

The ABA Revisits the Model Code of Judicial Conduct

A Report on Progress

By Eileen C. Gallagher

In August 2003, the American Bar Association (ABA) Standing Committee on Judicial Independence and the ABA Standing Committee on Ethics and Professional Responsibility jointly appointed a commission to evaluate the Model Code of Judicial Conduct. The Model Code, first adopted by the ABA in 1924, is the basis for state judicial codes of conduct throughout the country as well as for the federal judiciary. The ABA has revised the Model Code twice since its adoption in 1924: in 1972, when it changed the style and form of the rules, providing seven canons in place of the original thirty-six canons and cleaned up much of the hortatory language while maintaining the substance of the canons; and 1990, when it reduced the canons from seven to five by combining the rules that related to off-the-bench conduct into one canon.

After holding initial meetings and studying a report by the ABA Commission on the 21st Century Judiciary, which identified the principles of an independent, accountable judiciary, examined the trends that affect these principles, and recommended strategies to address them in this century, the two standing committees agreed that a comprehensive review of the Model Code of Judicial Conduct was necessary and formed the Joint Commission to Evaluate the Model Code of Judicial Conduct (Joint Commission). Chaired by Mark Harrison of Phoenix, Arizona, the Joint Commission has eleven members. Charles Gardner Geyh, of Indiana University School of Law, and William Hodes, a practitioner in Indianapolis, Indiana, serve as reporters. The Joint Commission also benefits from the active involvement of an advisory

commission that has representatives from eleven organizations. (See the sidebar on page 13 for the members of these commissions.)

To date, the Joint Commission has held seven public hearings and ten drafting meetings. It has heard testimony from individuals and organizations and has met with the leadership of the Judicial Division and the Association of Judicial Disciplinary Counsel. After considerable effort, the Joint Commission created a draft of proposed revisions, including significant changes to the structure and substance of the canons. The most current version is available online at www.abanet.org/judiciaethics. All decisions are preliminary at this stage and will be revisited before the final recommendations are made to the ABA House of Delegates.

Perhaps the most significant change in the revision is the decision to restructure the canons into rules. In previous versions of the Code, each canon contained sections and subsections. In the proposed version, this material will be presented in rules, a similar format to that used by the Model Rules of Professional Responsibility. The updated Model Code would retain a canon title for each of the five sections of the Code. This title would serve as a general outline—and a guiding principle—for each section. For instance, Canon 2 is titled, “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.” The canon contains twenty separate rules, all of which generally pertain to the advancement of the stated principle in the canon title. In addition, the sections are reorganized to provide more coherent groupings for

the rules. Therefore, while the rule’s content may not change, the rule itself may now be located in a different section. Canon 2 provides the clearest example of this practice, as it now encompasses most of the provisions of the 1990 version of Canon 3.

In restructuring the Model Code, the Joint Commission sought to clarify elements of judicial conduct for both judges and the public. The rules-based format gives guidance on which actions are enforceable—and thus would subject a judge to discipline if violated—and which are not. In general, the commission has chosen to move hortatory language to the commentary sections. This change illustrates a broader debate on the appropriate role of judicial conduct codes in general. Some commentators look to codes to provide a set of enforceable rules for disciplinary purposes. Others believe that judicial codes of ethics should contain aspirational principles as well as enforceable rules.

The remainder of this article attempts to provide some insight into the draft changes proposed by the Joint Commission. Readers should note that the revisions are preliminary and subject to change.

Canon 1

Conduct in general: A judge shall avoid impropriety and the appearance of impropriety in all the judge’s activities so as to uphold the integrity, independence, and impartiality of the judiciary.

The preliminary draft of Canon 1 combines elements of the 1990 version of Canon 1 and sections of Canon 2. Canon 1 is designed to set a general

tone for the conduct of judges, both on and off the bench. It contains two rules: (1) that judges must observe high standards of conduct in order to preserve the independence, integrity, and impartiality of the judiciary; and (2) that judges must respect and comply with the law.

In the revised Canon 1, the commission has retained the important concept that a judge must avoid impropriety and the appearance of impropriety at all times and has also attempted to address the perceived vagueness of the previous version. The placement of this rule is part of a critical debate regarding its enforceability. Although the directive to avoid the appearance of impropriety has existed in the Model Code for decades, the provision has only been found in the canon's title, not in its individual sections. For enforceability, many have looked to the provision of Canon 2A, which states that "[a] judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The current draft of Canon 1 eliminates the directive to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" but retains in the canon title the admonishment to avoid impropriety and the appearance of impropriety.

