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Mark I. Harrison Chair, Joint Commission to Evaluate the Model Code of Judicial Conduct Osborn Maledon PA Ste 2100 2929 N. Central Ave Phoenix, AZ 85012

Dear Mark:

I write as Chair of the Criminal Justice Section's Ad Hoc Committee to Review the Proposed Revisions to the ABA Code of Judicial Conduct. Our committee has several comments and concerns on the draft Code that we hope will be helpful to the Commission. I have already discussed our suggestions for Canons 2 and 4 with Charlie Geyh and Bill Hodes, but our comments on Canon 5 are new.

There are several provisions in Canon 2 that we believe do not take into account the special circumstances of criminal practice. We suggest that the commentary to Rule 2.9 be revised to make clear that its provisions on the judge's role in settlements apply only in the civil context. This could be accomplished by inserting the word "civil" before "disputes" in the first phrase of comment [2]. As to Rule 2.8, we suggest that the commentary address ethical issues raised by a judge's interaction with jurors during voir dire and trial, as well as after trial, in light of the newly adopted jury standards. On Rule 2.10, we recommend that the commentary make clear that a judge is not precluded from making an independent inquiry into the law, as opposed to the facts. In Rule 2.12(A)(2)(d), there appears to be a missing verb. We suggest that you include "or discipline" after "civil action" in the black letter of Rule 2.20

In Canon 4, we question whether Rules 4.03 and 4.04 may be unnecessarily restrictive when it comes to a judge's ability to serve on governmental committees or commissions, and to participate in civic or charitable activities. We see no reason why a judge should be limited to service on a governmental committee that is concerned exclusively with "the improvement of the law, the legal system or the administrative of justice." The categorical limitation in Rule 4.04(C)(1) also may be unnecessarily broad, depending upon the circumstances. A judge should not be categorically barred from

serving as an officer or advisor to any of the specified non-profit organizations or governmental entities where it is deemed "likely" that the organization or entity will be engaged in proceedings that would "ordinarily" come before the judge. We believe that the otherwise applicable rules of recusal should preclude any abuses in this sort of speculative situation. The situation described in Rule 4.04(C)(2), where litigation in the judge's court involving the organization is likely to be "frequent," is more problematic, and more appropriate for a categorical rule.

In either the "Terminology" or "Application" sections, we suggest that the term "judge" be defined to take into account such quasi-judicial positions as special masters, magistrates, and referees.

As to Canon 5, we urge the Commission to exercise the utmost caution in making any revisions to its provisions on political activity and solicitation in reliance on *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) [hereinafter *White II*]. Any major revisions would be premature because the Minnesota Board on Judicial Standards plans to petition the Supreme Court for review of the Eight Circuit's ruling on the constitutionality of those restrictions. We are concerned that any revisions which would permit judges to engage in partisan political activities, make statements on issues that may come before the court, or solicit endorsements and contributions would inevitably erode public confidence in an independent and impartial judiciary. At a minimum, we urge that any proposed modifications to Canon 5 in reliance on *White II* be very limited, and adopted only after thoughtful deliberation and input from all sections of the ABA.

I am attaching hereto a copy of the brief filed in the Minnesota Supreme Court by the Minnesota District Judges Association, arguing against adoption of certain amendments to the political activity restrictions in that state's judicial code. The brief points out the complexity of the policy issues raised by *White II*, and the wide range of activity potentially affected by it, from attending political gatherings and endorsing other candidates, to soliciting contributions and publicly stated support. It concludes that "The recommended revisions to the political activity restrictions would imperil the longstanding nonpartisan character of our judicial elections by inviting, if not encouraging, partisan political activity by candidates for judicial office."

We hope these comments are helpful.

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Sincerely,

Margaret Colgate Love