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Judges

## Speakers Urge Commission to Eschew Drastic Rewrite of Judicial Conduct Code

SAN FRANCISCO—Those who work with the canons of judicial ethics on a daily basis urged the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct at its latest hearing, held here March 26, not to tinker too much with the code's existing text and structure.

“I really urge you not to play around with the code,” said Patrick J. Monahan Jr., who is counsel to New Jersey’s Commission on Judicial Misconduct.

This point was echoed by a panel of jurists who sit on the California Judges Association’s ethics committee and by judicial disciplinary counsel from other states, all of whom argued that the current framework and wording in the Model Code strikes just the right tone with its blend of aspirational and normative directives.

The commission also heard from some speakers who had specific ideas on improving and clarifying the code, including a group of federal judges who want more flexibility to mediate state court cases.

This was the commission's third public hearing, following sessions on Dec. 5 in Washington, D.C., and Feb. 6 in San Antonio. See 20 Law. Man. Prof. Conduct 73. The next two hearings are scheduled for May 7 in New York and June 4 in Naples, Fla.

Leave Well Enough Alone.

Among other things, the commission has been grappling with the question of whether Canon 2 of the Model Code is too vague as a stand-alone proscription. Canon 2 states that “A judge should avoid impropriety and the appearance of impropriety in all activities,” and is then followed by three sections that proscribe specific conduct. (*See box*.)

“We’ve had a lot of discussion on this point already,” said commission Chair Mark I. Harrison, of Osborn Maledon, Phoenix, “and one matter is the inevitable due process concern about the inherent vagueness of the standard.”

(One proposal being floated in commission discussions is a draft rule that would wrap the “impropriety” language into the discussion of a judge’s duty to comply with the law, and add aspirational text stating that the judge should also avoid the appearance of impropriety.)

But several lawyers from the Association of Judicial Disciplinary Counsel pressed the commission to leave Canon 2 as is, arguing that the appearance of impropriety standard should remain an independently enforceable provision. Canon 2 violation cases are not just “add-ons,”said Steven Scheckman, special counsel to the Judiciary Commission of Louisiana, but embrace valuable and enforceable standards.

Commission members Loretta C. Argrett, Silver Spring, Md., and Judge James A. Wynn of the North Carolina Court of Appeals both wondered whether the appearance of impropriety language is too vague to stand on its own.

It is not too vague, Scheckman replied, because “case after case” has addressed and explained what circumstances constitute an appearance of impropriety. What you are saying, Wynn observed, is that if there is vagueness, you look elsewhere to cure the problem.

Both Scheckman and Marla N. Greenstein, who is secretary of the AJDC and executive director of Alaska’s Commission on Judicial Conduct, insisted that the appearance of impropriety standard has independent meaning, and said that it could be invoked on its own where, for example, a judge:
• conducts a “coin toss” to resolve an issue;

• “polls” the audience for a vote on a case;

• voluntarily sets up a merit hiring plan but then bypasses it to hire a favored candidate; or

• has an extramarital affair with a felon she previously sentenced.

You might not be able to prove an actual impropriety in each of those cases, Scheckman said, but the public’s confidence has nonetheless been undermined by the appearance of illicit activity.

‘Loosey-Goosey' Phrase.

Several panelists, however, seemed skeptical of the examples' validity. Peter W. Bowie, a federal bankruptcy judge from San Diego who is an advisor to the commission, said he thought that some of these indiscretions are already covered elsewhere in the code. Wouldn’t coin tossing violate Canon 3, which requires judges to perform their adjudicative duties diligently? he asked.

Commission member Thomas Fitzpatrick, a Seattle prosecutor and a member of the ABA Standing Committee on Ethics and Professional Responsibility, said he was “underwhelmed” by the cited examples. “If the judge is having an affair with somebody, so what?” he said.

