New York County Lawyers' Association

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NEW YORK COUNTY LAWYERS' ASSOCIATION
TASK FORCE ON JUDICIAL SELECTION

COMMENTS AND RECOMMENDATIONS PREPARED FOR PRESENTATION TO THE AMERICAN BAR ASSOCIATION JOINT COMMISSION ON THE EVALUATION OF THE MODEL CODE OF JUDICIAL CONDUCT AT A PUBLIC HEARING ON FEBRUARY 6, 2004 IN SAN ANTONIO, TEXAS.

The Comments and Recommendations were approved by the Board of Directors of the New York County Lawyers' Association at its regular meeting on February 2, 2004.

NEW YORK COUNTY LAWYERS' ASSOCIATION - JOINT COMMISSION

On behalf of the New York County Lawyers' Association, I thank you for this opportunity to address the Joint Commission. The New York County Lawyers' Association ("NYCLA") is a voluntary bar association founded almost 100 years ago in New York City. From its earliest history NYCLA has been open to all lawyers without regard to gender, race, religion, ethnicity, age, sexual orientation or disability; it has had a long and continuing commitment to diversity in the profession, to the public interest, to expansion of access to the justice system, and to maintaining and protecting the integrity and independence of the judiciary.

What I shall do is first set the context for NYCLA's decision to provide comments to the Joint Commission on the American Bar Association's Model Code of Judicial Conduct. I will then follow with comments directed to two of the topics of interest to the Joint Commission: Judicial Statements and the Appearance of Impropriety.

· **The Context**

In December 2002, the Chief Judge of the State of New York, Judith S. Kaye, formed a Commission to Promote Public Confidence in Judicial Elections (the "New York Commission"), to respond to a perceived erosion of public confidence in the judiciary of the State of New York. Thus far, the New York Commission has focused on four primary areas; judicial candidate selection, campaign activity, campaign financing and voter education.

As the New York Commission began its efforts, there were a number of court decisions regarding various Codes of Judicial Conduct that affected the course of its deliberations. These included: Republican Party of Minnesota v. White, 122 S.Ct. 2528 (2002), in which the United States Supreme Court invalidated the clause in the Minnesota Code of Judicial Conduct prohibiting judicial candidates from announcing their views on disputed legal or political issues; In re Raab, 793 N.Y.S.2d 213 (2003) and In re Watson, 763 N.Y.S.2d 219 (2003), in which the New York Court of Appeals found as a matter of law, that maintaining an impartial judiciary was a compelling state interest; and Spargo v. New York State Commission on Judicial Conduct, 244 F. Supp.2d 72 (N.D.N.Y. 2003), which declared certain provisions of

the New York Code of Judicial Conduct facially unconstitutional on First Amendment grounds, vacated 351 F.3d 65 (2d Cir. 2003)(district court should have abstained in favor or state proceedings).

In December 2003, the New York Commission issued an Interim Report, which proposed, among other things, a number of amendments to the New York Code of Judicial Conduct.

Earlier in the fall, NYCLA's President Michael Miller appointed a Task Force on Judicial Selection ("Task Force") whose mission was not only to study, assess and make recommendations with respect to the New York Commission's Interim Report, but also to consider taking a broader look at the issues involved in judicial selection and judicial conduct.

We believe that the comments that we provide today are entirely in keeping with the mandate that President Miller set out for the Task Force and we hope that these comments will be of assistance to the Joint Commission in its deliberations.

Judicial Statements

In 1990, the American Bar Association amended the Model Code of Judicial Conduct,

because it believed the prohibition on public comment on pending or impending proceedings was overbroad and unenforceable. See, Cynthia Gray. "The American Bar Association Model Code of Judicial Conduct," 25 Judicial Conduct Reporter, Nos. 3, 1, 9 (2003)("Gray"). The Model Code of Judicial Conduct altered the prohibition against any public comment by limiting the prohibition to "any public comment that might reasonably be expected to affect [the] outcome [of such proceeding] or impair its fairness . . . or any non-public comment that might substantially interfere with a fair trial or hearing."

