

**Comm\_Code\_Gray\_031104.doc**

**Canons 1-5**

**Code of Judicial Conduct**

**Cynthia Gray, Director**

**American Judicature Society, Center for Judicial Ethics**

**March 11, 2004**

Ms. Gray submits for the Commission's consideration the American Judicature Society's proposals to amend the 1990 ABA Model Code of Judicial Conduct. This comment consists of an extensive markup of the Code with proposed additions underlined and proposed deletions struck through.

**Canon 2A**

**Judicial Conduct**

**Cynthia Gray, Director**

**American Judicature Society, Center for Judicial Ethics**

**March 11, 2004**

In its markup containing AJS's proposed amendments of the Code, AJS notes its position that a judge's responsibility to avoid the appearance of impropriety should remain a mandatory obligation both to set the highest standard for judges seeking guidance from the code for prospective conduct and to establish an enforceable disciplinary rule. Judicial discipline cases applying the appearance of impropriety standard are discussed in the article "Canons 1 and 2" in the Fall 2003 issue of the *Judicial Conduct Reporter* published by the Center for Judicial Ethics.

**Canon 3B(9)**

**Adjudicative Responsibilities**

**Cynthia Gray, Director**

**American Judicature Society, Center for Judicial Ethics**

**March 11, 2004**

In its markup containing AJS's proposed amendments of the Code, AJS notes that the need for clarification of the ex parte communication provision is suggested by the revisions made by the states in adopting the rule as described in the article "Ex Parte Communications" in the Fall 2003 issue of the *Judicial Conduct Reporter*.

**Canon 3B(10)**

**Adjudicative Responsibilities**

**Cynthia Gray, Director**

**American Judicature Society, Center for Judicial Ethics**

**March 11, 2004**

In its markup containing AJS's proposed amendments of the Code, AJS notes that the difficulty of assessing the effect of a judge's public comment may subject the current

model version of the prohibition on commenting on pending cases to a constitutional challenge on vagueness grounds. The AJS proposals clarify the prohibition while narrowing it to allow comment during educational presentations. The proposed new commentary also emphasizes the importance of the prohibition in ensuring public confidence in judicial decisions. The revisions adopted by the states in the prohibition are discussed in the article “Commenting on Pending Cases” in the Fall 2003 issue of the *Judicial Conduct Reporter*.

**Canon 3D(1)**

**Disciplinary Responsibilities**

**Cynthia Gray, Director**

**American Judicature Society, Center for Judicial Ethics**

**March 11, 2004**

In its markup containing AJS’s proposed amendments of the Code, AJS notes that the necessity for clarifying and strengthening a judge’s disciplinary responsibilities is described in the article “Disciplinary Responsibilities” in the Fall 2003 issue of the *Judicial Conduct Reporter*.

**Canon 3D(4)**

**Disciplinary Responsibilities**

**Cynthia Gray, Director**

**American Judicature Society, Center for Judicial Ethics**

**March 11, 2004**

In its markup containing AJS’s proposed amendments of the Code, AJS notes that failure to cooperate with the judicial conduct commission and even misrepresentations during disciplinary proceedings frequently form the basis for discipline and is often a factor in removal decisions. Some cases are discussed in the article “The Importance of a Judge’s Conduct During Judicial Discipline Proceedings” in the Fall 2002 issue of the *Judicial Conduct Reporter*.

**Canon 4B**

**Avocational Activities**

**Cynthia Gray, Director**

**American Judicature Society, Center for Judicial Ethics**

**March 11, 2004**

In its markup containing AJS’s proposed amendments of the Code, AJS notes that Canon 4D of the Code of Conduct for U.S. Judges provides that a “judge should not use to any substantial degree judicial chambers, resources, or staff to engage in [extra-judicial activities to improve the law, the legal system, and the administration of justice]”. Canon 5H provides that a “judge should not use judicial chambers, resources, or staff to engage in [avocational activities, civic and charitable activities, financial activities, and extra-judicial appointments] except for uses that are de minimis.” These restrictions are discussed in U.S. Advisory Opinion 79 and U.S. Advisory Opinion 80.

**Canon 4C(2)**  
**Governmental, Civic or Charitable Activities**  
**Cynthia Gray, Director**  
**American Judicature Society, Center for Judicial Ethics**  
**March 11, 2004**

In its markup containing AJS's proposed amendments of the Code, AJS notes that its proposed clarifications are based on the numerous advisory opinions that address the propriety of a judge's involvement on government commissions on such issues as domestic violence, substance abuse, protection of children, juvenile justice, victim services, and anti-crime initiatives as discussed in the paper "Ethics and Judges' Evolving Roles Off the Bench: Serving on Governmental Commissions" by Cynthia Gray published by AJS in 2002.

**Canon 4C(3)**  
**Governmental, Civic or Charitable Activities**  
**Cynthia Gray, Director**  
**American Judicature Society, Center for Judicial Ethics**  
**March 11, 2004**

In its markup containing AJS's proposed amendments of the Code, AJS notes that most of its suggested clarifications for the black-letter and comment to Canon 4C(3) are based on changes made by states in adopting the model code as discussed in the article "Charitable Fund-raising" in the fall 2003 issue of the *Judicial Conduct Reporter*.

AJS's proposal regarding judges' encouraging attorneys to participate in pro bono activities is based on Alaska Advisory Opinion 04-1.

The issue of requiring contributions as part of sentencing was discussed in the article "Charitable Contributions as Part of a Sentence" in the winter 2000 issue of the *Judicial Conduct Reporter*.

In early 2004, the Virginia Supreme Court amended Canon 2B of the state's code of judicial conduct to add the following comment: "In a criminal case, a judge may not approve a plea agreement or disposition that requires or permits the defendant to make a charitable contribution or donation, or any other monetary payment other than a statutorily authorized fine or restitution or payment in satisfaction of an injury pursuant to Code § 19.2-151, as a condition of a suspended sentence or the reduction or dismissal of charges."