

**PRELIMINARY REPORT OF THE
ABA JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT**

INTRODUCTORY REPORT

JUNE 30, 2005

INTRODUCTION

In its “Preliminary Draft, ABA Model Code of Judicial Conduct” the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct (“Joint Commission” or “Commission”) proposes both format and substantive changes to the present Model Code. Created in July 2003 with a generous grant from the Joyce Foundation, the Joint Commission was appointed by and operates under the auspices of the ABA Standing Committees on Judicial Independence and Ethics and Professional Responsibility. The Commission circulates the Preliminary Draft at this time with a request that it be reviewed by all individuals and entities interested in judicial ethics and regulation, with a sincere hope that all those who have comments and suggestions regarding the provisions of the Preliminary Draft will submit them to the Commission *no later than September 15, 2005, to debrataylor@staff.abanet.org or by mail to Debra D. Taylor, American Bar Association, Center for Professional Responsibility, 321 North Clark Street, Chicago 60611.* After that time, and after a thorough review of all comments and suggestions it receives, the Commission intends to make such additional changes as may be appropriate and to submit a final Report with Recommendations to the House of Delegates for consideration at the ABA 2006 Midyear Meeting in New Orleans, Louisiana.

It has been sixteen years since the judicial ethics policies of the ABA were subjected to comprehensive review. Between 1987 and 1990 a Subcommittee of the Standing Committee on Ethics and Professional Responsibility conducted an extensive review process that led to adoption of the present ABA Model Code of Judicial Conduct in 1990. Since that time, several developments have occurred that suggested the need for a reconsideration of the Model Code. The increasing role of politics in judicial selection processes, the collective experience of judicial ethics commissions and judicial regulators in interpreting and applying the existing Code, and the development of new types of courts and court processes are among the factors that converged to present a convincing argument for an examination of the adequacy of the current Code.

The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct is chaired by Mark I. Harrison of Phoenix, Arizona. Mr. Harrison is a former member of the ABA Standing Committees on Ethics and Professional Responsibility and Professional Discipline. He has had a distinguished career in all aspects of lawyer and judicial regulation, including the representation of the Arizona Judicial Conduct Commission as well as judges in judicial discipline proceedings. The Commission membership is comprised of ten distinguished judges and lawyers whose breadth of experience in

various courts and areas of practice ensures a thorough and multi-dimensional review of the Judicial Code's provisions. It also includes a public member whose participation in a wide array of civic, business and charitable affairs brought to the review process a valuable public perspective; and eleven advisors having extensive experience in judicial ethics and discipline matters, many of whom served as formal liaisons from organizations interested in different aspects of judicial conduct. The Commission is supported in its evaluative work by two reporters and by counsel from the ABA Justice Center and the ABA Center for Professional Responsibility. A roster of the Commission members, advisors, reporters and counsel appears as an additional document (see Table of Contents).

THE EVALUATION PROCESS

Over the course of twenty-two months, the Commission met in person 12 times and convened via teleconference 17 times. At its in-person meetings, (widely advertised in advance) the Commission sponsored public hearings at which it heard comments from twenty-three individuals regarding their interests or the interests of entities they represented, on a broad range of judicial conduct issues. The Commission also received written comments from some of those who appeared in person and from a number of other interested persons. The Commission's developing work product, in the form of drafts of discrete portions of the Judicial Code, was posted periodically on a website maintained by the ABA, along with requests for responses and suggestions for further revisions. The Commission's work was also disseminated to representatives of sixteen entities whose work focuses on judicial conduct matters, and to over two-hundred fifty individuals who had expressed an interest in the process and asked that they be provided with electronic notification of all the Commission's recommendations. All told, twenty-five entities filed written comments with the Commission in relation to the existing Model Code; approximately three-hundred individuals filed comments with respect to the Commission's draft revisions to the Code.

The Preliminary Draft is the result of vigorous and informed discussion and debate among the Commission members and advisors. The formulations contained in the Preliminary Draft were established by vote of the members of the Commission. Although there was majority support for each of the proposed rules contained in the Preliminary Draft, there was frequent disagreement, ranging from mild to strong, with the voting majority's formulation of particular proposed rules. All important areas of disagreement and all significant differences between the proposed Rules and the present Code are discussed, *infra*, in the section of this report titled "Principal Substantive Changes from the 1990 Code and Significant Controversies," with the expectation that this will stimulate further consideration and comment among all those who review this Preliminary Draft.

MATERIALS CONTAINED IN THIS REPORT

To assist the reader with his or her review of the Preliminary Draft, the Commission provides here the following materials.

