

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

**FINDINGS AND ORDER IN THE MATTER OF
A COMPLAINT FILED AGAINST THE MINNESOTA JUDICIAL COUNCIL, CHIEF
JUSTICE RUSSELL ANDERSON AND ASSOCIATE JUSTICE G. BARRY ANDERSON**

Summary of Allegations and Responses

On May 20, 2006, Greg Wersal (“Complainant”) filed a complaint with the Campaign Finance and Public Disclosure Board (“Board”) against the Minnesota Judicial Council (“Council” or “Judicial Council”), Chief Justice Russell Anderson and Associate Justice G. Barry Anderson.

The complaint alleged that the Council sponsored a two-day retreat on February 15–16, 2006, and that the retreat constituted a campaign contribution to or expenditure on behalf of candidates for judicial office. According to the complaint, the conference was organized by Associate Justice G. Barry Anderson. Chief Justice Russell Anderson is a member of the Council. The Judicial Council is a public body established by the previous Chief Justice of the Minnesota Supreme Court, Justice Kathleen A. Blatz, by Order dated December 10, 2004, to act as the decision-making authority for administrative functions of the judicial branch of the State of Minnesota. The Council’s members include the Chief Justice and an Associate Justice of the Minnesota Supreme Court, the Chief Judge of the Court of Appeals, and the Chief Judges of the district courts of the State. The Council’s responsibilities include planning, budgeting, human resources, technology and education for the courts of the state.

In support of the complaint, Complainant submitted a document called “Summary/Talking Points” purportedly prepared by staff of the State Court Administrator’s office. The document states that it is a capsule summary of the main points from the February 15–16 Judicial Council Retreat on an Impartial Judiciary. Topics referred to in the Summary/Talking Points included: anticipated trends in judicial elections; references to remarks made by Annette Meeks, a former officer of the Republican Party of Minnesota and then-president of the Center for the American Experiment; strategies/responses to the *White* decisions; possible statutory fixes; a discussion of alternatives to state action or regulation by Sue Holden from the Minnesota State Bar Association (“MSBA”); judicial candidate speech and conduct; endorsements; a presentation entitled “campaign tips” from Carolyn Johnson, a former Texas judge; possible long-term reforms, including various options for judicial selection and retention; points from a speech by retired Chief Justice Kathleen Blatz; discussion of constitutional options by Mark Gehan, former MSBA Committee chair and Justice Blatz; a summary of the *White* decisions and what activities are permitted, by Assistant Attorney General Tom Vasaly; a report and recommendations of the Minnesota District Judges Association (“MDJA”) Judicial Elections Committee, describing the current judicial selection system, its practical realities, the MDJA position supporting the present merit selection and judicial election system, alternatives to the Minnesota system, various proposals for modifications to the current system, arguments for and against the proposed changes, and MDJA recommendations that the Judicial Elections Committee remain in existence through at least two election cycles and become involved in voter education and outreach.

A major topic of discussion at the February, 2006 meeting of the Council were the recent decisions of the United States Supreme Court and the Eighth Circuit Court of Appeals in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), *subsequent appeal after remand* 416 F.3d 738 (8th Cir. 2005). According to the Complaint, "It appears that the Judicial Council, acting as a political party or fund on behalf of its candidates, put together this retreat to tell its candidates how to seek election to judicial offices. Its candidates are the incumbent judges and the notes talk about how the incumbents must act together to ward off the threat of any challengers, especially those endorsed or supported by the Republican Party."

According to the Complaint, the Council spent \$3,000 on arrangements for the two-day retreat. The Complaint identified several quotes from the notes of the retreat that indicated, in the Complainant's opinion, that the Council's concern and purpose is the re-election of incumbent judges. In Complainant's view, the costs of the Council meeting were therefore "campaign expenditures" and the Council was therefore required to register as a political committee or political fund with the Board within fourteen days of making expenditures in excess of \$100. The Complainant also stated, "In addition, there is a serious issue raised here because the money being spent by the Judicial Council is public money."

