

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: July 20, 2004
Subject: POSTING OF **SECOND** (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 second (partial) draft of proposed revisions to the ABA Code of Judicial Conduct. This draft contains a revised Canon 3, based, with a single exception, upon provisions in the current Canon 2. In addition, it proposes – although not in its entirety – a new Canon 4, consisting of material drawn from and revising the current Canon 4. The remaining portion of Canon 4, pertaining to gifts, compensation, reimbursement, reporting and disclosure will be distributed at a later time. (A May 15, 2004 posting had presented draft proposals with respect to proposed revised Canons 1 and 2, on which the Commission received considerable comment prior to July 14, 2004.)

In drafting the proposed revisions that are being posted today, the Commission once again relies upon the information it has gained from an ongoing series of public hearings that have been held in conjunction with its frequent meetings, and upon the research being conducted by the Commission's Reporter and Counsel. The draft provisions circulated here represent only the current thinking of the members of the Commission and its advisors, and the current draft will be reconsidered following receipt of public comment.

The following items are to be particularly noted:

1. In this draft, the Commission once again has reorganized provisions from the current Canons, and footnotes have been employed to indicate where each specific provision appears in the current 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 second preliminary (and partial) draft. Comments should be directed to Eileen Gallagher at gallaghe@staff.abanet.org or to her 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, SUGGESTED LANGUAGE TO THE COMMISSION. The Commission will next meet in Atlanta, Georgia, August 6-7, 2004 during the ABA Annual Meeting, and again in Chicago October 22-23, 2004. It would appreciate all comments as soon as possible, but not later than October 8, 2004.

3. The following issues, addressed in 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 may not yet have been identified, will also be very helpful. You are encouraged to bring any and all concerns to our attention.
 - Rule 3.01 Using the Judicial Office for Private Purposes. Comment paragraph [5] of this Rule interprets the Rule to limit a judge's use of his or her judicial letterhead for letters of reference or recommendation to situations in which the judge's statements are based upon "information obtained through the judge's expertise or experience as a judge." The Commission is interested in input on whether such a limitation is appropriate and useful.
 - Rule 3.03 Affiliation with Discriminatory Organizations. The Commission has added "ethnicity" and "sexual orientation" to the list of factors that must not be the basis for discrimination in the policies of clubs and other membership entities to which judges seek to belong. It has also incorporated in the black letter of this Rule the notion that use of discriminatory facilities "to any significant extent" is prohibited. The Commission is aware that many jurisdictions have varied their approach to this subject, and is especially interested in receiving comments on the Rule and its Comment.
 - Rule 4.02 Appearances Before Governmental Bodies. The Commission has expanded Commentary in new paragraphs [1] and [2] to provide examples of appearances by judges before governmental bodies, in line with suggestions it has received in several of its public hearings. The subject is one on which judges themselves registered a significant amount of disagreement or doubt; the Commission believes it will benefit from further comments.
 - Rule 4.04 Civic or Charitable Activities. The Commission has heard considerable comment, and received a significant number of written statements, relating to this subject. With specific reference to the "acceptance of donations" at civic or charitable fundraisers, which is addressed in Comment paragraph [3], the Commission is uncertain that a complete bar on acceptance of funds by a judge – a key example

being the proceeds from the sale of a baked item at a library fundraiser – is necessary. Also important with respect to this Rule, the Commission’s draft would permit a judge to speak, be recognized, or honored at an event sponsored by a variety of law-related entities even where the event raises funds for its sponsor. This application or interpretation of the black letter satisfies concerns expressed by many judges and by many law-related groups. Because it continues to be a subject of considerable debate, the Commission hopes to receive comments and recommendations in regard to this subject.

The Joint Commission appreciates the interest you have demonstrated in monitoring – and we hope commenting upon – this ongoing project. We will carefully consider your comments and specific proposals.