

## **SUMMARY**

### **STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY PREAMBLE THROUGH CANON 4 AND THE AUGUST 25, 2005 DRAFT VERSION OF CANON 5 SEPTEMBER 15, 2005**

#### **THE PREAMBLE**

The Ethics Committee suggests that the first sentence be deleted as unnecessary.

They find the Preamble “protests too much,” and does not illuminate the dual nature of this Code in its combining aspirational and disciplinary subjects. In addition, there are redundancies, inaccuracies, and unusual terms that do not clearly lay out the purpose of the document it precedes. The Committee encourages the Commission to create a more concise statement of the concepts embodied by the Code.

#### **SCOPE**

The Ethics Committee recommends inclusion of the present Code’s discussion of significance of the term “should.”

#### **TERMINOLOGY**

Cross-references to rules should be omitted from the Terminology Section.

The asterisk references in the Rules, which seem both interruptive and unnecessary, should be deleted throughout the Code .

Some additional defined terms should be considered. The Rules often use the word “reasonable” and refer to a “reasonable person” which should be defined.

Occasionally definitions are contained in comments to the Rules: these definitions belong in Terminology.

#### **CANON 1**

The Committee offers a number of specific words and phrases and stylistic edits to clarify proposed Judicial Code provisions.

##### **Rule 1.03**

The Committee is closely divided concerning the retention of the “appearance of impropriety” standard. A majority of the Committee recommends insertion of the words “should avoid” before the phrase “the appearance of impropriety” in Canon 1 and in Rule 1.03, effectively making this an aspirational standard.

### **Rule 1.03**

The Ethics Committee believes that the standard of impairment in describing the test for appearance of impropriety in what would be the new Comment [3] is an improper independent standard unrelated to impropriety itself. The test for an appearance of impropriety should be whether reasonable minds perceive that there is impropriety in the judge's conduct. They offer new language to accomplish this.

The Committee recommends this additional rule:

#### **Rule 1.04 Professional Misconduct**

It is professional misconduct for a judge to:

- (a) commit acts that constitute a crime;
- (b) take action, in connection with the judge's official duties, that reflects adversely on the judge's integrity, impartiality or trustworthiness, or raises a substantial question as to the fitness of the judge to continue serving in a judicial capacity;
- (c) engage in conduct, whether or not in connection with the judge's official duties, involving dishonesty, fraud, deceit or misrepresentation; or
- (d) engage in conduct that is prejudicial to the administration of justice.

## **CANON 2**

The Ethics Committee made a number of specific drafting suggestions, corrections, and proposed changes to the language of the Canon and restatements to the Comment.

They propose that Rule 2.05 should be divided into three sections, rather than two. The first sentence of Rule 2.05A should stand alone as Rule 2.05A. The second sentence should then become Rule 2.05B, and presently proposed Rule 2.05B should become Rule 2.05C.

The Committee recommends deletion of Comment [5] to **Rule 2.10**. A judge should not, without consultation with parties and counsel, seek the advice of anyone in a connection with a matter.

The Ethics Committee expresses doubt that **Rule 2.11C** will withstand constitutional challenge, at least in the context of partisan judicial elections.

**Rule 2.12A(4)** should expressly include contributions made by other lawyers in the firm of the party's lawyer.

In **Rule 2.19**, the Committee questions the use of the term "knowledge" concerning performance being impaired as being highly subjective.

The Committee unanimously recommends omission of **Rule 2.20**. Any rule establishing judicial immunity will necessarily be part of other rules; moreover, the concept is not ethical in nature.

### **CANON 3**

The Ethics Committee proposed numerous changes to the language of the Canon the interrelationship of provisions, and redrafting of the Comment.

The Ethics Committee stated that Rule 3.04 should be divided into two rules, with the prohibition on holding membership constituting Rule 3.04A. This portion of the Rule should also be revised to incorporate language presently in Comment [1], so as to establish in the black-letter the types of membership organizations that do not fall under the Rule's prohibitions. They propose that the following language should be adopted:

#### **Rule 3.04: Affiliation With Discriminatory Organizations**

(A) A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, gender, religion, national origin, ethnicity, sexual orientation or unlawful discrimination. A judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation. A judge's membership in an organization that lawfully preserves and promotes the interests of an ethnic or cultural organization is not a violation of this Rule.

The portion of Rule 3.04 that addresses use of a discriminatory organization's facilities should become section (B) of the Rule. In addition, it should incorporate a knowledge requirement and should eliminate the "to any significant extent" limitation contained in the Preliminary Draft. It should read as follows:

(B) A judge shall not use the benefits or facilities of an organization when the judge knows or should know that the organization practices invidious discrimination on one or more of the bases identified in Section (A) of this Rule. A judge's attendance at an event in a facility of a group which he should not join as a member under this Rule is not a violation of the Rule when the judge's involvement in the event is de minimis. A judge's attendance at an event is de minimis when the attendance is an isolated occurrence and does not constitute an endorsement of the organization.

## **CANON 4**

The Ethics Committee offered proposed revisions to the language of the Canon and Comment, and changes that lead to better consistency between provisions.

**Rule 4.12A (7)** -- There are five types of persons mentioned: lawyer, party, third person, person and entity. None of the terms is defined. Does third person mean any other person? In common statutory interpretation, the term “person” also includes any legal entity. In both subparts (a) and (b), we recommend reference to “a lawyer, party or any other person” in the first line, and deletion of the words “or entity” in the second lines.

## **CANON 5 Reporter’s August 25, 2005 Version**

The Committee found the Reporter’s August 25 draft more acceptable, and has considered that draft to be the desired focus for its continuing discussion. They address that draft below, rather than the Canon 5 Rules of the June 30 draft. They suggest:

In Rule 5.01(A)(3), the phrase “in connection with political and campaign activities of judges and other candidates for judicial office” should be inserted before the word “knowingly.”

In Rule 5.01(A)(4), the word “public” should be deleted.

In Rule 5.01(A)(6) the two bracketed item, “[faithful and]” and “[adjudicative]” should be deleted.

In Rule 5.01(C)(1), the phrase “maintain the dignity appropriate to judicial office, and...” should be deleted.

As the provisions of the Code of Judicial Conduct are not enforceable against neither judges nor judicial candidate, the Committee recommends that Rule 5.02 be re-titled “Responsibilities of Judges and Candidates With Respect to Campaign Committees.”

The Rule would thus read as follows:

Rule 5.02 Judicial Responsibilities With Respect to Campaign Committees

- (B) Candidates for judicial office subject to public elections may establish campaign committees to conduct campaigns for the candidates and to expend funds in support of their campaigns.
- (C) Candidates for judicial office shall take reasonable measure to ensure that members of their campaign committees:
  - (1) solicit and accept only reasonable campaign contributions, not to exceed, in the aggregate, [\$\_\_\_\_] from any individual or [\$\_\_\_\_] from any entity or organization;
  - (2) solicit and accept contributions for a candidate's campaign no more than [one year] prior to a scheduled election and no more than [90] days after the last election in which the candidate participated;
  - (3) file with [name of appropriate regulatory authority] within [ ] days following an election, or within such other period as is required by law, a report stating the name, address, occupation and employer of each person who has made campaign contributions to the committee in an aggregate value exceeding [\$\_\_\_\_]; and
  - (4) comply with other applicable election campaign law.