On June 5, 2006, Complainant sent another letter to the Board stating that he wished to supplement his complaint by raising three issues: 1) the legality of a public body spending public funds on election activities for a candidate or ballot issue; 2) the actions of the Judicial Council in concert with the Minnesota State Bar Association and the coordination of "independent" campaign activities and expenditures; and 3) the activities of the Citizen's Commission for the Preservation of an Impartial Judiciary (popularly known as the "Quie Commission"). Complainant also provided a research memo dated October 2000 and prepared by the League of Minnesota Cities, and three Opinions of the Attorney General, dated July 18, 1927, April 29, 1954, and July 10, 1958. The memo and Attorney General Opinions dealt with the legality of public spending on elections and ballot issues.

In the initial May 20 complaint, Complainant alleged that the Judicial Council spent public funds with the purpose of trying to reelect judicial incumbents and defeat any challengers endorsed by political parties. In his supplemental July 5 letter, Complainant also asked, "1. Are laws being violated because public funds are being used to support a ballot initiative? 2. Are the Campaign Finance laws being violated because the Quie Commission has now had several meetings and probably has spent over \$100, especially if you include the staff time, and has failed to file with the Campaign Finance and Public Disclosure Board? 3. Is there an illegal coordination of activities between the MSBA, the Judicial Council and the Quie Commission? 4. Is the Quie Commission simply a wholly owned subsidiary of the Judicial Council, acting under another name to give the appearance that this isn't simply the judges trying to preserve their jobs?" In support of the allegations, Complainant also submitted materials prepared by the MSBA and the Quie Commission regarding judicial selection and election in light of the *White* decision and in other states.

On June 12, 2006, Wilbur W. Fluegel responded to the Complaint on behalf of Associate Justice G. Barry Anderson. On June 23, 2006, Thomas C. Vasaly, Assistant Attorney General,

responded on behalf of the Judicial Council and Chief Justice Russell Anderson. Responses were also filed on behalf of the MSBA and the Quie Commission.

In his response on behalf of Associate Justice G. Barry Anderson, Mr. Fluegel identified what he believed to be seven issues raised in the two letters submitted by Complainant, and addressed each of these issues. Mr. Fluegel described the issues as follows:

1. Did the “retreat” held by the Minnesota Judicial Council constitute an unreported “campaign expenditure” by an “association” that was not, but allegedly should have been, registered as a “political committee,” “political fund,” “political party,” “party unit,” or “association” with the Board.
2. By failing to register or report its expenditure of funds incurred at the “retreat,” did the Judicial Council violate the reporting requirements of Minn. Stat. §10A.14.
3. The information relayed by one or more speakers at the “retreat” discussed what judges who may run for reelection could and could not legally do under recent court decisions. If this information constituted something of value, did it represent a “donation in kind” by the Judicial Council to the judges who attended the retreat, so as to trigger the reporting requirements of lobbying activities under Chapter 10A.
4. Did the Judicial Council, in using public funds to hold its “retreat,” “commingle” funds budgeted for public management of the judicial branch of government with political funds.
5. The Minnesota Judicial Council, the MSBA and the Quie Commission are studying the impact of recent court decisions on the public perception of the judiciary. While no current “ballot question” exists regarding the reformation of judicial elections, to the extent that a ballot question could be among the suggestions that may someday be advocated by one of these organizations, do their activities violate the reporting requirements applicable to “activities related to qualifying the question for placement on the ballot” under Minn. Stat. §10A.01, subd. 7.
6. Does the expenditure of public money by the judicial branch of government in the study by its member of possible reforms of the judicial system violate state law, as reflected in the Attorney General Opinions from 1927, 1954 and 1958 supplied by the Complainant.
7. Does the expenditure of funds by the Judicial Council, MSBA or Quie Commission constitute an “independent expenditure” as defined in Minn. Stat. §10A.01, subd. 18, thereby triggering disclaimer requirements under §10A.17, subd. 4, the limitations on spending by an entity other than a registered political fund under §10A.12, subd. 1, or the reporting obligations by the “candidate” receiving the contribution under §10A.20, subd. 6b.