The first rule of Canon 1 has been rewritten to incorporate the concept that a judge's conduct affects the public's trust and confidence in the judiciary. The rule states, "A judge shall observe the high standards of conduct embodied in these Rules so that the

integrity, impartiality, and independence of the judiciary, and the public's confidence therein, are promoted and preserved." The Joint Commission seeks feedback as to whether the suggested revisions appropriately meet the dual goals of preserving the admonition to avoid impropriety and the appearance of impropriety while satisfying concerns as to vagueness.

Canon 2

Judicial conduct: A judge shall perform the duties of judicial office impartially and diligently.

The preliminary draft of Canon 2 contains twenty distinct rules, most of which can be found in the 1990 version of Canon 3. This grouping of rules is designed to address the specific duties of a judge while on the bench. The first set addresses such issues as upholding the duty to decide, maintaining competence in the law, applying the law with impartiality, and preventing bias and discrimination. Some rules have been modified to eliminate vague language. For instance, Rule 2.03, based in part on the current Canon 3B(2), states, "A judge shall maintain professional competence in the law," deleting the requirement that a judge also "be faithful to the law." A new Rule 2.04 addresses impartiality and fairness. It states, "A judge shall apply the law without regard to the judge's personal views and shall decide all cases with impartiality and fairness."

The rule related to demeanor and decorum provides a new comment about debriefing jurors after a trial. It simply states, "Where not otherwise prohibited by law, judges may take the opportunity to debrief jurors on their jury experience, after their trial service is concluded." It has been brought to the Joint Commission's attention that many courts throughout the country have developed procedures, formal or informal, whereby judges engage in a debriefing process with jurors after their jury service has been concluded. The commission is seeking additional input

as to whether the new comment provides appropriate guidance or whether a more in-depth discussion or description of this practice would be useful.

Rule 2.08 addresses the right to be heard. A new comment discusses the judge's role in settlement proceedings. The Joint Commission heard extensive testimony related to the role that a judge plays in encouraging settlement and how this affects both the rights of the litigants and the effective management of case dockets. The testimony was divided about the appropriate level of judicial participation in settlement discussions. For instance, should a judge who plays an active role in facilitating settlement proceedings be permitted to hear the matter if settlement efforts are unsuccessful? Two paragraphs of commentary have been added in an attempt to clarify this issue. In particular, the second paragraph states,

The judge has an important role to play in overseeing the settlement of disputes, but should be careful that efforts to further settlement not undermine a party's right to be heard according to law. A judge may therefore encourage parties to a proceeding and their lawyers to settle matters in dispute but should not act in a manner that coerces a party into settlement.

Rule 2.09 embodies the rules related to ex parte communications. Portions of this rule have been modified to provide greater clarification. For instance, one exception to the rule prohibiting judges from engaging in communications outside the presence of the parties allows a judge to consult with court personnel "whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges." Proposed revisions to this rule add the following language, "provided that the judge does not abrogate the responsibility to personally decide the case and takes all reasonable steps to avoid receiving factual information that is not part of the record." A paragraph of commentary to address the growing ready access to information available through electronic mediums has also

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been added. It states, “The prohibition against a judge investigating the facts of a case independently or through a member of the judge’s staff, extends to information available in all mediums including electronic access.” Finally, the Reporter’s Memo accompanying the release of the Canon 2 draft notes that some observers have expressed concern that the ex parte communications rule does not sufficiently address communications that are required or encouraged for judges serving on specialized courts—often referred to as problem-solving courts—such as drug courts, community courts, or mental health courts. The role of the judge in these courts requires a very different level of involvement with the defendant, including close interaction to monitor progress. The Joint Commission welcomes any suggestions to address the concerns of judges involved in these problem-solving courts.

The next grouping encompasses those rules governing administrative aspects of judicial duties, such as supervision of staff and other judges, administrative appointments, and the prompt discharge of administrative duties. No significant changes to the black letter of these rules are currently proposed.

