

IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 02-\_\_\_\_\_ **9167**

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APPROVAL OF AMENDMENTS TO THE  
TEXAS CODE OF JUDICIAL CONDUCT

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In *Republican Party of Minnesota v. White*, 122 S.Ct. 2528 (2002), the United States Supreme Court held that Minnesota's canon of judicial conduct, which prohibits judicial candidates from announcing their views on disputed legal and political issues, violates the First Amendment. In light of that decision, this Court determined it was appropriate to review the provisions of the Texas Code of Judicial Conduct to determine the extent to which changes to the Code were necessary. The Court appointed an advisory committee, composed of nationally recognized experts in the area of judicial ethics and free speech, to advise the Court about *White's* impact on the Texas Code of Judicial Conduct. The Committee's performance of its charge was exemplary and provided valuable insights to the Court. We commend the following members of the Committee for their dedication to this task:

Mr. Charles L. Babcock, Chair  
Professor Elaine Carlson  
Mr. R. James George  
Professor Douglas Laycock

Dean John B. Attanasio  
Mr. Leon Carter  
Professor David M. Guinn  
Professor Roy Schotland

The Court, having carefully considered the Committee's comments and recognizing that a general election involving a substantial number of judges and judicial candidates will take place shortly, has determined that it is appropriate to make amendments to the Texas Code of Judicial Conduct. These amendments should be placed in proper context. While there is no doubt that *White* compels amendments to our Code, the immediacy of pending elections requires that these amendments be undertaken without the full and deliberate study the Court would ordinarily employ. Like many of our sister states, we are called upon to provide immediate guidance to judges, judicial candidates and the electorate before the next election in November 2002. Thus, while we are inclined to engage in an extended debate on the impact of *White* with scholars, judges, the media, the Commission on Judicial Conduct, and other interested parties, we must yield to the reality that hundreds of judicial races will be contested this November and that the judges and candidates involved in those races are entitled to some direction on the permissible limits on judicial speech during this election cycle.

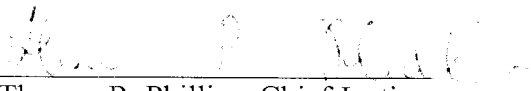
These changes represent our initial attempt to satisfy the requirements placed on our judicial conduct code by *White*. The Court will continue to examine the extent to which these or additional changes to the Texas Code of Judicial Conduct are required. Subsequently, the Court will announce the formation of a committee to examine all of provisions of the Texas Code of Judicial Conduct.

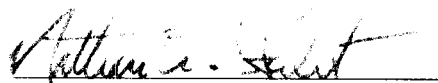
Accordingly, it is

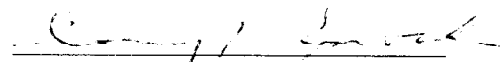
**ORDERED** that:

1. The Texas Code of Judicial Conduct is amended as follows:
  - a. Canons 3(B)(10), 6(B), and 6(C)(1) are amended; and
  - b. Canon 5 is amended and a comment is added
2. These amendments take effect immediately;
3. The Clerk is directed to file an original of this Order with the Secretary of State forthwith, and to cause a copy of this Order to be mailed to each registered member of the State Bar of Texas by publication in the *Texas Bar Journal*.

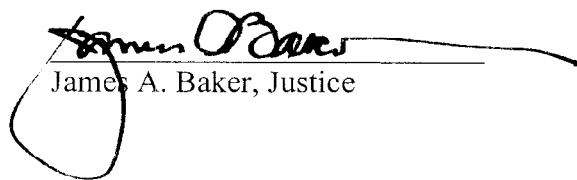
SIGNED AND ENTERED this 22<sup>nd</sup> day of August 2002.

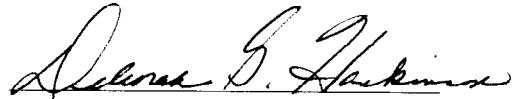
  
Thomas R. Phillips, Chief Justice

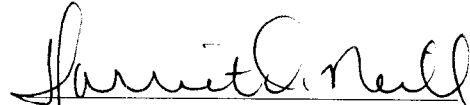
  
Nathan L. Hecht, Justice

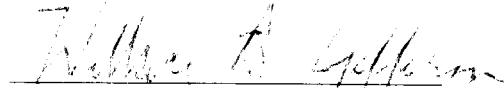
  
Craig T. Enoch, Justice

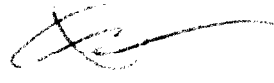
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Priscilla R. Owen, Justice

  
James A. Baker, Justice

  
Deborah G. Hankinson, Justice

  
Harriet O'Neill, Justice

  
Wallace B. Jefferson, Justice

  
Xavier Rodriguez, Justice

### CANON 3(B)(10)

(10) A Judge shall abstain from public comment about a pending or impending proceeding which may come before a judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. **This prohibition applies to any candidate for judicial office, with respect to judicial proceedings pending or impending in the court on which the candidate would serve if elected.** A [The] judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This section does not apply to proceedings in which the judge or **judicial candidate** is a litigant in a personal capacity.