With regard to the first issue described above, Mr. Fluegel stated: “The ‘retreat’ was not a ‘campaign expenditure’ by an entity subject to chapter 10A that violated any reporting or registration requirements or constituted ‘anything of value’ for purposes of the laws governed by the Campaign Finance Board.” According to Mr. Fluegel, even “Assuming these allegations [of

campaign expenditures by the Judicial Council] to be true, they do not equate to a violation of chapter 10A by Justice Anderson. None of the above allegations suggests that Justice Anderson acted improperly, but assert that the Minnesota Judicial Council did.” Further, citing Advisory Opinion 234, Mr. Fluegel argued that “Research and analysis of laws is not ‘anything of value’ and thus a ‘campaign expenditure’ is not triggered by sharing research.” Mr. Fluegel further asserted that Justice Anderson is not a group but rather a single individual, and thus cannot be an “association.” Mr. Fluegel further stated, “The Minnesota Judicial Council is not a political organization, but rather is the management group of court officials who develop and implement the budget and programs for the third branch of government under the constitution.” Mr. Fluegel argued that while it is an association, the Council does not meet the statutory definitions of “political committee,” “political fund,” “political party” or “lobbyist.”

Mr. Fluegel also disputed that the activities of the retreat were for the purpose of reelecting judges, stating, “The activities of the ‘retreat’ are genuinely in issue.” He stated that “Given the 2005 federal court rulings in [the *White* case], its implications on the judiciary and public confidence in the judicial branch are obviously matters of current concern to all judges and lawyers, regardless of their beliefs about judicial elections.” Mr. Fluegel asserted the retreat “was convened to study how to promote public confidence in the state’s judiciary in light of the potential for recent case law changes to make judicial elections more ‘politicized’.”

Specifically with regard to the role of Associate Justice Anderson, Mr. Fluegel stated that he “must attend to a number of official duties in addition to judging cases that come before his court.” According to Mr. Fluegel, while Justice Anderson played a role in organizing the retreat, he attended it as part of his official duties as a member of the Supreme Court. Again citing Board Advisory Opinion 234, Mr. Fluegel argued that “a judge’s attending a judicial conference is not the receipt of ‘anything of value’ within the meaning of Minn. Stat. §10A.01, subd. 13.” According to Mr. Fluegel, “Thus, even if the branch of government for which he works ‘gave’ him information at a meeting of that branches’ governing body which was convened using public funds, ‘an individual while engaged in selling goods or services to be paid for by public funds’ is not a lobbyist under Minn. Stat. §10A.21(b)(6) [*sic*].”

With regard to lobbying, Mr. Fluegel stated that “There is no showing that Justice Anderson has been paid to lobby anything, incurred any lobbying expense and moreover he is a state employee.” Mr. Fluegel also stated, “Additionally there is no showing that the Minnesota Judicial Council has any lobbyists or is a lobbyist under the definition set out in chapter 10A.”

Regarding the “commingling” allegation, Mr. Fluegel stated, “While Mr. Wersal’s complaint refers to ‘commingling,’ there is no evidence that either Justice Anderson--an individual-- or the Minnesota Judicial Council -- an agency of state government -- has or is a ‘political fund’ under §10A.01, subd. 28 or a ‘political committee’ under §10A.01, subd. 27.” He noted that there is no indication that either the Judicial Council or Justice Anderson accumulated dues or voluntary contributions to influence the nomination or election of a candidate or to promote or defeat a ballot question, as provided in the definition of a “political fund” under Minn. Stat. §10A.01, subd. 28. Mr. Fluegel also stated that presently there are no candidates or ballot questions at issue for the state agency to expend funds on.

In this regard, Mr. Fluegel argued that study of possible legislative and/or constitutional changes, including possible ballot questions, is under way but has not progressed to the point that a specific ballot question has been put forward or advocated by either the MSBA or the Quie Commission. Mr. Fluegel stated his position that “‘Qualifying’ [of a ballot question] is not defined in chapter 10A, but presumably means the obtaining of signatures or the advocacy of legislation that would enable the placement of a specific question on a state-wide ballot.” According to Mr. Fluegel, since no signatures have been obtained or any legislation lobbied, qualification efforts have not yet begun.

Mr. Fluegel further argued that the study of reforms to the judicial system is not illegal. He noted, “The judiciary regularly advocates for new programs to promote justice.” According to Mr. Fluegel, these include programs to help the poor access the court system, and to better and more efficiently process family law issues and drug crimes. Mr. Fluegel stated that “Justice Anderson is not even mentioned as having advocated a particular view regarding an amendment to the state’s Constitution, much less having formulated a ballot question or solicited signatures or legislative votes for one.”

