

ABA JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT

OVERVIEW OF MODEL CODE OF JUDICIAL CONDUCT AS ADOPTED FEBRUARY 12, 2007

The American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct (Joint Commission or Commission) proposed both format and substantive changes to the 1990 ABA Model Code of Judicial Conduct at the Midyear 2007 Meeting of the Association. Following discussion of the Commission's proposals by the Association's House of Delegates, including the adoption of two amendments, the Revised Model Code of Judicial Conduct 2007 became the policy of the ABA.

Created in July 2003, with a grant from The Joyce Foundation, the Joint Commission had been appointed by and operated under the auspices of the ABA Standing Committees on Ethics and Professional Responsibility and on Judicial Independence. It had been nineteen years since the American Bar Association last undertook a comprehensive review of its judicial ethics policies. Between 1987 and 1990, a Subcommittee of the Standing Committee on Ethics and Professional Responsibility conducted an extensive review process that led to adoption of the 1990 ABA Model Code of Judicial Conduct in 1990. Since that time, however, developments had occurred that suggested the need for a careful reevaluation of the Model Code. First among them was the extensively reported collective experience of judges, judicial regulators and judicial ethics commissions that had worked with the 1990 Code for well over a decade. The Commission was motivated as well by specific issues, including those that had arisen as a result of the variety of methods utilized throughout the United States in the judicial selection process, those stemming from the development of new types of courts and court processes, and those relating to the increasing frequency of *pro se* representation in the courts.

The Joint Commission to Evaluate the Model Code of Judicial Conduct was chaired by Mark I. Harrison of Phoenix, Arizona, a former member of the ABA Standing Committee on Ethics and Professional Responsibility and a former chair of the ABA Standing Committee on Professional Discipline having extensive experience in all aspects of lawyer and judicial regulation. The Commission included ten distinguished judges and lawyers whose breadth of experience in various courts and areas of practice ensured a thorough and multidimensional review of the Judicial Code. It also included a public member whose participation in a wide array of civic, business, and charitable affairs brought to the review process a valuable public perspective, and eleven advisors with extensive experience in judicial ethics and disciplinary matters, many of whom served as formal liaisons from organizations interested in different aspects of judicial conduct. The Commission was supported in its evaluative work by two Reporters and by counsel from the ABA Center for Professional Responsibility and the ABA Justice Center. A roster of the Commission members, advisors, Reporters, and counsel appears at <http://www.abanet.org/judicialethics/roster.html>.

THE EVALUATION PROCESS

Over the course of thirty-nine months, the Commission met in person nineteen times and convened via teleconference thirty-one times. At its in-person meetings, widely advertised in advance the Commission sponsored nine public hearings at which it heard comments from several dozen individuals regarding their interests, or the interests of entities they represented, on a broad range of judicial conduct issues. Representatives of the Commission met on several occasions with the Conference of Chief Justices and with various entities within the Judicial Division of the ABA. The Commission also received written comments from some of those who appeared in person and from a number of other interested persons. The Commission's developing work product, in the form of drafts of discrete portions of the Judicial Code, was posted periodically on a Web site maintained by the ABA, along with requests for responses and suggestions for further revisions. The Commission's work was also disseminated to representatives of sixteen entities whose work focuses upon judicial conduct matters, and to more than two hundred and fifty individuals who had expressed interest in the process and asked that they be provided with electronic notification of all the Commission's recommendations. All told, thirty-nine entities filed written comments with the Commission in relation to the existing Model Code, a Preliminary Report distributed by the Commission in June 2005, or a Proposed Final Draft in December 2005. In total, approximately three hundred individuals also filed comments regarding the Commission's draft revisions to the Code. A listing of the commentators, as well as the text of their comments, can be found at www.abanet.org/judicialethics/comments.

The new Model Rules of Judicial Conduct are the result of vigorous and informed discussion and debate among the Commission members and advisors. The formulations contained in the Model Rules were established by vote of the members of the Commission. Although there was majority support for each of the Canons and Rules, there was inevitably some disagreement, ranging from mild to strong, with the formulation of particular proposals. Important differences between the new Rules and the 1990 Code are addressed in the section of this Overview titled, "Principal Substantive Areas of Concern and Changes from the 1990 Code."

ORGANIZATIONAL CHANGES FROM THE 1990 CODE

The structure of the Revised Model Code of Judicial Conduct 2007 presents two notable differences from the 1990 Code.