New York rejected this modification of the prohibition on public comment on the ground it was unseemly for judges to comment on pending or impending cases, since such comments are likely to have a negative impact on the public's perception of judicial impartiality. Several other jurisdictions also rejected the liberalization adopted by the American Bar Association. These include California, Delaware, Massachusetts, Maine, Minnesota and Missouri, as well as the Code of Judicial Conduct adopted by the federal judiciary.

As to comments made to or for general public consumption, we believe that the position

adopted by New York and these other jurisdictions represents the wiser course. Public perception of judicial bias or lack of impartiality is far too prevalent to warrant the lifting of the prohibition against judicial comment to the extent embodied in the current Model Code of Judicial Conduct.

However, we believe that restrictions on judicial speech in educational forums such as those currently in place in New York are unduly restrictive and serve no legitimate public interest. While New York's current Code of Judicial Conduct permits a judge to speak, write and teach [Rule 100.4B(1)], it prohibits even non-public educational comment on cases pending in any court within the United States or its territories. Educational activities of members of the judiciary are beneficial to the law and to the administration of justice. We are recommending that the New York Commission propose the adoption of an amendment to the New York Code in Rule 100.3B(8) by adding language from the Model Code of Judicial Conduct that would limit the prohibition in the non-public context to "any non-public comment that might substantially interfere with a fair trial or hearing."

We also believe it important to clarify through commentary that private educational

settings, include colleges, law schools and bar associations, where the course or speech is intended for students of the educational institution or members of the bar association and to which the general public and the media are not invited.

In response to the United States Supreme Court decision in White, the American Bar Association Model Code of Judicial Conduct was amended by combining the Pledge or Promise Clause and the Commit Clause and making both applicable not only to candidates for judicial election, but also to sitting judges. While, unlike the current Model Judicial Code, the New York Commission proposal would not combine the Pledge or Promise Clause with the Commit Clause, the New York Commission's proposed amendments would be applicable both to candidates for judicial election and to sitting judges. It would narrow the Pledge or Promise categories of restrictive speech by limiting the proscription only to statements that are "inconsistent with impartiality," and made in relation to "adjudicative duties" of a judicial office, and limit the Commit clause to commitments related to cases or controversies likely to come before the judge or candidate for election. These refinements have the salutory effect of ensuring that the restrictions are narrowly tailored to a compelling state interest.

However, we believe one further step should be taken both by the New York Commission and by the Joint Commission. Both should propose amendments that would make it clear that the provisions are also applicable to candidates for appointive judicial offices. There should be no distinction between the restrictions placed on elective and appointive candidates for judicial office.

· Appearance of Impropriety

The concerns that have arisen as a result of the Supreme Court's decision in White, which struck down the provision in the Minnesota Code Judicial Conduct prohibiting a candidate from announcing views on "disputed legal or political issues," have created unnecessary complications about the issue of the appearances of impropriety.

The White Court did not hold that a provision of a Code of Judicial Conduct, that proscribes both actual misconduct and the appearance of misconduct to be unconstitutionally vague. To the contrary, the Court refers repeatedly to standards that bar actual impropriety, as well as the appearance of impropriety, without criticism. See, e.g. White at 2534 fn.5 ("statements that commit or appear to commit"); 2535 ("We think it plain that the announce

clause is not narrowly tailored to serve impartiality (or the appearance of impartiality")); 2536 fn.7 ("serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality"); 2536-37 ("Respondents argue that the announce clause serves the interest in open-mindedness, or at least the appearance of open-mindedness..."). At one point, the Court even suggests that furthering the state interest of judicial impartiality, "and the appearances of it, are desirable," See White, 122 S.Ct. At 2536.

Accordingly, the Task Force recommends to both the Joint Commission and the New York Commission that the bar on conduct that appears to be a judicial pledge, promise or commitment be restored. We believe that such a proscription does not create an unconstitutionally vague category of restricted speech. Any diminution of a judge's or judicial candidate's obligation to avoid the appearance of impropriety is dramatically at odds with addressing the concern that all of us have about the public's poor perception of the judicial system.

I thank you for this opportunity to appear before you. On behalf of the NYCLA Task Force on Judicial Selection, I want to reserve to right to submit additional comments about a

number of other issues the Joint Commission proposes to address, particularly about the issues that may be involved in problem-solving courts.

Presented by Susan B. Lindenauer
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New York County Lawyers' Association