The response from Mr. Fluegel further argued that “No ‘independent expenditures’ have been made by the MSBA or the Quie Commission that benefited Justice Anderson or the Minnesota Judicial Council.” Mr. Fluegel noted that Minn. Stat. §10A.01, subd. 18 defines “independent expenditure” as “an expenditure expressly advocating the election or defeat of a clearly identified candidate.” He further stated that “Mr. Wersal does not identify any candidate addressed by an MSBA expenditure.” Mr. Fluegel suggested that the Complainant appears to believe “that the MSBA, the Quie Commission, the Minnesota Judicial Council and others will conspire to promote the election of all incumbent judges regardless of their qualification or ability.” Mr. Fluegel went on to argue that even if that were to be the case, actions that may occur in the future cannot be punished as current offenses, and further that to be regarded as having made an “independent expenditure,” the MSBA, Quie Commission and others would, in any case, have to have expressly advocated the election or defeat of specific candidates.

Together with his response, Mr. Fluegel submitted documents including the December 10, 2004 Order of Chief Justice Kathleen Blatz establishing the Judicial Council; minutes of a March 27, 2006 meeting of the Quie Commission; a 2001 report entitled “Strategies & Priorities for Minnesota’s Judicial Branch”; the 2004 Annual Report of the Judicial Branch; and a statement of Susan M. Holden, Minnesota State Bar Association, as reported in the Minneapolis StarTribune.

In his response on behalf of the Minnesota Judicial Council and Chief Justice Russell Anderson, Mr. Vasaly stated that “The Complaint should be dismissed on two grounds: (1) the Minnesota Ethics in Government Act does not regulate the expenditures of State agencies, and (2) the alleged conduct does not violate the Act.

First, Mr. Vasaly stated that the Act is not applicable to State agencies. He said, “In determining the scope of a statute, it is presumed that the statute does not apply to the State itself.” Mr. Vasaly quoted the provisions of Minn. Stat. § 645.27 (2004), which states:

State bound by statute, when. The state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.

The response further stated that “The Minnesota Ethics in Government Act contains no language suggesting that the Legislature intended it to apply to the State or its agencies.” Mr. Vasaly pointed out that Complainant also alleged that public funds were spent for unauthorized activities. Mr. Vasaly argued that “While there are restrictions on the expenditure of public funds, these restrictions are not contained in the Minnesota Ethics in Government Act and are not enforceable by the Board.”

The response asserted that “Similarly, the Act does not apply to State officials acting in their official capacities.” Accordingly, the response took the position that “[The Act] does not apply to Chief Justice Anderson in his capacity as Chief Justice and a member of the Judicial Council.”

Second, Mr. Vasaly’s response argued that even if the Act applies to State agencies, the Judicial Council is not an organization subject to the Act. The response argued that the Council is not a “political committee” as defined in Minn. Stat. § 10A.01, subd. 27, because the purpose of the Council is administrative decision-making, not the election of a political candidate or the promotion or defeat of a ballot question. Likewise, the response argued that the Council is not a “political fund” as defined in subd. 28, because “The statute has been narrowly construed to limit its application to groups that *expressly advocate* the election or defeat of a particular candidate or the promotion or defeat of a ballot question.” According to Mr. Vasaly, “The Judicial Council does not engage in such express advocacy” and further, “it does not collect or expend contributions for such advocacy.” The response further argued that “the Judicial Council does not fall within the any of the remaining definitions of the Act,” including “political party”, “party unit”, or “principal campaign committee.”