There are supreme court decisions holding otherwise, Greenstein replied. I understand, Fitzpatrick continued, “but we kind of get to invent the world here so we need to ask whether we should use this standard as an independent basis of discipline.”

I know courts are finding violations for appearances of impropriety, Fitzpatrick added, “but I have a little difficulty with the proposition that somebody could be subjected to public scandal and/or discipline for this pretty loosey-goosey term.”

‘Nightmare to Work With.’

Commission member Donald B. Hilliker of Chicago's McDermott, Will & Emery wanted to hear more about the AJDC's resistance to any change in the current format of the Model Code. Hilliker said the structure reminded him of the old Model Code of Professional Responsibility with its Ethical Considerations. "Frankly, I find it hard to follow," Hilliker said.

Harrison went one step further. Speaking from the perspective of one who occasionally defends judges against charges, he said of the CJC: "I found it a nightmare to work with because you've got aspirational stuff mixed in with normative stuff."

With all due respect, Scheckman responded, those of us who have spent many years working with this code and the courts themselves find it a "very workable document." There is little confusion, he said, given the large body of case law that defines and explains every canon.

Later in the day, several judges who sit on the California Judges Association Ethics Committee revisited this point, contending that the code is workable as is. Justice Thomas E. Hollenhorst of the Fourth District Court of Appeal, Riverside, Cal., referred to Canon 2 as the "great catch-all" that all judges became familiar with when they went to "judge's school."

Los Angeles Superior Court Judge Ronni B. MacLaren agreed, characterizing the appearance of impropriety test as "very workable."

Starting From Scratch.

According to Scheckman, a "wholesale" rewrite will only make it harder for judges and disciplinary counsel to do their jobs. "Developing a whole new code," he said, will force everybody—judges, disciplinary counsel, and the courts—to start from scratch.

Greenstein also said that even if the ABA agrees to change the Model Code, which is a body of recommended standards for state judicial systems, the states themselves may be reluctant to follow the ABA lead. She noted that Alaska had recently revisited its rules and, in her opinion, would not likely take it up again merely because the ABA had decided to reinvent the Model Code.

Think of all the years of training it took to educate judges about the current code, Monahan said, adding: "They don't want to start learning a new thing."

That's always the complaint when there's been a significant change in a substantive area of law, Harrison responded. "I for one am not very persuaded by the simple fact that it would be an awkward change for those who are experts in working with the document." It would be a vast improvement for those who don't work with the code every day, Harrison added, "to have a clear explication of the rules they are supposed to follow and what are the aspirational things that inform those rules."

'Shove It.'

Margaret Childers, executive director of Alabama's Judicial Inquiry Commission, encouraged the ABA commission to bear in mind that Canon 2 is not used primarily as a penal code but rather as a device to sustain the public's trust and to encourage judges to do the right thing.

E. Keith Stott Jr., executive director of the Arizona Commission on Judicial Conduct, picked up on this point, informing the ABA commissioners that of the 350 complaints his office received last year only two ended up even being considered for formal proceedings.

“So the rest of the work we do is all aspirational,”he said, and frequently involves helping and educating judges by issuing advisory letters.

“Do you think that a judge who receives a reprimand regards it as aspirational?” asked Harrison. “I’ve represented judges who received reprimands and for whom it was devastating.”

Circuit Judge Ellen Rosenblum, of Portland, Ore., a commission advisor, suggested that even an admonition can have significant repercussions if a judge is seeking reelection.

Wynn returned to the educational aspect of the Code of Judicial Conduct. “What do you do,” he asked, “when you advise a judge not to do something and the judge says ‘shove it’?”

In the minor cases, Scheckman said, we would probably issue a caution letter or even an admonishment. “But I’ve never seen anybody just say ‘shove it’.”

“Except for Alabama!” Wynn joked, apparently referring to that state's former Chief Justice Roy Moore, who was found to have acted unethically and removed from office after defying a federal court order to remove from the state courthouse a two-ton granite monument listing the Ten Commandments.