The final grouping of Canon 2 rules addresses a judge’s responsibility to report misconduct. Rule 2.17 addresses a judge’s responsibility to report judicial misconduct and Rule 2.18 covers a judge’s duty to report lawyer misconduct. Rule 2.19, an entirely new provision, states that “[a] judge having knowledge that the performance of a lawyer or another judge is impaired by drugs, alcohol, or other mental, emotional or physical condition shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.” The comment to this rule provides, in part, that

[t]aking or initiating corrective action by way of referral to an assistance program can fulfill several laudable purposes . . . That action alone may satisfy the mandates expressed in this section. Depending

on the gravity of the conduct, however, . . . a judge having knowledge of such conduct may be required to take action in addition to or in lieu of a referral to the relevant assistance program.” This rule codifies an additional aspect of a judge’s duty to maintain the public’s trust and confidence in the judiciary by ensuring the appropriate on-the-bench conduct of officers of the court.

Canon 3

Personal conduct: A judge shall conduct the judge’s personal affairs to preserve the integrity, impartiality, and independence of the judiciary.

The revised Canon 3 primarily incorporates aspects of the 1990 version of Canons 2B and 2C. The rules address the use of the judicial office for private purposes, the disclosure of nonpublic information acquired in a judicial capacity, and affiliation with discriminatory organizations.

The first rule of this revised canon states, “A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others.” The commentary notes that this rule addresses the long-standing debate about the appropriate use of judicial letterhead for references. A newly drafted comment to this rule attempts to provide clear guidance as to what type of reference may be written on judicial letterhead. The comment states: “A judge may provide a reference or recommendation for an individual based upon the judge’s personal knowledge. However, unless the recommendation is based upon information obtained through the judge’s expertise or experience as a judge, the reference or recommendation should not be communicated on the judge’s judicial letterhead.” The Joint Commission is interested in input about whether such a limitation is appropriate and useful.

Rule 3.02 states, “A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.”

Rule 3.03 states, “A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, ethnicity, or sexual orientation, and shall not use the facilities of such an organization to any significant extent.” 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 might belong. Also, the notion that use of the discriminatory club’s facilities “to any significant extent” is prohibited has been added to the black letter to clarify that the rule extends to regular use of such facilities even if the judge is not a member of the organization in question. These new factors generated significant comment when the draft was first released. Comment to the rule has been drafted to distinguish what clubs or organizations a judge may join without fear of violating this rule.

Canon 4

Extrajudicial conduct: A judge shall conduct the judge’s extrajudicial activities to minimize the risk of conflict with judicial obligations.

Revised Canon 4 closely tracks the sections of the 1990 version. The provisions address a judge’s appearance before governmental bodies, civic and charitable activities, and service as an arbitrator or mediator. In addition, the rules in this section address a judge’s financial responsibilities, e.g., how he or she should manage investments to avoid conflicts, disclosure of income, and the acceptance of gifts.

Rule 4.01 provides a set of rules designed to address a judge’s extrajudicial activities in general, so that the extrajudicial activities do not interfere with the performance of judicial duties, demean the judicial office, or cast doubt on the judge’s impartiality, integrity and independence. Rule 4.02 addresses a judge’s appearance before governmental bodies. Significant commentary has been added to this rule to clarify its

purpose. Rule 4.03 closely tracks the existing code language stating, “A judge shall not accept appointment to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice . . .”

Civic and charitable activities of judges are governed by Rule 4.04. This rule is modified slightly to state, “A judge may participate in civic or charitable activities that do not reflect adversely upon a judge’s impartiality, integrity and independence, or interfere with the performance of judicial duties, subject to the following limitations and other requirements of this Code.” The rule contains a series of limitations such as a judge may not personally solicit funds for the organization or “personally participate in membership solicitation if the solicitation is primarily a fundraising mechanism . . .” As with other rules found in Canon 4, significant changes to the commentary have been made to provide guidance in the application of this rule. Rules 4.05, 4.06, 4.07, and 4.08 address appointments to fiduciary positions, service as an arbitrator or mediator, testifying as a character witness, and the practice of law, respectively. The financial activities of a judge are covered by Rules 4.09–4.12. There are few changes to the black letter from the existing rules that cover restrictions on engaging in financial or business dealings that may be perceived to exploit the judge’s position, requirements to manage investments so as to minimize the number of cases from which the judge would be disqualified, and restrictions on a judge serving in an official capacity with a business.