The first difference is the presentation of black-letter Rules that follow each of the "Canons," or statements of overarching principles of judicial conduct. In the 1990 Code, each Canon was followed by "sections" that discursively established the parameters of permissible and prohibited conduct. A consensus was reached by the Commission in its first year of deliberations that a structure similar to that of the ABA Model Rules of Professional Conduct, which address permitted and prohibited conduct for lawyers,

would be more straightforward and user-friendly. This consensus developed from consideration of the Commission members' own experience in using the 1990 Code both for guidance and for the purpose of judicial discipline proceedings, and from the experience and testimony of numerous individuals providing comments to the Commission. Similar to the organization of the Model Rules of Professional Conduct, the Rules here are usually followed by comments that provide both aspirational statements and guidance in interpreting and applying the Rules. These comments neither add to nor subtract substantively from the force of the Rules themselves.

Second, the material treated under each of the Canons has been reorganized to provide a more logical, functional and helpful arrangement of topics. Canon 1 and its Rules combine most of the subject matter of Canons 1 and 2 in the 1990 Code, addressing the obligations of judges to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. Canon 2 and its Rules address solely the judge's professional duties as a judge, which constituted most of Canon 3 in the 1990 Code. Canon 3 and its Rules address specific types of personal conduct, including involvement in extrajudicial activities and in business or financial activities; most of which had been addressed in Canon 4. Finally, Canon 4 and its Rules address, as did Canon 5 of the previous Code, acceptable political conduct of judges and judicial candidates. The 1990 Preamble has been divided into two parts: a new Preamble stating the objectives of the Model Rules, and a Scope section describing the manner in which they are to be interpreted, used for guidance, and enforced.

PRINCIPAL SUBSTANTIVE AREAS OF CONCERN AND CHANGES FROM THE 1990 CODE

CANON 1

Canon 1 combines the previous Canons 1 and 2, placing at the forefront of the document the judge's duties to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. In doing so, it embraces the most general, but overarching, obligations of a judge, leaving a judge's specific activities—whether occurring while the judge is on the bench, in the judge's private life, or in the political arena—to be addressed in the remaining three Canons.

The Commission heard much oral testimony and received numerous written communications on the question, identified by the Commission itself as an important one at the beginning of the project, of whether the "appearance of impropriety" concept should be retained. A majority of commentators on the subject, citing to judicial discipline cases decided over a three-decade period, strongly urged that the concept be retained. Others, among them lawyers who represent judges and judicial candidates in disciplinary proceedings, voiced concerns that the concept was not clearly definable and

did not provide judges and judicial candidates with adequate notice about what conduct might constitute a disciplinable offense. Some of those commentators also questioned whether that aspect of the provision might make it subject to challenge on constitutional grounds. The Commission was persuaded by the former group of commentators. Thus, the injunction to avoid impropriety and its appearance appears in the very first Canon and in a black-letter Rule (1.2). In addition, the Terminology section adds a definition of the term “impropriety,” and Comment to Rule 1.2 establishes a “test” for identifying the appearance of impropriety.

Comment [2] to Rule 1.3, Avoiding Abuse of the Prestige of Judicial Office, retains the concept presently in Commentary to Canon 2B whereby letters of recommendation submitted by a judge on behalf of another person may be based upon any “personal knowledge” the judge possesses. In an earlier draft of this provision, the Commission had proposed, based upon considerable discussion and the comments of numerous witnesses, that only knowledge obtained by a judge in his or her official capacity ought to be used in letters of recommendation. In the end the formulation from the 1990 Code was adopted, as both well-balanced and preferable.

CANON 2

Rule 2.3, Bias, Prejudice, and Harassment, has added to the 1990 Code’s list of improper bases for discrimination four new categories: ethnicity, marital status, gender, and political affiliation. Also new is the inclusion of “harassment” in the Rule’s black letter language, and explanatory Comment that describes both harassment generally and sexual harassment.

Rule 2.5, Competence, Diligence, and Cooperation, combines in a single Rule the treatment of adjudicative competence, addressed in the 1990 Code under the rubric of competence “in the law,” Canon 3B(2), and administrative competence, Canon 3C(1). The new Rule identifies in a single location the judge’s obligation to perform all judicial duties competently.

Rule 2.6, Ensuring the Right to Be Heard, expands considerably the 1990 Canon 3B(7)(d), discussing judges’ actions in encouraging parties and their lawyers to settle disputes when possible, and cautioning judges against using coercion in doing so. The Comment is expanded to enumerate some of the factors judges should take into account if they participate in settlement proceedings. Whether a judge who participates in facilitating settlement of a matter pending before him or her should be permitted to hear that matter if settlement efforts are unsuccessful is not addressed in the rules.

Rule 2.8, Decorum, Demeanor, and Communication with Jurors, contains a new comment acknowledging the developing practice of judges allowing jurors to discuss court proceedings with them following trial, though cautioning them not to discuss the merits of a case. This Comment accommodates recently-developed formal and informal procedures whereby judges engage in voluntary “debriefing” processes with jurors after their jury service concludes.