- A “clean copy” of the Commission’s proposed ABA Model Code of Judicial Conduct, including a “Preamble,” a “Terminology” section, a note on “Scope,” the Rules and their accompanying Comment, and an “Application” Section. This document contains footnote notations indicating where various proposed Code provisions appear (if at all) in the 1990 Code.
- A redlined version of the Proposed Rules that compares the Preliminary Draft with the present Code, in traditional legislative format.
- For the benefit of those who have reviewed the Commission’s early drafts that were posted on the website between May 2004 and May 2005, and who wish to see the changes that the Commission has decided upon in response to comments received in the interim, a redlined version of the Proposed Rules that compares the Preliminary Draft with the provisions proposed earlier.

ORGANIZATIONAL CHANGES FROM THE 1990 CODE

The organization or format of the Preliminary Draft presents two notable differences from the 1990 Code. First, the material treated under each of the Canons has been reorganized to provide what the Commission considers a more logical and helpful arrangement of topics. Canon 1 in the Preliminary Draft combines most of the subject matter of present Canons 1, 2 and 3, addressing both the obligation of judges to uphold the integrity, impartiality, and independence of the judiciary and to avoid impropriety and its appearance. Canon 2 of the Draft addresses solely the judge’s professional duties *qua* judge, which constitute part of Canon 3 in the present Code. Draft Canon 3 contains brief, general provisions governing a judge’s personal conduct, most of which appear in the present Code’s Canon 2. Draft Canon 4 addresses, as does present Canon 4, a judge’s “extra-judicial activities,” primarily civic or community involvement, business activities, and the acceptance of gifts. Finally, Canon 5 addresses, as does present Canon 5, acceptable political conduct of judges and judicial candidates.

A second change in the Code’s format is the presentation of Canons, which state overarching principles of judicial conduct, followed by specific “Rules.” In the 1990 Code, each Canon was followed by “sections” that discursively established the parameters of permissible and prohibited conduct. A consensus was reached by the Commission in its first year of deliberations that a structure more like that of the ABA Model Rules of Professional Conduct (which address permitted and prohibited conduct for lawyers) would be a more straightforward and user-friendly form for a Judicial Code. This consensus developed from consideration of the Commission members’ own experience in using the present Code both for guidance and for judicial discipline proceedings, and from the experience and testimony of numerous other individuals providing comment to the Commission. Consistent with the organization of the Model Rules of Professional Conduct, the Rules in the Preliminary Draft are usually followed by Comment that provides aspirational guidance and assists the user in interpreting and

applying the Rules. The Comment neither adds to nor subtracts substantively from the force of the Rules themselves.

PRINCIPAL SUBSTANTIVE CHANGES FROM THE 1990 CODE, AND SIGNIFICANT CONTROVERSIES

CANON 1

The Commission heard presentations and received numerous written communications on the question, identified by the Commission itself as an important one at the beginning of the project, of whether the “appearance of impropriety” concept contained in the present Code should be retained. A majority of commentators on the subject, citing to judicial discipline cases decided over a three-decade period, urged that the concept be retained. Others, notably lawyers who represent judges and judicial candidates in disciplinary proceedings, voiced concerns that the concept is not clearly definable and does not provide judges and judicial candidates with adequate notice about what conduct might constitute a disciplinable offense. Some of those commentators questioned whether that aspect of the provision might also make it subject to attack on constitutional grounds. The Commission was persuaded by the former group of commentators. Thus the Preliminary Draft places the admonishment that judges avoid not only impropriety but also its appearance in two places: in the text of Canon 1 and in Rule 1.03. The explicating Comment language relating to impropriety and its appearance are substantially as they appear in the present Code. *Comment on this proposal is eagerly sought.*

CANON 2

Rule 2.08, “Demeanor and Decorum,” contains a new Comment to accommodate recently developed formal or informal procedures the Commission has learned of whereby judges engage in a “debriefing” process with jurors after their jury service has been concluded. As drafted, the proposed Comment essentially provides examples of matters that must not be discussed in such a debriefing. *The Commission seeks input on what additional discussion or description of this practice might be appropriate.*

The Comment to Rule 2.09, “Ensuring the Right to be Heard,” discusses judges’ actions in encouraging parties and their lawyers to settle disputes where possible, cautioning that judges should not use coercion in doing so. Whether a judge who participates in facilitating settlement of a matter pending before him or her should be permitted to hear that matter if settlement efforts are unsuccessful has been the subject of conflicting testimony and comment to the Commission, but the Preliminary Draft does not propose to address this question specifically. *Further comment will be very useful to the Commission.*

Rule 2.10(B) in the draft, “Ex Parte Communications,” prohibits a judge from “independently investigat[ing] facts in a case.” The Comment to the Rule states that the prohibition extends to a judge’s use of electronic research methods, which include

Internet research. *The Commission is interested in hearing responses to this specific language.*

Several commentators informed the Commission that developing practices in recently-created “specialized courts,” such as drug courts, domestic abuse courts, and others, encourage or require judges to engage in communications with individuals and entities outside the court system itself that they fear may run afoul of traditional restrictions on ex parte communications. The Preliminary Draft does not specifically address this issue in Rule 2.10. *The Commission is hopeful that additional comments will be received on this issue from those who are familiar with developing practices.* (Reference to new types of courts has, however, been added to the “Application” Section of the Preliminary Draft.)

