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By PDF Transmission

ABA Joint Commission to Evaluate the Model Code of Judicial Conduct
c/o Mark Harrison, Esq.
Osborn Maledon, P.A.
2929 North Central Avenue
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Dear Colleagues:

The Association of Professional Responsibility Lawyers (APRL) is an independent national organization of lawyers practicing (and often concentrating) in the fields of professional responsibility, legal and judicial ethics, and the law of lawyering generally. Our membership includes law professors, bar counsel, counsel for respondents in attorney and judicial disciplinary cases, expert witnesses and consultants, litigators involved on both sides of cases raising legal ethics issues (including without limitation legal malpractice cases), in-house ethics counsel for law firms, and in-house counsel to corporations and other entities, including insurance companies. Many of our members are called upon to act as counsel for judge respondents in judicial disciplinary proceedings, and are also consulted by judges with questions about their ethical responsibilities, typically in the areas of disqualification and political campaign activity.

Consistent with its diverse membership, APRL frequently speaks out on issues of vital importance to the legal profession, especially as they affect our areas of practice and concentration. With respect to the ABA Commission on the Model Code of Judicial Conduct (the "ABA Commission"), former APRL President Ronald E. Mallen of San Francisco appointed a committee to formulate a response to the original request for public comment made by the ABA Commission in November 2003. That committee is chaired by current APRL President Ronald C. Minkoff of New York, New York and includes Murray Abowitz of Oklahoma City, Oklahoma, Elizabeth Alston of Mandeville, Louisiana, Dianna M. Anelli of Columbus, Ohio, Warren Lupel of Chicago, Illinois, Peter Ostermiller of Louisville, Kentucky and Suzanne Westerheim of Dallas, Texas. The committee's recommendations, embodied in this letter, have been approved by the APRL Board of Directors.

The committee has reviewed the Commission's Proposed Final Draft, posted on the ABA website on December 14, 2005. APRL maintains its previous comments on prior drafts. In this letter, however, we wish to focus on the Proposed Final Draft of Canon 5.

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We have grave concerns that the Commission's Proposed Final Draft of Canon 5 ignores existing case law regarding the First Amendment rights of judicial candidates.¹ These cases, from different levels of the federal court system and from several different parts of the country, emphasize the constitutional importance of allowing judges and judicial candidates to freely discuss relevant issues in the context of judicial campaigns and freely associate with the political party of their choice. Whether or not we agree that affording judges facing elections the same constitutional freedoms as other elected officials in the same situation is a good idea – and APRL has no consensus on that issue – we feel strongly that the ABA should not ignore the existing, and we believe controlling, case law that requires it.

Indeed, we question the utility of any approach that fails to recognize this line of cases. We are concerned that the ABA Commission's approach will make the ABA Commission appear hostile to the election of judges, judicial campaigning, or even to any application of the First Amendment to speech by judges. While we understand that this is not the ABA Commission's intention, that impression could put in jeopardy the rest of the ABA Commission's important work, since it could lead to hostility to the proposed Model Code revisions in some jurisdictions from judges who obtained their positions through the electoral process. We are concerned, in short, that straying too far from existing case law will result in a constitutional debate that will overshadow, and possibly drown, the other less controversial, but equally valuable, proposals that the ABA Commission is making.

Further, we believe that the approach of the Proposed Final Draft, if adopted, could put at serious risk the relevance of the ABA's continued, otherwise exemplary leadership on judicial ethics by essentially refusing to engage the debate on what should be the appropriate public policy on judicial speech in light of the existing case law.

¹ *Dimick v. Republican Party of Minnesota*, --- S.Ct. ----, 2006 WL 152093 (U.S., January 23, 2006), 74 USLW 3303, 74 USLW 3421, 74 USLW 3424, denying certiorari in *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir.(Minn.)(Aug. 2, 2005); *North Dakota Family Alliance, Inc. v. Bader*, 361 F.Supp.2d 1021, (D.N.D. Mar 21, 2005) (NO. A3-04-115); *Anderson v. Spear*, 356 F.3d 651 (6th Cir.(Ky.) Jan 16, 2004), cert. den'd, *Stumbo v. Anderson*, 543 U.S. 956, 125 S.Ct. 453 (Mem), 160 L.Ed.2d 317 (U.S. Nov 01, 2004); *Family Trust Foundation of Kentucky, Inc. v. Wolnitzek*, 345 F.Supp.2d 672, (E.D.Ky. Oct 19, 2004), stay den'd, 388 F.3d 224 (6th Cir.(Ky.) Oct 27, 2004) (NO. 04-6250, 04-6251); *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S.Ct. 2528, 153 L.Ed.2d 694 (U.S., Jun. 27, 2002); *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. (Ga.) Oct. 18, 2002); *In re Chmura*, 608 N.W. 2d 31 (Mich. Mar. 28, 2000).

