed rules provide for the disqualification of a judge who has made a public statement "that commits, or appears to commit, the judge with respect to an issue in the proceeding or the controversy in the proceeding."

This is fine in theory but, in practice, will not happen very often. Also, when such a motion is made to an ideologically divided multi-member court, and the court can determine disqualification of one of its members, this rule will lead to opinions that do no credit to the impartiality of the judiciary.

There are many reasons why lawyers do not file recusal motions. For example, if an appeal involves three issues, and the judge is believed to be prejudiced as to only one of them, the lawyer may well hope that the judge will nevertheless be willing to agree with his client on the other two. On the other hand, if a lawyer in that situation files a motion for recusal and the judge really is biased, the judge may deny the motion and rule against the lawyer on all three issues. So the lawyer won't file a recusal motion. Even where the case only presents the issue as to which bias is alleged, a collegial court will probably not disqualify one of its members on the basis of Canon 2.12.F. in a circumstance that is not already covered by the general impartiality requirement of Canon 2.12 A.

False speech. The other avenue the Supreme Court left open was false speech. If a candidate's statements are knowingly false, then the state can restrict them. Judges take oaths of office. They can be impeached if they

violate those oaths. Because a judge has to obey an oath of office, a judicial candidate cannot truthfully comit to, or appear to comit to, some action which, if taken, would violate the judge's oath of office. The judicial ethics authorities ought to be able to sanction such an actual or apparent promise.

The oath which federal judges take is found in 28 U.S.C. § 453:

> I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons,
> and do equal rights to the poor and to the rich, and that I will faithfully and impartially discharge and
> perform all of the duties incumbent upon me as _____ under the Constitution and laws of the
> United States. So help me God.

Such a sanction would be very hard for the Supreme Court to strike down. No longer would impartiality be just an interest to be weighed. Instead, it would be the standard by which truth or falsity is judged. The standard is not vague, because oaths are not mere ceremonial acts. Finally, expressing the disciplinary action as restricting only knowingly false speech should eliminate most of the First Amendment problem.

Some other comments:

1) Commentary to Canon 2.11[4]. The rules should simply prohibit the judge from making public statements concerning allegations in the media or elsewhere. Freedom to speak for some judges will be coercion to speak for others. No longer will a judge be able to tell the press "I can't." Once you allow an exception, then the judges who wisely do not want to comment to the press will have no shield behind which they can hide.

2) Canon 2.12.D. might simply say "any person residing in the judge's household." That would be simpler. The rule ought to apply to household members who are not "family," and you avoid the "domestic partner" debate.

3) Commentary to Canon 2.12.E. The comment should explain what a "lawyer" is. Presumably this means an individual lawyer, but we have had trouble in Mississippi with an interpretation that it appears to lump all of the contributions of one law firm together.

4) Canon 5.05(b). A judicial candidate for appointment should not be able to seek the support or endorsement from an individual or organization "who has a specific case which is pending before the judge's court, or is pending in a lower court and could be appealed to the judge's court." This restriction in Canon 5.05 is especially important in light of Canon 5.07(b), which says the judge can stay in office while seeking an appointive position.

Thank you for this opportunity to comment on the committee's work.

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