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Dear Ms. Gallagher:

I appreciate the opportunity to comment on the preliminary drafts of Canons 1 and 2 of the ABA Model Code of Judicial Conduct. My views are largely the product of recent four-year experience as a member of the committee that recommended a redraft of the present Code of Judicial Conduct for adoption in Massachusetts and, previously, fourteen years experience as member of the Massachusetts Advisory Committee on Judicial Ethics.

These experiences have led me to believe that codes of judicial ethics serve three distinct and not always consistent purposes. The first is to set appropriate standards of conduct for judges and to do so in a way that is reassuring to the general public. The second is to aid judges who are trying to decide whether conduct they are contemplating is appropriate for a sitting judge. The third is to provide a text that will serve as a basis for the decision on disqualification or discipline of a judge. I have tried to read each provision of the proposed drafts of Canons 1 and 2 with those purposes in mind, and I have a few observations to offer.

Canon 1. In my view, avoiding impropriety and the appearance of impropriety are what a code of judicial conduct is all about. All the remaining canons are subtexts of that theme. It is not possible, however, to list all the specific instances of possible violations and I would eliminate the second sentence of paragraph 2 of the Commentary. As it now stands, the "Ordinarily" language may tend to suggest that there is no violation of the code if there is no specific prohibition of the conduct in question or it may lead those charging with advising or enforcing to try to jam improper conduct into the language of another general provision. As an example, I would assume that judges should not publicly drink a great deal of alcohol before sitting on the bench even if their competence is not impaired. There is no specific prohibition of such conduct. Canon 2.03 doesn't quite do it. Nor does 2.07(b)'s requirement of dignity. But I think such conduct ought to be a violation of Canon 1, which should be read to cover conduct about which there is a general consensus that this is the sort of behavior in which judges should not engage. This was the constitutional standard urged in the lawyer discipline context by Justice White in *In re. Ruffalo*, 390 U.S. 544, 555 (1964) and has been often cited since. As such, it is a manageable standard for individual judges, courts, and disciplinary bodies to understand.

Canon 2.03. “Maintaining” professional competence has the sound of keeping up on the substantive law. The Commentary goes beyond that notion. How about: “A judge shall perform judicial duties with professional competence.”

Canon 2.04. This section raises a variety of issues because the text is so broad and ambiguous. The Commentary may be read as altering, rather than just explaining, the text. What happens in a state where the adopting body adopts the text but not the Commentary of the Code. What happens in a state that views the text and the Commentary as in conflict. Which controls? Moreover, if the Commentary really does narrow the text a great deal, and I think it does, of what use is the text? Moreover, this seems to be an instance where the code is getting into subject matter that does not belong in a code of judicial conduct.

Canon 2.04 states: “A judge shall apply the law without regard to the judge’s personal views” Taken at face value, that provision flies in the face of the common understanding of many, if not most, students of judicial decisions. Personal views play an important role, some would say more than that, in judicial decision-making. The Commentary attempts to narrow the statement in three ways. It first seems to equate “personal views” with a “judge’s background and philosophy.” It then states that “the judge’s personal views, by themselves, should not be controlling.” And finally it adds a connector, “Thus,” to start the next sentence. To me, “thus” seems a misnomer. The thought seems more like a “moreover,” that “a judge must uphold the law without regard to whether the judge personally approves or disapproves of the law in question.” Personal views understood as the judge’s background and philosophy seem rather different to me from personal views understood as approving or disapproving of the law in question and both are considerably narrower than the naked term “personal views” in the text. Moreover, approving or disapproving of “the law in question” seems a rather different matter when one is talking about a constitutional provision or statute on the one hand or a common law doctrine on the other. I would eliminate Canon 2.04 entirely. It doesn’t give clear advice to judges individually or to courts or disciplinary bodies about the nature of the prohibited conduct. The language may sound good to that segment of the general public that believes “the law” is somewhere out there to be found, but legislating about the extent to which personal views may play a role in decision-making seems to me to involve rather subtle points of jurisprudence that are not appropriate to a code of judicial conduct.