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We also believe that, if this is the approach finally taken by the ABA, it should be accompanied by a "disclaimer" or "caveat" to those states considering the adoption of the Model Code that they face a significant risk of extended and costly constitutional challenges to this version of Canon 5. Portions of proposed Canon 5 are facially unconstitutional under current case law, and private interest groups will continue to ask Judges and judicial candidates "hot button" questions. When those questions are not answered based on Canon 5 as currently written, those interest groups are going to file lawsuits, and the States which adopt this version of Canon 5 are likely to lose any constitutional attack. We strongly believe that the ABA has a duty to propose a code which is enforceable.

Therefore, we recommend that the Commission adopt the following as their Final Draft of Canon 2, Rule 2.11, and Canon 5 of the Model Code of Judicial Conduct:²

CANON 2

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY, AND DILIGENTLY.

RULE 2.11: JUDICIAL STATEMENTS ON PENDING* AND FUTURE CASES

(A) A judge shall not make any statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending* in any court.

(B) The judge shall require similar abstention on the part of staff, court officers, and others subject to the judge's direction and control.

(C) A judge shall not make pledges, promises or commitments regarding pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific positions of law, that would reasonably lead to the conclusion that the judge has prejudged a decision or ruling in cases that would fall within the scope of the pledge, promise or commitment. To fall within the proscription of this rule the statement by the judge must pertain to matters likely to come before the court on which the judge serves.³

² A redline version comparing the current Proposed Final Draft with APRL's suggested Final Draft is attached.

³ This language is taken from proposed Comment [15] to the Commission's May 26, 2005, draft of Canon 5, which stated:

[15] Some speech restrictions are indispensable to maintaining the integrity, impartiality and independence of the judiciary. The state has a compelling interest in enforcing these limited restrictions. Thus, under this Rule it remains improper for a judicial candidate to make pledges,

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(D) This Rule does not prohibit public statements made in the course of a judge's official duties or an explanation of court procedures, nor does it preclude a judge from commenting on proceedings in which the judge is a litigant in a personal capacity.

CANON 5

A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY.

Rule 5.01 Political and Campaign Activities of Judges and Candidates for Judicial Office

(A) A judge or judicial candidate:

- (1) shall not personally solicit campaign contributions except when speaking before groups;
- (2) shall not personally accept campaign contributions;
- (3) shall not use or permit the use of campaign contributions for the private benefit of the candidate or others;
- (4) shall not use court staff, facilities, or other court resources in a campaign for judicial office;
- (5) shall not knowingly, or with reckless disregard for the truth, make any false or misleading statement;
- (6) shall not make any statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending* or impending* in any court; and

promises or commitments regarding pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific propositions of law, that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases within the scope of the pledge, promise or commitment. To fall within the proscription of this Rule the statement by the candidate must pertain to matters likely to come before the court on which the candidate would serve, if elected. Statements by a candidate that would have this effect are inconsistent with the obligation of all judges to perform impartially the adjudicative duties of office.

See also the October 11, 2005, *per curiam* order of the Supreme Court of Tennessee, amending the Commentary to that state's Rule 10, Canon 5(A)(3)(d).

(7) shall not make pledges, promises or commitments regarding pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific positions of law, that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases that would fall within the scope of the pledge, promise or commitment. To fall within the proscription of this rule the statement by the candidate must pertain to matters likely to come before the court on which the candidate would serve, if elected.

(B) A judicial candidate:

(1) shall take reasonable measures to ensure that other persons do not do on behalf of the candidate what the candidate is prohibited from doing by this Code, whether or not the other person is under the direction and control of the candidate;

(2) shall comply with all applicable election, election campaign, and election campaign fundraising laws* and regulations of [jurisdiction name]; and

(3) shall review and approve the content of all campaign statements made and materials produced by the candidate or his or her campaign committee prior to their dissemination.

Rule 5.02: Activities of Judges who Become Candidates for Non-Judicial Office

(A) Upon becoming a candidate for a non-judicial elective office, a judge shall resign from judicial office, unless permitted by law* to continue to hold judicial office.

(B) Upon becoming a candidate for a non-judicial appointive office, a judge is not required to resign from judicial office, provided that the judge complies with the other provisions of this Code.

Although we disagree with certain of the ABA Commission's conclusions, as discussed above and in our prior communications, we continue to support its fine and valuable work. We particularly support and applaud the restructuring and reformatting of the Model Code and the efforts of the Commission to provide, for the most part, clear guidance to judges seeking to abide by its standards.

In that regard, APRL has been asked to consider becoming a sponsor of the ABA Commission's Final Report to the House of Delegates. Because of our positions on the "appearance of impropriety" standard and Canon 5, we cannot agree to serve as a sponsor

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of the entire Final Report. We are, however, willing to serve as a sponsor of the Final Report with respect to the proposals regarding the formatting of the Code. Please call me to discuss this matter at your earliest convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ronald C. Minkoff". The signature is written in a cursive style with a large initial "R".

Ronald C. Minkoff,
President, APRL and Chair,
APRL Committee on Model Code
Of Judicial Conduct

cc: Jeanne Gray, Esq. (By pdf)
George Kuhlmann, Esq. (By pdf)
Eileen Libby, Esq. (By pdf)
Ellyn Rosen, Esq. (By pdf)
Members of APRL Board of Directors (By pdf)
Members of APRL Subcommittee (By pdf)