The Comment to Rule 2.12, “Disqualification,” states that a judge “should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, *even if the judge believes there is no real basis for disqualification.*” There was disagreement among the Commission as to whether such an application of the disqualification rule is necessary or desirable, and specifically whether such an interpretation may work a hardship on one or both of the lawyers in a proceeding. *Comment on the question will be very helpful.*

Rule 2.20 in the Preliminary Draft, “Immunity for Discharge of Duties,” purports to establish legal immunity for actions a judge takes in responding to judicial or lawyer misconduct or disability or impairment. *The Commission seeks comment on the appropriateness of including this concept in a series of rules governing a judge’s ethical obligations.*

CANON 3

Comment [5] to Rule 3.02, “Use of the Prestige of Judicial Office,” retains the concept presently in Commentary to Section 2B whereby letters of recommendation submitted by a judge on behalf of another person may be based on any “personal knowledge” the judge has. In an earlier draft of this provision, the Commission had proposed, based on considerable discussion and the comments of numerous witnesses, that only knowledge obtained by a judge *in his or her official capacity* ought to be used in letters of recommendation. This subject continues to provoke discussion.

In Rule 3.04, “Affiliation with Discriminatory Organizations,” the Preliminary Draft adds “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 seek to belong. These bases of discrimination are presently contained in the 1990 Code’s prohibition against the manifestation of bias in the court, but do not appear with respect to organizational memberships held by a judge. Notwithstanding the addition of these two factors, the Comment provides instruction, taken directly from the present Code, that a judge may belong to “any organization dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members.” *The Commission seeks comment on this issue.*

The Preliminary Draft also adds to the black-letter of Rule 3.04 a prohibition against a judge using the benefits or facilities of such an organization “to any significant extent.” The present Code treats the subject of a judge’s use of such organizations’ facilities only in Commentary, and interprets the provision as being violated either by a judge scheduling a meeting at a facility or regularly using the facility. *The Commission is interested in comments on the approach it has taken on this subject in the Preliminary Draft.*

Finally, with respect to Rule 3.04, Comment [4] interprets the black-letter to require that a judge immediately resign from an organization to which he or she belongs upon discovering that it engages in invidious discrimination. In the 1990 Code, the prohibition against membership in discriminatory organizations was being newly introduced, and Commentary provided that a judge be given one year to withdraw from membership, unless he or she was successful in influencing the organization to abandon its discriminatory policies. The Commission considers that both the policy and practice of prohibiting judges from belonging to discriminatory organizations are now well-established, so that a per se prohibition is appropriate. *The Commission welcomes comment about this proposed change.*

CANON 4

Rule 4.13, “Solicitation and Acceptance of Gifts.” Although the text of this Rule remains largely unchanged from its former presentation in Section 4D(5) of the 1990 Code, the Rule’s basic structure has been revised. The term “gift” is described both in this Rule and in the Terminology Section. The slightly revised description of gifts excludes several items that are not, in common parlance, thought of as gifts, including but not limited to: ordinary social hospitality; trivial tokens of appreciation; and loans, discounts, prizes, and scholarships that judges receive for reasons generally unrelated to their being judges.

Under Rule 4.13(A)(3) judges are permitted to accept invitations to “widely attended events,” a term that is separately defined in the Terminology Section. The Commission believes that judges should be encouraged to interact with the public they serve, and that they would not be in a position to attend many community events to which they are invited if they were on all occasions obligated to pay their way.

Rule 4.13(A)(7) remains substantially similar to the present Code, but includes several important changes. The new Rule would prohibit judges from accepting gifts in excess of specified dollar limits comparable to those established for gifts received by those serving in other branches of government; the present rule simply requires that gifts be reported. The provision enables judges to receive modest and innocuous gifts not excepted elsewhere in the Rules, but prohibits gifts of unlimited size. Finally, the Rule has been revised to limit the ban on gifts from persons who previously appeared before the judge to a period of five years, and likewise limiting its application to those who may come before the judge “later” to the foreseeable future.

Rule 4.13(B) is new, imposing a reporting requirement upon judges who receive gifts in excess of \$250.