Rules 4.13–4.15, covering the acceptance of gifts, represents an area where the Joint Commission devoted significant efforts to provide a set of clear, relevant rules for judges as well as the public. This set of rules begins with the addition of a comprehensive definition of a gift. The definition states

that a gift means “any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, bequest, or anything of monetary value” but also includes eight specific exceptions. For example, ordinary social hospitality is not considered a gift as long as it is “extended for a non-business purpose by an individual, not a corporation, limited to the provision of modest items, such as food and refreshments, that is common among people in the judge’s community.” Rule 4.13 provides that “a judge shall not solicit or accept and shall urge members of the judge’s family residing in the judge’s household not to solicit or accept a gift from anyone . . .” but sets out seven exceptions, such as a gift incident to a public testimonial, a gift from a relative or friend for a special occasion, or “any individual gift valued at [\$50] or less, or series of gifts from the same source whose value in the aggregate does not exceed [\$150].” The dollar amounts are suggested amounts. A second part of Rule 4.13 requires public disclosure of any gift, other than from a family member, that exceeds \$250 in value.

The reimbursement or waiver of charges for travel-related expenses is covered by Rule 4.14. This rule states, in part,

A judge may receive reimbursement or accept a waiver of charges from sources other than the judge’s employing entity for the expenses of necessary travel, food and lodging associated with the judge’s participation in extrajudicial activities permitted by this Code, if such receipt or acceptance does not cast reasonable doubt on the judge’s capacity to act with impartiality, integrity, or independence.

The rule also requires public disclosure of any reimbursement or waiver of charges that exceeds \$100. Rule 4.15 is similar in structure and covers compensation for extrajudicial activities.

Rule 4.16 requires a judge to report “the date, place and nature of any activity for which the judge received compensation, reimbursement or waiver of charges, and the name of the

payor . . . and the amount of compensation, reimbursement, or waiver of charges . . .” In addition, the rule requires that the judge’s report be made at least quarterly and, when feasible, posted to the court’s Web site.

Canon 5

A judge or candidate for judicial office shall refrain from political activity that is inconsistent with the impartiality, integrity and independence of the judiciary.

The Joint Commission released a preliminary draft of the black letter rules of Canon 5 in January 2005. This canon has been at issue in some of the most significant developments in judicial ethics during the past decade, and therefore deserves careful attention.

A brief history of the political activity canons. Beginning with the 1924 version of the Judicial Code of Model Conduct, which contained two canons relating to the campaign conduct of judges, the ABA has strived to balance the need to preserve judicial impartiality with the need to address judges’ individual free speech rights. Canon 28, entitled “Partisan Politics,” referred to a judge’s political activity in general. It restricted judges from making political speeches, contributing or soliciting payments for party funds, publicly endorsing candidates for political office, and participating in party conventions. The canon was later amended to prohibit judges from engaging in partisan activities generally and from serving as party committee members or party leaders. However, Canon 28 did allow candidates subject to partisan elections to attend and speak at political gatherings and to contribute to the campaign fund of the party that was supporting the judge’s candidacy.

Canon 30, “Candidacy for Office,” prohibited judges from making “promises of conduct in office which appeal to the cupidity or prejudices of the appointing or electing power.” A judge could not announce views on the law or disputed issues or, while a candidate,

do anything that would give the impression of bias if eventually elected. In addition, the canon required sitting judges to resign from judicial office before running for nonjudicial positions and to refrain from using the prestige of the office to promote their own candidacies, or their particular political party, if running for another judicial position. The canon finally admonished judges to not allow others to do on their behalf as candidates anything that would “reasonably lead to such suspicion.”

The 1972 revisions significantly changed the structure of the canons relating to political conduct. The 1972 drafting committee noted that “the tensions between the demands of political reality and the necessity that a judge be impartial and appear to be impartial became fully evident to the committee when it began considering the standards to apply to a candidate for judicial office during a partisan election process.” One goal of the 1972 code revision was to provide greater distinction between general political conduct and conduct during campaigns. In addition, the revised canons were made applicable to both incumbent judges and nonjudge candidates.

