

JUDICIAL ELECTION RULES UPHELD

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On September 25, the United States Supreme Court denied certiorari in the case *Wersal v. Sexton, et al.*^{Ftn 1} Why is this newsworthy for Minnesota lawyers, judges and the public? Because what was at issue were portions of the Minnesota Code of Judicial Conduct that affect Minnesota's judicial election and campaign process. Although the recently completed judicial election campaigns were relatively calm, that does not guarantee that future elections will not generate controversy over issues or fundraising.

Background

Gregory Wersal, plaintiff in the recent litigation, has been a candidate for judicial office on several occasions, particularly for a position on the Minnesota Supreme Court. In that role, he earlier successfully challenged restrictions on judicial campaigning contained in the Minnesota Code of Judicial Conduct. The United States Supreme Court agreed with Mr. Wersal and the Republican Party of Minnesota in *Republican Party of Minnesota (RPM) v. White*^{Ftn 2} that restrictions on a judicial candidate's ability to announce her views on issues were an impermissible restriction on free speech. On remand to the 8th Circuit, that court also found restrictions on partisan activities and some restrictions on solicitation of funds to be unconstitutional.^{Ftn 3}

Following those decisions, the Minnesota Supreme Court, on recommendation from the Board on Judicial Standards and in conjunction with the MSBA, amended Minnesota's judicial code as to any remaining restrictions on judicial elections. Those revisions formed the basis of the current federal litigation, in which Mr. Wersal was seeking to have the new provisions also declared unconstitutional. He named as defendants all members of the Lawyers Professional Responsibility Board and the Board on Judicial Standards in their official capacities. The individuals were represented by the Attorney General's Office throughout.

The somewhat back-and-forth, tortured path of this litigation was as follows: The Code of Judicial Conduct restrictions were upheld by the federal district court for the District of Minnesota; then reversed on appeal by a three-member panel of the 8th Circuit Court of Appeals; the restrictions were again upheld by the 8th Circuit Court of Appeals *en banc*; that result is now final with the Supreme Court's denial of certiorari. The matter should now be remanded for entry of judgment at which time the litigation will be finished. Unlike in the *RPM v. White* litigation, no mandatory award of attorney's fees will be entered against the defendants, who on this round were the prevailing parties. It should be noted that the 8th Circuit's determination was by plurality and far from unanimous.

Meaning

What will this mean for the present and future of judicial elections in Minnesota? As has been the situation since the Code of Judicial Conduct was amended in 2006, candidates for judicial office are not able to publicly endorse or publicly oppose (except the candidate's opponent) another candidate for public office,^{Ftn 4} and will not be able to personally solicit or accept campaign contributions except through a campaign committee.^{Ftn 5} Those restrictions were in place during the recent elections and now can remain effective in future elections. Since the decisions in *White I* and *White II*, judicial candidates have been permitted to express their views on disputed legal and political issues, list themselves as members of a political party and attend political party meetings, seek and accept (and advertise) party endorsements, establish campaign committees to solicit and raise funds, sign letters used by those committees, and even personally solicit funds from groups of 20 or more. Thus, the restrictions that have now been upheld in fact do not substantially restrict the activities of candidates for judicial office.

What was the rationale of the 8th Circuit *en banc* plurality ruling that ultimately proved persuasive? They found that the appearance of impartiality, in the sense of a lack of bias for or against either party to a proceeding, is a compelling state interest that withstood strict scrutiny. The court determined that it cannot reasonably be argued that seeking to uphold a constitutional protection, such as due process, is not *per se* a compelling state interest. The 8th Circuit also found that denying a candidate the ability to endorse other candidates (or accept such endorsements) was different from prohibiting a candidate from announcing his views on an issue, which had been found unconstitutional. Minnesota's restrictions on speech for or against parties were found to be narrowly tailored to serve the compelling interests of impartiality and the appearance of impartiality.

Further, the court determined that recusal by individual judges was not a less restrictive alternative, as Mr. Wersal argued. The appearance created by a judge's endorsement for or by parties who might regularly appear before a judge, such as county attorneys, was not susceptible to remedy by recusal.

As to in-person solicitation of funds by judicial candidates, the court again found a compelling interest in protecting impartiality as to parties who might come before a judge. Fundraising clauses that prohibit all personal fundraising by judicial candidates have not withstood constitutional scrutiny. But as noted, Minnesota's amended rule allows judges to personally solicit funds from groups of over 20 people, where the likelihood of the candidate knowing who in fact contributed and who did not is minimized. Thus, Minnesota's amended Code was upheld.

Future

While the decision in the *Wersal* case has an impact on how our current judicial elections will be conducted, it does not impact the more fundamental question of what kind of judicial elections should we have, or if we should conduct any at all. Concerns about the potential for costly contested judicial elections remain. Concerns about contested elections heavily financed by out-of-state organizations and focused on a specific political agenda are real. Most observers seem to believe that change should be considered before such a volatile and expensive judicial campaign occurs in Minnesota. The MSBA and many prominent lawyers and judges in Minnesota have weighed in on whether the current appointment and reelection process should be replaced, possibly by appointment and periodic retention elections. Some have asked whether the process need be the same for appellate judges as for trial court judges.

While the recent litigation over endorsements and personal solicitation of funds helps allay some concerns of greater political involvement in our judicial elections, these more basic questions remain alive.

Notes

1 *Wersal v. Sexton, et al.*, 674 F.3d 1010 (8th Cir. 2012), *cert. denied*.

2 536 U.S. 765 (2002) (referred to as "*White I*").

3 416 F.3d 738 (8th Cir. 2005), *cert. denied* (referred to as "*White II*").

4 Rule 4.1A(3), Minnesota Code of Judicial Conduct (MCJC).

5 Rule 4.1A(6), MCJC.