### CANON 5

~~(1) [A judge or judicial candidate shall not make statements that indicate an opinion on any issue that may be subject to judicial interpretation by the office which is being sought or held, except that discussion of an individual's judicial philosophy is appropriate if conducted in a manner which does not suggest to a reasonable person a probable decision on any particular case.~~

~~(2)] A judge or judicial candidate shall not:~~

~~(i) make pledges or promises of conduct in office regarding **pending or impending cases, specific classes of cases, specific classes of litigants, or specific propositions of law that would suggest to a reasonable person that the judge is predisposed to a probable decision in cases within the scope of the pledge** [judicial duties other than the faithful and impartial performance of the duties of the office, but may state a position regarding the conduct of administrative duties] ;~~

~~(ii) knowingly or recklessly misrepresent the identity, qualifications, present position, or other fact concerning the candidate or an opponent; or~~

~~**(iii) make a statement that would violate Canon 3B (10).**~~

~~(2) [(3)] A judge or judicial candidate shall not authorize the public use of his or her name endorsing another candidate for any public office, except that either may indicate support for a political party. A judge or judicial candidate may attend political events and express his or her views on political matters in accord with this Canon and Canon 3B (10).~~

~~(3) [(4)] A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in~~

a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.

~~(4)~~ [(5)] A judge or judicial candidate subject to the Judicial Campaign Fairness Act, Tex. Elec. Code § 253.151, *et. seq.* (the “Act”), shall not knowingly commit an act for which he or she knows the Act imposes a penalty. Contributions returned in accordance with Sections 253.155(e), 253.157(b) or 253.160(b) of the Act are not a violation of this paragraph.

#### COMMENT

*A statement made during a campaign for judicial office, whether or not prohibited by this Canon, may cause a judge’s impartiality to be reasonably questioned in the context of a particular case and may result in recusal.*

#### CANON 6

B. A County Judge who performs judicial functions shall comply with all provisions of this Code except the judge is not required to comply:

- (1) when engaged in duties which relate to the judge's role in the administration of the county;
- (2) with Canons 4D (2), 4D (3), or 4H;
- (3) with Canon 4G, except practicing law in the court on which he or she serves or in any court subject to the appellate jurisdiction of the county court, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.
- (4) with Canon ~~(5)~~ [(3)] [5(4)].

C. Justices of the Peace and Municipal Court Judges.

- (1) A justice of the peace or municipal court judge shall comply with all provisions of this Code, except the judge is not required to comply:

(a) with Canon 3B(8) pertaining to ex parte communications; in lieu thereof a justice of the peace or municipal court judge shall comply with Canon 6C(2) below;

(b) with Canons 4D(2), 4D(3), 4E, or 4H;

(c) with Canon 4F, unless the court on which the judge serves may have jurisdiction of the matter or parties involved in the arbitration or mediation; or

(d) if an attorney, with Canon 4G, except practicing law in the court on which he or she serves, or acting as a lawyer in a proceeding in which he or she has served as a judge or in any proceeding related thereto.

(e) with Canon 5(3)[5(4)].

# IN THE SUPREME COURT OF TEXAS

Misc. Docket No. 02- 9167

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**STATEMENT OF JUSTICE HECHT  
CONCURRING IN THE AMENDMENTS TO  
THE TEXAS CODE OF JUDICIAL CONDUCT  
APPROVED AUGUST 21, 2002**

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Before promulgating any rule, the Supreme Court of Texas must, in my view, determine that the rule does not violate the United States Constitution, the Texas Constitution, or federal or state law. The Court should not adopt rules of doubtful validity. A strict adherence to this standard must yield to present circumstances.

After the United States Supreme Court's decision in *Republican Party of Minnesota v. White*, 122 S. Ct. 2528 (2002), it is clear that Canon 5(1) of the Texas Code of Judicial Conduct violates the First Amendment to the United States Constitution and should be repealed. It is less clear whether other Code provisions relating to judicial speech — Canon 3(B)(10) and the remainder of Canon 5 — are likewise infirm. The eminent members of the advisory committee appointed by the Supreme Court of Texas are not of one mind on the subject, and the issues and arguments they have raised in their deliberations over the past few weeks deserve thoughtful consideration. This can be done, however, only at the expense of delaying guidance to the scores of judicial campaigns well underway across the State. I agree with the Court that some immediate action is necessary while the Code is reviewed further.

Therefore I join in the Code amendments approved today although I remain in doubt whether they are sufficient to comply with the First Amendment.



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Nathan L. Hecht  
Justice