



National Judicial Education Program

To: ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

From: Lynn Hecht Schafran, Director, National Judicial Education Program

Date: July 8, 2004

Subject: Commission's Draft Revision of Canon 1 and Canon 2

The following comments are limited to the subject matter on which the National Judicial Education Program submitted testimony in April 2004 and related issues. Although I appreciate the Commission's hard work and dedication, I must express strong reservations about certain of the proposed revisions.

Proposed Canon 1.01, Commentary [2]

Sentence two of the draft Commentary states:

“Ordinarily, when a judge is disciplined for engaging in conduct that creates an appearance of impropriety, it will be in conjunction with charges that the judge violated some other specific rule under this or another Canon.”

Despite the introductory “Ordinarily”, this Commentary will be read as yoking a violation of Canon 1.01 to violation of another Canon before a claim of impropriety can be invoked. That would be a mistake because situations arise that are not contemplated in other Canons. The comments of David S. Paull, Executive Secretary, Minnesota Board on Judicial Standards, also express objections to this formulation, and we concur. (I reference only Mr. Paull here and later in this comment because at the time of

writing, of the comments available online, his was the only one touching on these issues.)

Proposed Canon 2.05, Commentary [1]

Re sexual harassment, the proposed Commentary to Canon 2.05 states:

“A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as harassment and must require the same standard of conduct of others subject to the judge’s direction and control.”

This is the only reference to harassment in the proposed revision. Far from being an improvement, this generic bar on harassment weakens the bar on sexual harassment in the current Code and is therefore unacceptable.

In the current Code, the Commentary to Canon 3B (5) states:

“A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge’s direction and control.”

The Commission’s proposal to eliminate this language is extremely puzzling given the testimony submitted by the American Judicature Society and the National Judicial Education Program on the need to strengthen the prohibition on sexual harassment with a new Canon and Commentary that provides an explicit, non-exclusive list of what constitutes sexual harassment. Our testimony provided extensive documentation as to why this approach is necessary and specific language to be added to the Code. The National Judicial Education Program strongly objects to the proposed revision.

We note that David S. Paull, Executive Secretary, Minnesota Board on Judicial Standards, has also criticized the proposed generic bar on harassment as providing insufficient guidance and recommended that the Commission give the same kind of specifics with respect to harassment as it does in proposed Commentary [3] with respect to manifestations of bias. As noted above, the American Judicature Society and the National Judicial Education Program provided the specific language that should be used respecting sexual harassment.

Proposed Canon 2.05, Commentary [3]

This Commentary presents a non-exclusive list of nine types of manifestations of bias that would violate the Canon. It is an almost verbatim adoption of language proposed by the American Judicature Society and seconded by the National Judicial Education Program – almost because it excludes the tenth item in that list which was “and insensitive statements about crimes against women.” Why did the Commission cut that phrase?

Bar on Membership in/Organizations that Individually Discriminate

In the current Code, Canon 2C states:

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

This language and the related Commentary do not appear in the draft revision of Canon 2. Will it be in the revised Canon on extra-judicial activities? The National Judicial Education Program would strongly object to the elimination of this Canon and Commentary.