Mediation Proposal.

Not all the speakers thought the Model Code should be left intact. A panel of three federal judges urged the commission to tweak the code to allow federal judges to perform state mediation work.

Judge Edward Leavy of the U.S. Court of Appeals for the Ninth Circuit noted that he had been performing mediation services for some time “in perfect ignorance” of the proscription against a judge's acting “as an arbitrator or mediator or otherwise perform[ing]judicial functions in a private capacity unless expressly authorized by law.”The prohibition appears in Canon 5E of the federal Code of Judicial Conduct and Canon 4E of the Model Code.

“What evil are we trying to avoid by suggesting we can’t be mediators?” he asked.

Magistrate Judge Wayne Brazil, who sits in the Northern District of California in Oakland, put it on a more personal level: “Why is it unethical for me to serve as a mediator in my kids’ school?”

Judge Ann Aiken, also of the Northern District of California, suggested that it is a matter of modernizing the code. Alternative dispute resolution was not as prominent a tool as it is now when the code was last revisited in 1990, she said.

‘Rent-a-Judge.’

Commission advisor Seth Rosner, of Greenfield Center, N.Y., and the commission’s Ethics Counsel George Kuhlman—both involved in the 1990 revisions to the code—agreed that not much time was spent on this question 15 years ago. ADR really took off after 1990, Rosner said.

Kuhlman speculated that the provision on mediation was adopted largely to address concerns over the “rent-a-judge” phenomenon:judges who wanted to stay on the bench but hire themselves out on the side.

The basic problem is that “we’ve developed a settlement culture but no accompanying ethics culture,” observed commission member James J. Alfini, president and dean of the South Texas College of Law in

Houston.

Judge Carol Bagley Amon of the U. S. District Court for the Eastern District of New York, who is serving as an advisor to the commission, wanted to know why the judges didn't take their concerns to the U.S. Judicial Conference's Committee on Codes of Conduct for clarification. Frankly, Brazil replied, we've been advised that we might not get the right answer. In any event, he added, going through the ABA will be more persuasive because "our debate will be enriched when we go to the judicial conference."

Playing devil's advocate, Wynn argued that there are those who believe that judges' roles ought not be diluted and that judges open themselves up to criticism when they pick and choose which disputes to mediate.

Specific Recommendations.

Cynthia Gray, director of the Center for Judicial Ethics, an organization that acts as a clearinghouse for information about judicial ethics and discipline, had proposed line-by-line amendments to the current Model Code and fielded the commissioners' questions about those recommendations.

Many of the proposals, Gray said, grew out of her study and collection of judicial ethics advisory opinions from across the country. Gray's recommendations include these:
• Define "spouse"in the anti-nepotism provision in Canon 3C to include "a domestic partner or other person with whom an individual maintains a shared household and conjugal relations."

• Require judges to disqualify themselves under Canon 3E if "within the preceding three years, the judge was associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy or represented any party to the controversy while the judge was an attorney engaged in the private practice of law."

• Specify in the commentary to Canon 3 that improper bias includes, but is not limited to, "epithets, slurs, demeaning nicknames, negative stereotyping, attempted humor based on stereotypes, threatening, intimidating or hostile acts, suggesting a connection between race or nationality and crime, irrelevant references to personal characteristics, and insensitive statements about crimes against women."

• Clarify in the commentary to Canon 4C that a judge "may donate to an organization's fund-raising activity and participate in de minimis fund-raising activities so long as a judge is careful to avoid using the prestige of the office in the activity."

by Lance J. Rogers

Further information on the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, including comments and testimony it receives, is available on the commission's Web site at http://www.abanet.org/judicialethics/home.html

Appearance of Impropriety Directive

*Canon 2 of the ABA Model Code of Judicial Conduct provides:*

“A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE’S ACTIVITIES

“A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

“B. A judge shall not allow family, social, political or other relationships to influence the judge’s judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

“C. A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin.”