Paragraph (A)(2) of Rule 2.9, Ex Parte Communications, introduces new requirements when a judge seeks to obtain the written advice of a disinterested expert on the law applicable to a proceeding. The parties must receive advance notice of the person to be consulted and the substance of the advice to be solicited, and must be given a reasonable opportunity to object and respond, both to the notice and to the advice received.

Rule 2.9(C) contains a new provision prohibiting a judge from “investigat[ing] facts in a matter independently.” The Comment to the Rule states that the prohibition extends to a judge’s use of electronic research, including Internet research.

New Comment [4] to Rule 2.9 addresses developing practices in recently created “specialized courts,” such as drug courts, domestic abuse courts, and others. Numerous commentators informed the Commission that rules specially developed for application in such courts frequently authorize—or even require—judges to engage in communications with individuals and entities outside the court system. By virtue of the “authorized by law” exception to Rule 2.9, ex parte communications made in compliance with such rules are permitted.

Rule 2.14 is a new Rule requiring that judge take “appropriate action” when he or she believes that a lawyer’s or judge’s performance is impaired by drugs, alcohol or some mental, emotional or physical condition. This new Rule is directed toward both protecting the public and assisting judge or lawyer.

Rule 2.16 is a new Rule, addressing the duty of a judge to cooperate with judicial and lawyer disciplinary authorities.

CANON 3

In Rule 3.6, Affiliation with Discriminatory Organizations, judges are now prohibited from belonging to organizations whose membership policies discriminate against individuals based upon their gender, ethnicity, or sexual orientation. Sexual orientation was contained in the 1990 Code’s provision prohibiting the manifestation of bias in the court, but neither it nor gender nor ethnicity were singled out in connection with organizational memberships held by a judge. The comment to this rule notes that the determination of whether a particular organization’s exclusionary membership practices constitute “invidious discrimination,” such that a judge may not belong to it, can be made only by considering numerous factors. Two of those factors are whether the organization is “dedicated to the preservation of religious, ethnic, or cultural values of legitimate common interest to its members,” and whether it is an “intimate, purely private organization” whose membership limitations could not constitutionally be prohibited.

The Revised Code also adds to the black letter of Rule 3.6 a statement that a judge's attendance at an event in a facility of a group that the judge could not join as a member does not constitute a rule violation when it is an isolated event that "could not reasonably be perceived as an endorsement of the organization's practices."

Comment [3] to Rule 3.6 interprets the black letter to require that a judge immediately resign from an organization to which he or she belongs upon discovering that it engages in invidious discrimination. In the 1990 Code, the prohibition against membership in discriminatory organizations was newly introduced, and Commentary provided that a judge be given one year to withdraw from membership, unless he or she was successful in influencing the organization to abandon its discriminatory policies. Both the policy and practice of prohibiting judges from belonging to discriminatory organizations are now well established, so that a per se prohibition is appropriate.

The substance of Rule 3.13, Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, and Other Things of Value remains largely unchanged from its former presentation in Section 4D(5) of the 1990 Code, although the Rule's structure has been revised. The extensive discussion of what does *not* constitute a gift has been deleted.

Rule 3.14, Reimbursement of Expenses and Waivers of Fees or Charges, adds language not contained in the 1990 Code, Canon 4H, to clarify that in addition to actual reimbursement to judges for expenses they may have incurred, waivers of fees or other charges are also regulated by the Rule. In an important addition to the Commentary on this subject, Comments [2] and [3] discuss the analysis a judge should employ in making a determination about whether to accept reimbursements or fee waivers.

Rule 3.15, Reporting Requirements, sets out the requirements for reporting extrajudicial compensation, gifts, and other things of value, as well as reimbursements and waivers of fees. Paragraph (A)(2) of the Rule introduces an important change, prohibiting judges from accepting gifts in excess of specific dollar limits to be established by individual jurisdictions. The 1990 Code provision simply required that gifts be reported. The new provision enables judges to receive modest and innocuous gifts not excepted elsewhere in the rules, but prohibits gifts of unlimited size. Also of significant note is the time line established for reporting of reimbursements. Following the recent issuance of guidelines for federal judges by the Judicial Conference of the United States, paragraph (C) of this Rule requires that reimbursement of expenses and waivers of fees be reported within thirty days following the conclusion of the event or program to which they relate. Consistent with the new rules' acknowledgment of the impact of developing technology upon judicial practices, the Rule requires the posting of information relating to compensation and reimbursement on appropriate Web sites.