Rule 4.14, “Reimbursement or Waiver of Charges for Travel-related Expenses” addresses only that portion of the present Code’s Section 4H(1) that relates to reimbursement, leaving treatment of compensation to a new Rule 4.15. It continues to allow judges to be reimbursed for travel associated with their attendance at programs or with other permissible extrajudicial activities. Several changes are proposed, however. First, Rule 4.14(A) would apply to waiver of charges as well as reimbursement of expenses. Second, permissible reimbursement is specifically limited to necessary travel and lodging. Third, the condition precedent to accepting reimbursement or waiver of charges - that it not create an appearance of impropriety - has been amended to identify specifically the potential that the acceptance of gifts has for creating the perception that judicial integrity, impartiality or independence may be compromised.

The Comment explicating this Rule is designed to provide judges with greater guidance when analyzing whether their reimbursement for attendance at a given event may be perceived as casting doubt on their integrity, impartiality or independence. The sources of funding for an event, the reasonableness of the expenses paid, and the identity of the sponsor are all among factors that judges are urged to consider when deciding whether to attend expense-paid seminars. The Comment also emphasizes the importance of transparency in judges’ acceptance of such reimbursements, focusing on the need for public access to information relevant to judicial participation in such events, including information about reimbursement and waiver of expenses.

Rule 4.16, “Reporting of Compensation, Reimbursement and Waiver of Charges,” is similar to the provision in the present Code, with one important difference: the Rule requires quarterly, rather than annual reporting, and requires that reports be published on court web pages where feasible. *The Commission welcomes comment about these proposed changes.*

CANON 5

Throughout its deliberations, the Joint Commission has sought to find a balance that accommodates the political realities of judicial selection while ensuring that the concepts of judicial integrity, independence, and impartiality are not undermined by the inappropriate participation of judges and judicial candidates in political activity. The Commission has added extensive comment to the Rules it proposes in the Preliminary Draft, confident that it will enhance compliance and enforcement of the Rules.

The structure of Canon 5 has been significantly modified. Although it begins with a Rule that addresses generally the prohibitions against political activity that apply to all judges and judicial candidates, as does the present Canon, it then provides additional Rules that separately treat each of the various types of judicial selection processes. The most noticeable feature of this reorganization is the clearer distinction that is drawn among partisan elections, non-partisan elections, retention elections and appointments to judicial

office; each involves a different level of restrictions on political activity. *The Commission is especially interested in receiving comments on whether the particular limitations proposed for each type of judicial candidate are the appropriate ones.*

A fundamental part of these restrictions on political activity is the concept of “political organizations.” This draft, in its “Terminology” section, retains the concept in the present Code that a political organization is a political party or other group, the primary purpose of which is the election or appointment of a candidate for judicial office, but this draft adds language to make it clear that candidates’ campaign committees are not political organizations for the purposes of Canon 5.

Rule 5.01, “Restrictions on Political Activities of Judges and Candidates for Judicial Office,” allows judges and judicial candidates at all times to purchase tickets for political functions. Although the provision restricts judges to purchasing tickets for their personal use, and requires that the cost of the tickets not exceed the reasonable value of the goods and services received, it nonetheless constitutes a considerable expansion from the present Code, which generally limits judges’ purchases of tickets to periods in which they are candidates in partisan elections. *The Commission seeks comment on this less restrictive approach to the issue.*

The Comments to Rule 5.01 have been revised to address the right of a judicial candidate to respond publicly to personal attacks or attacks on a candidate’s record during the course of a campaign. That subject is addressed by black-letter language in the current Code. The Commission believes that the discussion of the issue is primarily informative, and that the topic ought not be made the subject of disciplinary charges, *but it is interested in receiving comments on its proposal.*

In Rule 5.03, “Permitted Political Activities of Candidates for Judicial Office in Non-partisan Public Elections,” the Commission proposes Comment that interprets the Rule as prohibiting a candidate in a non-partisan election from completing and submitting questionnaires when the judge knows, or has reason to know, that the purpose of the questionnaire is for a political organization to decide whom to endorse in a non-partisan election. *The Commission is especially interested in receiving response to the question of whether this application of Rule 5.03 is an appropriate one.*

The Commission encourages all those who are interested in its work to review the Preliminary Report containing the Commission’s current draft of the entire Code carefully and to provide comments and suggestions to the Commission as soon as possible, but in no event later than September 15, 2005. *Specific language changes that give effect to commentators’ concerns will be extremely helpful to the Commission*

We hope that the work already completed by the Commission will be supplemented with suggestions from every quarter, so that our final recommendations for revision to the Code, when presented to the ABA House of Delegates in February 2006, will represent a consensus that will have been reached among the judiciary, the legal profession, and the public.