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VIA ELECTRONIC MAIL

Ms. Brenda Taylor
American Bar Association
ABA Justice Center
321 N. Clark Street
Chicago, IL 60610

Re: Preliminary Comments on Proposed Canon 5

Dear Ms. Taylor:

I am writing to the Commission in my capacity as Chair of a subcommittee of the Professional Responsibility Committee of the Philadelphia Bar Association. The subcommittee is charged with reviewing and, as appropriate, providing comments to the ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct.

For the past year, the subcommittee has been reviewing the Commission's proposed changes to the Model Code of Judicial Conduct. Although our work is not yet completed, we would like to provide our input on Canon 5 at this time in view of the Commission's further deliberations on that Canon later this month. Canon 5 is, of course, a particularly important issue in Pennsylvania, since this is a jurisdiction in which both trial and appellate judges are elected in partisan elections. Please be advised that, in view of their preliminary nature, these comments represent *only* the views of our subcommittee; they have not been reviewed or endorsed by the Philadelphia Bar Association as a whole.

As presently drafted, the provisions of Rule 5.01(m) are inconsistent with those of Rule 2.12A (5) in light of the Supreme Court's decision in *Minnesota v. White.* Rule 2.12A provides that:

> A judge **shall disqualify** himself or herself in any proceeding in which the judge's impartiality **might be questioned** by a **reasonable** person, including but not limited to circumstances where: ... (5) the judge while a judge or [judicial candidate] 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. (Emphasis added.)

Rule 5.01(m) provides that:

> [A judge or a candidate for judicial office shall not directly or indirectly] 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.

As required by *Minnesota v. White,* the prohibitions in Rule 5.01(m) are based on an objective standard and extend only to actual "pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." In other words, Rule 5.01(m) permits judges and judicial candidates to make statements about issues or controversies, provided they do not make pledges, promises or commitments and that they are still able to render decisions in accordance with applicable law as required by their judicial function. Under this standard, the judge or judicial candidate is not required to avoid making comments because of the perceptions of others who might be aware of those comments. The comments are constitutionally protected by the First Amendment. On the other hand, failure to disqualify in the circumstances enumerated in Rule 2.12A (5) then becomes grounds for a disciplinary action. This creates an inherent and, in our view, irreconcilable tension between the two rules.

While Comment 14 to Rule 5.01 references Rule 2.11, it does not address the contradiction found in Rule 2.12, nor does the Comment's suggestion that candidates for judge who express their view emphasize their "duty" (and presumably willingness and ability) "to uphold the law regardless of their personal views" resolve the issue. As presently drafted, a judge can be disciplined under Rule 2.12A (5) for engaging in activity that is both constitutionally protected and specifically permitted by Rule 5.01(m).

We respectfully ask the Commission to review the conundrum faced by the judicial candidate caused by the interplay between Rules 2.12 and 5.01(m). If the judicial candidate is permitted by law to state his or her views on a topic as part of an election campaign, it cannot be cause for mandatory disqualification for the judge to have done so.

We believe that Rule 2.12 should be redrafted to remove disqualification as a requirement where a judge or judicial candidate has articulated a view or position that is allowed under Rule 5.01(m). One way to accomplish this would be to change the language in Rule 2.12 to eliminate disqualification and replace it with the suggestion that a judge in such circumstances should consider recusal if appropriate. By phrasing the rule in terms of recusal rather than disqualification, the matter becomes a discretionary one (subject, of course, to appellate review), rather than a disciplinary one, and thus the inconsistency (of constitutional proportions) between the two rules is alleviated.

In closing, we would like to thank you for this opportunity to provide our input on this particularly important question, and look forward to providing further comments in the months ahead.

Very truly yours,

Nancy Winkelman