On August 14, 2006, Complainant sent a third letter to the Board, stating that he wished to supplement his complaint with two items. First, Complainant stated that in July, he personally attended a meeting of the Quie Commission that was open to the public. Complainant further stated, “Staff members of the Minnesota Supreme Court Administrators [sic] Office, were in attendance and helping organize the meeting. Again, the salaries of the staff were paid for by public funds....” Complainant went on to state, “Members of the Quie Commission include Patrick Kelly, who is an officer [of the MSBA], Justice Alan Page and Justice G. Barry Anderson, who organized the ‘retreat’ that was the focus of my original complaint.” Second, Complainant attached an article from the August 7, 2006 “Minnesota Lawyer” magazine. The article described an “affirmation” that the MSBA is sending to all judicial candidates. The affirmation contains certain voluntary pledges relating to the conduct of judicial campaigns, that candidates are asked to consider making. Complainant’s letter concludes that “The entire thrust of this activity is to protect incumbent judges up for reelection.” Complainant further states his belief that “this appears to be a clear violation of the Campaign Finance and Disclosure laws which prohibits [sic] coordination of activities.”

The Complaints against the MSBA and the the Quie Commission are addressed in separate Findings and Orders relating to the complaints against those entities. Therefore, these Findings

relate only to the Complaint regarding the Minnesota Judicial Council, Chief Justice Russell Anderson, and Associate Justice G. Barry Anderson.

The Board considered this matter in executive session at its meetings on June 7, 2006 and August 15, 2006. The Board's decision was based on information provided with the May 20, 2006 Complaint, Complainant's supplemental letters of June 5 and August 14, 2006, and the responses from Mr. Fluegel and Mr. Vasaly.

Relevant Statutes

1. Minn. Stat. §645. **State bound by statute, when.** The state is not bound by the passage of a law unless named therein, or unless the words of the act are so plain, clear, and unmistakable as to leave no doubt as to the intention of the legislature.

Based on the above Summary of Allegations and Responses and Relevant Statutes, the Board makes the following:

Findings Regarding Probable Cause

1. The Minnesota Ethics in Government Act, Minn. Stat. ch. 10A, does not apply to the Minnesota Judicial Council because the Judicial Council is the administrative body of the judicial branch of state government, and there is no evidence that the Legislature intended the Minnesota Ethics in Government Act to apply to the state or its judicial branch.

2. The Board does not have jurisdiction over the question whether the expenditures made by the Judicial Council in connection with the February 15–16, 2006 Retreat on an Impartial Judiciary were proper expenditures of state funds. The financial practices of the court system are subject to audit by the legislative auditor, pursuant to the provisions of Minn. Stat. §3.971, subd. 6.

3. Having found that the Minnesota Ethics in Government Act does not apply to the Minnesota Judicial Council, the Board does not reach the issue whether any of the activities of the Council would have been in violation of any of the provisions of the Act, were it applicable.

4. There is no evidence that Chief Justice Russell Anderson made campaign expenditures or engaged in any activities requiring registration as a political committee, political fund, or political party under the provisions of Minn. Stat. chapter 10A.

5. There is no evidence that Associate Justice G. Barry Anderson made campaign expenditures or engaged in activities requiring him to register as a political committee, political fund, or political party under the provisions of Minn. Stat. chapter 10A.

6. There is no evidence that Chief Justice Russell Anderson engaged in any activities requiring him to register as a lobbyist under the provisions of Minn. Stat. §§10A.01, subd. 21 and 10A.03.

7. There is no evidence that Associate Justice G. Barry Anderson engaged in any activities requiring him to register as a lobbyist under the provisions of Minn. Stat. §§10A.01, subd. 21 and 10A.03.

Based on the above Findings, the Board makes the following:

Order

1. Based on the Board's finding that the Minnesota Ethics in Government Act, Minn. Stat. ch. 10A, does not apply to the Minnesota Judicial Council, the allegation that the Council violated the provisions of the Minnesota Ethics in Government Act by failing to register as a political committee, political fund, political party or party unit within 14 days after making expenditures in excess of \$100 is dismissed.

2. The allegation that Chief Justice Russell Anderson violated the provision of Minn. Stat. ch. 10A is dismissed.

3. The allegation that Associate Justice G. Barry Anderson violated the provisions of Minn. Stat. ch. 10A is dismissed.

2. The Board's investigation of this matter is hereby made a part of the public records of the Board pursuant to Minn. Stat. §10A.02, subd. 11. Board staff is directed to forward copies of these Findings to Greg Wersal, Wilbur Fluegel and Thomas Vasaly.

Dated: August 15, 2006



Bob Milbert, Chair

Campaign Finance and Public Disclosure Board