CANON 4

Throughout its deliberations, the Joint Commission sought to find a balance that accommodated the political realities of judicial selection and election while ensuring that the concepts of judicial independence, integrity, and impartiality would not be undermined by the participation of judges and judicial candidates in political activity. The Commission expanded the title of the Canon, specifically identifying “campaign” activities in addition to political activities generally. More importantly, it replaced the difficult-to-define term “inappropriate political activity” with the phrase “activity inconsistent with the independence, integrity, or impartiality of the judiciary.” This extends to the political arena the focus that the new Model Rules apply consistently on those fundamental principles. The Commission also added extensive commentary to the Rules in Canon 4, to enhance compliance with and, when necessary, enforcement of the Rules.

The internal organization of Canon 4 (formerly Canon 5) is significantly modified. Rule 4.1 signals, in its introductory clause (“except as permitted by law, or by Rules 4.2, 4.3 and 4.4”) that there will be exceptions to its provisions. It then addresses the prohibitions against political activity that apply generally to judges and judicial candidates, as did the 1990 Code, leaving it to Rules 4.2, 4.3 and 4.4 to identify those obligations and prohibitions that relate to judges and judicial candidates who seek office through various judicial selection processes. Depending upon the type of selection process involved, these rules either introduce new restrictions, reduce the scope of prohibitions set out in Rule 4.1, or eliminate them entirely. Rule 4.5 applies solely to judges who seek election to nonjudicial office.

There are several notable changes effected by Rule 4.1 and its Comment. A broad prohibition against seeking, accepting, or using endorsements from political organizations has been included. Although this is among the prohibitions that are ultimately relaxed somewhat in specific Rules that follow, it nonetheless carries forth from the 1990 Code the statement of a preference for reducing the level of politicization in judicial selection

Rule 4.1 broadens the 1990 Code’s prohibition against a judge “knowingly misrepresent[ing] the identity, qualifications, present position, or other fact concerning the candidate or an opponent,” instead prohibiting judges and judicial candidates from “knowingly, or with reckless disregard for the truth,... making any false or misleading statement.”

The Revised Code deletes language from the 1990 Code that required judges and judicial candidates to maintain “appropriate dignity,” finding the phrase both unhelpful and less effective at capturing the fundamental characteristics of proper judicial conduct, independence, integrity, and impartiality, than using the terms themselves.

Where the 1990 Code discussed only briefly the fact that judges are entitled to engage in the political process as voters, Comment [6] specifically notes that judges in jurisdictions that employ caucus procedures to select political candidates are not prohibited from participating in such caucuses.

Perhaps the most significant addition to the Comment accompanying Rule 4.1, however, is the series of five comments that discuss the distinction between “announce clauses,” which have been found unconstitutional and therefore eliminated from judicial ethics rules and “pledges and promises clauses,” which the Commission was convinced are solidly supportable limits that must be set to prohibit judges from promising to reach particular results on specific issues that may come before them. Comment [14] explains that promises respecting a judge’s intentions to handle matters of court administration are exempt from the general prohibition against “pledges and promises.”

Rule 4.2, which permits certain political activity, as part of the electoral process, that otherwise would be prohibited in Rule 4.1, nevertheless narrows the time frame in which such activity is permitted. Although leaving to the discretion of each adopting jurisdiction the question of what time period will be used, the Rule permits certain political activity “not earlier than [amount of time] before the first applicable primary election, caucus, or general or retention election.”

The Rule departs from the 1990 Code in permitting judges to seek “public support,” while retaining the Code’s prohibition against personally soliciting or accepting campaign contributions.

Finally, Rule 4.2 imposes a new requirement that judges personally approve the contents of campaign literature and other materials employed to promote their election.

The activities permitted to candidates seeking appointive judicial office under Rule 4.3 reach beyond what was permitted in the 1990 Code. First, a candidate for appointment is not obligated to wait to be invited to seek an endorsement, but is free to initiate a request for endorsement. Second, the candidate is not limited to seeking endorsements from organizations “regularly making recommendations to appointing authorities,” but may seek endorsement from any individual or organization other than a partisan political organization.

Rule 4.4, relating to the activities of a judge’s or judicial candidate’s campaign committee, carries forth the provisions of the 1990 Code, but adds to them a specific injunction that the judge or judicial candidate is responsible for ensuring that his or her campaign committee complies with both the provisions of the Model Rules and other applicable law.

Rule 4.5, which relates to the activities of judges who become candidates for nonjudicial office, has been expanded beyond its counterpart in the 1990 Code, which solely

addressed the obligation of a judge to resign when he or she becomes a candidate for a nonjudicial office. A second paragraph is added to establish that judges who are merely seeking appointment to some nonjudicial office are not required to resign their position simply to be considered for an appointment – especially because there may be a large pool of potential appointees being considered.