Canon 2.09. The Massachusetts committee spent a great deal of time on the ex parte provisions of the code and altered the current code in several respects. Although the committee originally recommended a provision like 2.09(2), it removed the provision after receiving numerous objections from various segments of the bar, which raised the serious issue that the provision allowed a judge to receive ex parte advice in secret, with only an opportunity to object to the person or the advice after the fact. The committee concluded that the provision should be removed from the code. A judge who wanted expert advice could appoint an adviser or master in accordance with the usual provisions of procedural law.

The Massachusetts committee also added to what is Canon 2.09(3) the following italicized language in order to protect rights of litigants and to address issues of impartiality and the appearance thereof, and it also added some Commentary to explain the reasons for the added language (which I have not quoted because of its length).

(c) A judge may consult with court personnel* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, subject to the following:

(i) a judge shall take all reasonable steps to avoid receiving from court personnel* or other judges factual information concerning a case that is not part of the case record. *If court personnel* or another judge nevertheless bring non-record information about a case to the judge's attention, the judge may not base a decision on it without giving the parties notice of that information and a reasonable opportunity to respond. Consultation is permitted between a judge, clerk-magistrate or other appropriate court personnel and a judge taking over the same case or session in which the case is pending with regard to information learned from prior proceedings in the case that may assist in maintaining continuity in handling the case;*

(ii) *when a judge consults with a probation officer about a party in a pending or impending criminal or juvenile case, the consultation shall take place in the presence of the parties who have availed themselves of the opportunity to appear and respond;*

(iii) *a judge shall not consult with an appellate judge, or a judge in a different trial court department, about a case that the judge being consulted might review on appeal; and*

(iv) *no judge shall consult with another judge about a case pending before one of them when the judge initiating the consultation knows* the other judge has a financial, personal or other interest which would preclude the other judge from hearing the case, and no judge shall engage in such a consultation when the judge knows* he or she has such an interest.*

Canon 2.11. I am a strong believe in the notion that judges should not make comments on pending or impending cases. The primary job of judges is to decide cases pending before them. A secondary job is to educate the public about the law in ways that do not interfere with their primary job. In doing their primary job, judges express their views to the public formally in orders and opinions after considering all the relevant evidence and legal doctrine. When they make pronouncements in the course of doing their primary job, they are experts in those cases. When they make pronouncements about cases that are not before them, they present themselves to the public as "judges," but they are not behaving in a judicial fashion, usually giving their views off the cuff, without having considered all the relevant evidence and legal doctrine. The current model code of judicial conduct prohibits such "deception" of the public and such misuse of the judicial role – wisely in my view. The committee's proposal cuts the heart of the current prohibition. Rarely will it be apparent that a judge's comment "might reasonably be expected to affect [a case's] outcome or impair its fairness."

I am speculating that a purpose of the virtual elimination of the prohibition, although the Commentary says nothing, relates to a judge's free speech rights. Another purpose may be to accommodate the desire of some judges for a public forum to discourse about the law. Those issues involve more of a discussion than can fit within a letter responding to the current tentative draft. My view, briefly stated, is that the right to comment freely about matters pending before another judge is not of the essence of the free speech rights we should be preserving for judges.

Canon 2.12. I think that there is a slip in the wording of Canon 2.12(C)(2) when it disqualifies a judge "when the judge . . . 2. is acting as a lawyer in the proceeding." A judge can't be acting as a lawyer in the proceeding. When referring to a judge, shouldn't it refer to a judge who has acted as a lawyer in the proceeding? In that connection, I note that remittal would be possible in that situation. That does not seem wise to me. Again, there is some useful cautionary language in the recent Massachusetts revision. "There are circumstances when other provisions, such as Section 2A, may override the remittal procedure of Section 3F. An example would be where a judge's close relative has supervisory responsibility over attorneys prosecuting criminal cases in the county where the judge is sitting."

