

MEMORANDUM

To: Individuals and Entities Interested in Judicial Ethics
From: Mark I Harrison, Chair, ABA Joint Commission to Evaluate the
Model Code of Judicial Conduct
Date: May 11, 2004
Subject: **POSTING OF FIRST (PARTIAL) DRAFT PROPOSALS
FOR PUBLIC CONSIDERATION AND COMMENT**

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct hereby posts on its web site, www.abanet.org/judicialethics, a first (and partial) draft of proposed revisions to the ABA Code of Judicial Conduct.

The Commission has conducted a series of public hearings at which it has heard extensive comment from individuals and entities interested in judicial ethics rules and their enforcement. In addition, the Commission has held a series of meetings in conjunction with those hearings, at which it has focused its attention on the first three Canons of the ABA Model Code of Judicial Conduct. As the Commission holds additional public hearings and discussions it will work through the remainder of the current Code, but it will also be reconsidering the proposals contained in this present draft in light of the comment it expects to receive and in the context of ongoing research being conducted by the Commission's Reporter and Counsel. Although the draft provisions circulated here represent the current thinking of the members of the Commission and its advisors, they are likely to be reconsidered in the context of any comments received.

The following items are to be particularly noted:

- 1. In this first partial draft presented for review and comment, the Commission has reorganized Canons 1, 2 and 3 into two Canons. (Footnotes have been inserted in this document to indicate where specific Code provisions appear in the current ABA Model Code.) To the extent that questions of organization in the Model Code can be considered independent of the substance of the various provisions, the Commission invites comment as to the merits or demerits of its proposed reorganization.**
- 2. The Commission welcomes comments and questions regarding the substantive provisions of this preliminary (and partial) draft. They should be directed to Eileen Gallagher at gallaghe@staff.abanet.org or via mail at American Bar Association, ABA Justice Center, 321 North Clark Street, Chicago, IL 60610. If you believe that changes should be made in the proposed language, PLEASE PROVIDE SPECIFIC LANGUAGE SUGGESTIONS TO THE COMMISSION. The Commission will meet next**

on June 5 in Naples, Florida and again on August 7 in conjunction with the ABA Annual Meeting in Atlanta, Georgia, and would appreciate all comments as soon as possible, but not later than July 15, 2004.

3. The following issues, addressed in certain specified provisions of this draft, were prominent in the discussions of the Commission, and were considered to be of enough significance that the Commission makes particular reference to them here, noting questions that remain unresolved. Your comments on these issues will be helpful. However, the Commission expects that comments on other issues, which it may yet not have identified, will also be very helpful; you are encouraged to bring any and all concerns to our attention.

- **Canon 1. The Commission has drafted the provisions of this canon to retain the admonishment that judges avoid impropriety and the appearance of impropriety while addressing concerns for vagueness. The Commission requests input as to whether the provisions, as drafted, achieve this goal.**
- **Rule 2.02 The Duty to Decide. The Commission is uncertain whether the final sentence of the Commentary to this Rule is best placed under this Rule, or whether it may be better placed in the Commentary accompanying Rule 2.12 (Disqualification).**
- **Rule 2.07 Demeanor and Decorum. It has been brought to the Commission's attention that many courts throughout the country have developed procedures, formally or informally, whereby judges engage in a "debriefing" process with jurors after their jury service has been concluded. The Commission seeks input on what additional discussion or description of this practice might be appropriate in the Commentary in paragraph [3].**
- **Rule 2.08 Ensuring the Right to be Heard. Comment paragraph [2] discusses judges' actions in encouraging parties and their lawyers to settle disputes where possible, cautioning that judges should not use coercion in doing so. Those who made presentations on this subject are not of one mind as to several aspects of judges' involvement in promoting settlements. For example, the question of 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 answered with strong conviction going both ways, i.e., opposing it and encouraging it. Comments and proposed language that might address the appropriate aspects of judicial participation in settlements are eagerly sought by the Commission.**

- **Rule 2.09 Ex Parte Communications.** Section 2 A. (2) of this Rule discusses a judge's obtaining information and opinions from disinterested experts in a proceeding. Should the Rule or its accompanying comment address directly the newly expanded range of information available to judges through the use of the Internet, or other electronic research methods? With respect to Section 2 A. (3), which authorizes judges to consult with other judges under certain limited circumstances, the Commission inquires whether the Rule should address the possibility of disqualifying interests that might be attributed to "consulted" judges. Finally, many persons appearing before the Commission, as well as Commission members, have concerns that the present draft (and the present Model Code) does not address sufficiently certain types of communications that are encouraged or required of a judge in the course of his or her service on "specialized courts," such as drug courts, domestic abuse courts, etc. Comments on this subject from judges and others who are knowledgeable about the operations of specialized courts will be greatly appreciated.
- **Rule 2.12 Disqualification.** Comment [2] of this Rule urges that judges disclose information that the parties or their lawyers might consider relevant to disqualification even if the judge himself or herself believes it does not constitute a basis for disqualification. Is this process (also suggested in the current Code) necessary? Does it create a difficult situation for at least one of the lawyers in the proceeding?
- **Rule 2.20 Immunity for Discharge of Duties.** The Commission is interested in hearing comment on whether a Rule that purports to establish legal immunity is appropriately placed in an ethics code, or whether it may be more appropriately placed in applicable laws for judicial disciplinary enforcement.

On behalf of the Joint Commission, thank you for the interest you have demonstrated in following – and we hope commenting upon – this ongoing project. We will carefully consider your comments and specific proposals.