

Proposed Rule	Comments on the Substantive Rule	Editorial Suggestions
<p>RULE 4.1 <i>Political and Campaign Activities of Judges and Judicial Candidates in General</i></p> <p>Comment</p> <p>PLEDGES, PROMISES, OR COMMITMENTS INCONSISTENT WITH IMPARTIAL PERFORMANCE OF THE ADJUDICATIVE DUTIES OF JUDICIAL OFFICE</p> <p>[11] The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.</p> <p>....</p> <p>[13] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases; instead, the totality of the statement must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result....</p>		<p>What is meant by the declaration that: “[c]ampaigns for judicial office must be conducted differently from campaigns for other offices” is not clear.</p> <p>The text and clarity of the Commentary would be improved if this sentence were deleted.</p> <p>Comment 13 would be clearer if it read:</p> <p>[13] The making of a pledge, promise, or commitment is not dependent upon, or limited to, the use of any specific words or phrases. <u>Instead, the totality of the statement circumstances must be examined to determine if a reasonable person would believe that the candidate for judicial office has specifically undertaken to reach a particular result in a specific case or category of cases....</u></p>

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<p>RULE 4.2 Political and Campaign Activities of Judicial Candidates in Public Elections</p> <p>....</p> <p>(B) A candidate for elective judicial office may, unless prohibited by law,* and not earlier than two years before the first applicable primary election:</p> <p>(1) establish a campaign committee pursuant to the provisions of Rule 4.4;</p> <p>(2) speak on behalf of his or her candidacy through any medium, including but not limited to advertisements, websites, or other campaign literature;</p> <p>(3) publicly endorse or oppose candidates for the same judicial office for which he or she is running;</p> <p>....</p> <p>(7) (a) make a general request for campaign contributions when speaking to an audience of 20 or more people; and,</p>	<p>It is quite clear that political speech, attending events hosted by political organizations, and campaign fundraising, are all activities that lie at the core of the First Amendment. There is good reason to believe, therefore, that an ethical rule which limits these activities to the two year period next preceding a primary election, would not survive a constitutional challenge.</p> <p>In Minnesota, where state court judges are elected to six-year terms, such restrictions are not narrowly tailored, nor do they seem to advance any interest of state government – much less a compelling one. The proposed restrictions all but invite a legal challenge.</p> <p>I urge the Advisory Committee to again review the <i>en banc</i> decision of the U.S. Court of Appeals for the Eighth Circuit in <i>Republican Party of Minnesota v. White</i>, 416 F.3d 738 (8th Cir. 2005). Judge Beam’s analysis with respect to the “Partisan Clauses” of the predecessor Canon 5 is directly on point.</p> <p>It is hard to imagine that a majority of that Court would sustain multi-year restrictions on activities that it earlier said deserve the “fullest and most urgent application” of the First Amendment.</p>	

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<p>(b) sign letters, for distribution by the candidate's campaign committee, soliciting campaign contributions, if the letters direct contributions to be sent to the address of the candidate's campaign committee and not that of the candidate.</p>	<p>Likewise troubling is the disparate – and more generous – treatment that is accorded to prevailing candidates under proposed Canon 4.2.</p>	
<p>Comment</p> <p>[1] Paragraph (B) permits judicial candidates in public elections to engage in some political and campaign activities otherwise prohibited by Rule 4.1. Candidates may not engage in these activities earlier than two years before the first applicable electoral event, such as a caucus or a primary election. Provision B(1) relates to when a candidate may form a new campaign committee. Previously existing campaign committees for a sitting judge may remain in existence from term to term.</p> <p>....</p> <p>[5] Judicial candidates are permitted to attend or purchase tickets for dinners and other events sponsored by political organizations.</p>	<p>Under the proposed Canon, a judicial candidate who prevailed in the election would be permitted to retain his or her campaign committee, while the defeated candidate would be obliged to disband his or her committee. It is not clear what interests of state government are advanced by requiring judicial candidates to disband private associations following an electoral defeat. At best, the restriction appears to be self-serving; at worst, it appears to be spiteful. Neither quality recommends adoption of this rule.</p> <hr/> <p>The restriction on attending events sponsored by political organizations appears to be over-inclusive. It is not clear what governmental interest is advanced by prohibiting judges from attending such events 735 days (or more than 2 years) before the applicable primary election, that is not likewise present 725 days (or less than 2 years) before the applicable primary election. Cf. Proposed Canon 4.2 (B)(1).</p>	

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<p>RULE 4.3 Activities of Candidates for Appointive Judicial Office</p> <p>A candidate for appointment to judicial office may:</p> <p>....</p> <p>(B) seek support for the appointment from organizations and individuals to the extent requested, required, or permitted by the appointing authority or the nominating commission.</p>		<p>I urge the committee to consider this simpler and more direct statement of the rule:</p> <p>A candidate for appointment to judicial office may:</p> <p>....</p> <p>(B) seek support for the appointment from organizations and from individuals to the extent requested, or permitted by the appointing authority of the nominating commission.</p>
<p>RULE 4.4 Campaign Committees</p> <p>....</p> <p>(B) A judicial candidate subject to public election shall direct his or her campaign committee:</p> <p>(1) to solicit and accept only such campaign contributions* as are reasonable, in any event not to exceed, in the aggregate,* \$2000 from any individual, entity or organization in an election year and \$500 in a non-election year;</p>		<p>It is not at all clear what qualifies as a "reasonable contribution."</p> <p>Particularly if the Advisory Committee intends that some contributions which otherwise comport with <i>Minnesota Statutes</i> Chapter 10A, would be refused, the restrictions should be made clear.</p>

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<p>(2) not to solicit or accept contributions for a candidate's current campaign more than two years before the applicable primary election, nor more than 90 days after the last election in which the candidate participated;</p>	<p>As noted above, it is not at all clear what interests of state government are advanced by restricting when a candidate's committee may undertake fundraising.</p> <p>Indeed, the proposed restrictions are far broader than other time-delimited rules – compare, e.g., Minn. Stat. § 10A.273 – and do not seem to be related to any anti-corruption objective.</p> <p>In my view, the restrictions are not sustainable.</p> <p>Moreover, to the extent that the proposed rule increases the time pressure to complete fundraising activities, it represents a poor policy choice. Because the proposed rule cabins a committee's post-election fundraising to retire campaign debt, and limits the ability of candidates to compete with wealthy, self-financed opponents, it heightens, rather than reduces, anti-corruption concerns.</p> <p>Therefore, not only is it unclear that the proposed rule advances any legitimate governmental interests it undermines the interests that the government does possess.</p>	