
Proposed Amendment - Code of Judicial Conduct

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Dear Chief Justice Newby:

I write to propose amending Canon 7B of the Code of Judicial Conduct concerning political conduct of judges. As you know, in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), the Supreme Court of the United States decided “whether the First Amendment permits the Minnesota Supreme Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues.” *Id.* at 768. Justice Scalia, writing for the Court, noted that these types of judicial speech codes “set[] our First Amendment jurisprudence on its head” because “it is simply not the function of government to select which issues are worth discussing or debating[.]” *Id.* at 781, 782 (citation omitted). That concern is particularly evident where disciplinary authority turns on subjective judgment regarding the content of speech, rather than clearly defined and objective limits.

In addition, the plain language of the North Carolina Constitution arguably provides even more explicit protection for speech than does the First Amendment. See N.C. Const. art. I, § 14 (“Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained[.]”)

With this in mind, I am proposing the following amendment to Canon 7B for inclusion in the Code of Judicial Conduct:

(7) The Judicial Standards Commission’s authority shall not extend to the regulation or oversight of constitutionally protected speech. Consistent with *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), it is not the duty of the Commission “to select which issues are worth discussing or debating” as it relates to political speech. *Minnesota v. White*, 536 U.S. at 782.

However, no sitting judge or justice, or candidate for judge or justice, may make, communicate, or otherwise disseminate extrajudicial statements that contain or include:

- a. Confidential information obtained in the course of his or her official duties;
- b. Public comment on the merits of a matter pending in any court.
Consistent with Canon 3A(6), the prohibition on public comment on the merits does not extend to public statements made in the course of the judge’s official duties, to explanations of court procedures or case posture for public information, or to scholarly presentations made for purposes of legal education. But under no circumstances are public

comments concerning how he or she would decide, rule, or otherwise resolve a particular issue or pending case permissible; or
c. Knowingly false statements concerning the qualifications or integrity of a judge, justice, or candidate for judge or justice.

This proposed amendment is not about expanding political activity by judges but rather preserving the legitimacy of judicial regulation by having clear, objective, and enforceable rules. My preference would be that judges and justices refrain from discussion of political issues. But as it stands, the subjective nature of policing political speech invites uneven enforcement and weaponization of the process, and seems difficult to reconcile with the unambiguous direction provided by the Supreme Court and our State Constitution.

Please note that this correspondence is not intended to be confidential as I believe robust public debate and input from members of the Judicial Standards Commission is important. Let me know if you have any questions or thoughts.

Phil