Canons 2.17 and 2.18. I think the reporting requirements cause significant anxiety within the judiciary and require a good deal of explanation as to what is required and why in order to assure compliance. I offer the Massachusetts Rules and commentary as one way of providing guidance to judges about the extent of their responsibilities with respect to reporting lawyers and fellow judges:

Canon 3D(1) A judge having knowledge* of facts indicating a substantial likelihood that another judge has committed a violation of the Code that raises a significant question about that judge's honesty, integrity, trustworthiness, or fitness for judicial office shall inform the Chief Justice of this court and of that judge's court. A judge having knowledge* of facts indicating a substantial likelihood that another judge has committed a violation of the Code that does not raise a significant question of that judge's honesty, integrity, trustworthiness, or fitness for judicial office shall take appropriate action.

(2) A judge having knowledge* of facts indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct that raises a significant question as to that lawyer's honesty, integrity, trustworthiness, or fitness as a lawyer shall inform the Bar Counsel's office of the Board of Bar Overseers.

Commentary:

This Section requires judges to report conduct indicating a substantial likelihood of a serious violation of professional conduct by judges or lawyers together with the factual basis for this conclusion. Even an apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. The word "significant" in

the Section refers to the seriousness of the possible offense and not the quantum of evidence of which the judge is aware.

Judges are required by this Section to participate actively in maintaining and preserving the integrity of the judicial system. The rule is necessary because judges make up a significant group that may have information about colleagues' misconduct. For this reason, judges have an opportunity and a special duty to protect the public from the consequences of serious misconduct and the potential harmful results of other violations of the Code.

The following examples are not exhaustive but include misconduct that has been found in particular factual circumstances to raise a significant question about honesty, integrity, trustworthiness, or fitness for judicial office: tampering with or attempting to influence improperly a judicial action of another judge; giving false testimony under oath; tampering with or falsifying court papers to support judicial action; grossly abusing the bail statutes; failing to recuse at a hearing when the judge is engaged in a personal financial venture with lawyers or parties; misusing appointment power to show favoritism; using court employees during regular work hours for private benefit; engaging in inappropriate political activity, such as attending fundraisers, soliciting money for candidates or causes, and lobbying except on matters concerning the law, the legal system, or the administration of justice; engaging in a pattern of any of the following activities: abuse of alcohol in public, indifference to case law or facts, use of injudicious or abusive language on the bench, or failure to devote full-time to judicial work.

Other Code violations by a judge that are less serious still require appropriate action by the judge who has knowledge of them. Examples include but are not limited to: speaking or being the guest of honor at an organization's fund-raising event; serving as a director of a family business; serving as the executor of an estate of a relative or person with whom the judge had no close familial relationship; frequently starting court business late or stopping it early; soliciting advice about pending cases from a friend who is a law professor without disclosure; placing or leaving a bumper sticker for a political candidate on a vehicle the judge regularly drives; frequently delaying making decisions in cases. Appropriate action by a judge who has knowledge of these less serious Code violations may include: speaking to the other judge directly; asking someone else who may be more appropriate to speak to that judge; reporting to the presiding judge of the court where the violation occurred or where that judge often sits; reporting to the Chief Justice of that judge's court; and speaking to Judges Concerned for Judges or calling the judicial hotline maintained by Lawyers Concerned For Lawyers, Inc. This list of actions is illustrative and not meant to be limiting.

While a measure of judgment is required in complying with this Section, a judge must report lawyer misconduct that, if proven and without regard to mitigation, would likely result in an order of suspension or

disbarment, including knowingly making false statements of fact or law to a tribunal, suborning perjury, or engaging in misconduct that would constitute a serious crime. A serious crime is any felony, or a misdemeanor a necessary element of which includes misrepresentation, fraud, deceit, bribery, extortion, misappropriation, theft, or an attempt, conspiracy, or solicitation of another to commit the above crimes. Section 3D(2) does not preclude a judge from reporting a violation of the Massachusetts Rules of Professional Conduct in circumstances where a report is not mandatory. Reporting a violation is especially important where the victim is unlikely to discover the offense. If the lawyer is appearing before the judge, a judge may defer making a report under this Section until the matter has been concluded, but the report should be made as soon as practicable thereafter. However, an immediate report is compelled when a person will likely be injured by a delay in reporting, such as where the judge has knowledge that a lawyer has embezzled client or fiduciary funds and delay may impair the ability to recover the funds.

I thank you for the opportunity for comment on this beginning to your important project.

Sincerely yours,
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