The 1990 revisions to the Model Code saw even more changes to the political activity canons, now categorized as Canon 5. The Reporter’s Notes explain that the 1990 committee

decided to revise Canon 7 because it failed to provide adequate guidance regarding the political conduct of judges and candidates, both of whom are subject to varying methods of judicial selection in the jurisdictions The challenge for the Committee was to devise a Canon that addressed adequately the issues unique to the various selection methods, without diminishing the force of the rules that ought to be universally applicable.

After grappling with a variety of constructions intended to acknowledge the various challenges of the different selection systems while avoiding excessive duplication in the rules, the 1990

Model Code emerged with a new approach. Canon 5A addressed “issues common to the political conduct of all judges and judicial candidates” regardless of selection method, while Canon 5B addressed specific issues related to appointments. Canon 5C addressed issues unique to public elections, whether partisan, nonpartisan, or retention elections. Finally, Canon 5D addressed the political activity of incumbent judges distinct from candidates.

Within the last decade, state code provisions restricting the political activity of judges have been the subject of numerous court challenges. The most well-known of these cases is *Republican Party of Minnesota v. White*,¹ decided by the U.S. Supreme Court in 2002. The case is currently on remand with the Court of Appeals for the Eighth Circuit. Other significant cases in this arena include *Weaver v. Bonner*,² *Spargo v. New York State Commission on Judicial Conduct*,³ *In re Watson*,⁴ *In re Raab*,⁵ *Buckley v. Illinois Judicial Inquiry Board*,⁶ *Stretton v. Disciplinary Board of Supreme Court of Pennsylvania*,⁷ *In re Dunleavy*,⁸ and *In re Fadeley*.⁹

The Joint Commission’s Recommendations. The Joint Commission, having considered the recent litigation in this area, decided to take a fresh look at the format and restrictions of Canon 5. The preliminary draft of Canon 5 attempts to define a clear, user-friendly set of rules that govern political activity of both the sitting judge and the judicial candidate. Rule 5.01 sets out general restrictions on the political activity of a sitting judge. Rule 5.02 lists a set of restrictions on the political activity of candidates for political office. Rule 5.03 sets out a list of permitted political activities for candidates running in a partisan judicial election. Under the proposed revision of the Model Code, these allowances, such as speaking to gatherings or attending meetings sponsored by political organizations, are now limited to only the duration of the campaign. The current model code allows judges sub-

ject to public election to partake in these activities at any time, not just during the campaign period.

Rule 5.04 is a new addition to Canon 5. This rule is designed to address the specific allowances of political activity for candidates running in a nonpartisan race. The current Model Code makes no distinction between partisan and nonpartisan candidates. The new rule does not allow a nonpartisan judicial candidate to publicly speak in support of or against a political organization nor attend meetings or other events sponsored by a political organization or a candidate for public office.

Rule 5.05 addresses the political activity allowed for candidates seeking appointment to judicial office. Rule 5.06 covers the use of campaign committees by judicial candidates. The rule tracks the existing Model Code language, including the limits on the amount of money that can be solicited from one source and the requirement that campaign contributions be disclosed. One change that should be noted is that while personal solicitation of campaign contributions by judicial candidates is still banned, this draft of Canon 5 contemplates allowing judicial candidates to directly solicit publicly stated support for their campaign.

Conclusion

Although the first draft of the revised Model Code has been completed, the work of the Joint Commission is far from over. The Joint Commission continues to seek comments from all interested parties. Beginning in spring 2005, the members of the commission will review the first drafts of the canons in light of these responses. Their work will be greatly enhanced by the active participation of members of the judiciary. To review the current draft of the Model Code of Judicial Conduct and make comments, please visit www.abanet.org/judiciaethics.

The Model Code of Judicial Conduct has stood for the past eighty years as a guiding set of principles for

the judiciary. Commission members hope that the contemplated revisions will continue the Model Code's relevancy and importance for years to come.

Endnotes

1. 536 U.S. 765 (2002).
2. 309 F.3d 1312 (11th Cir. 2002).
3. 24 F. Supp. 2d 72 (2003).
4. 794 N.E.2d 1, 6 (N.Y. 2003).
5. 793 N.E.2d 1287, 1293 (N.Y. 2003).
6. 997 F.2d 224, 231 (7th Cir. 1993).
7. 944 F.2d 137 (3d Cir. 1991).
8. 838 A.2d 338 (Me. 2003).
9. 802 P.2d 31, 44 (Or. 1990).