STATEMENT OF GERALD STERN BEFORE THE ABA JOINT COMMISSION ON EVALUATION OF THE MODEL CODE

DECEMBER 5, 2003

I will cover in this brief summary two subjects: (1) the need to retain the general language of Canon 2 (appearance of impropriety) and (2) the need to prohibit judicial campaign statements that are plainly biased against potential parties but may not constitute "pledges or promises" or "commitments" on matters likely to come before the court.

(1) The Appearance of Impropriety is an Integral Part of Judicial Disciplinary Law: Retain Canon 2

The important concept that a judge should take no action that would convey the "appearance of impropriety" has been criticized for its lack of definition, and challenges to Canon 2 are pending in the courts.[1] Technically, Canon 2 does not include an "appearance" standard. In 1972, the ABA replaced the Canons of Judicial Ethics, which did have such a standard for the "official" conduct of a judge, with the Code, and, in doing so, employed the language, "appearance of impropriety" solely as a title or classification that apparently was intended to introduce the various subsections of Canon 2. The 1972 provision was carried

[1] *Spargo, McNally and Kermani v. Commission on Judicial Conduct, Stern and Berger*, 244 F.Supp.2d 72 (NDNY 2003).

over to the 1990 version of the Code. The change from the Canons to the Code in 1972 and in 1990 did not prevent judicial conduct commissions or the courts from applying the standard as though it is a substantive provision of the law, and it seems clear that even in the absence of any reference to the "appearance of impropriety" in the Code, the courts would justify the disciplining of a judge in certain situations (that I will address below) by concluding that the judge's conduct conveyed the appearance of impropriety. There is simply no way of avoiding the "appearance" standard at this point in our jurisprudence.

The courts are an appropriate forum for "vagueness" challenges, and I urge this Commission to retain the Canon 2 language in its present form and permit the courts to resolve challenges that the Canon failed to provide fair notice that certain conduct was improper. A strong argument can be made to uphold the constitutionality of these general standards, based on numerous court decisions by federal and state courts reasoning that it is not possible to codify rules that would specifically cover every conceivable scandalous act of a judge or other public official or public employee.[2] The Penal Law is different, and it should be. If the Penal Law does not cover an act with specificity, if it does not provide clear notice that an act constitutes a crime, the act should not subject a person to a jail or a

[2] Consider, for example, the removal of judges and other public employees on a standard no more specific than "for cause," which has been successfully defended in state and federal courts and the United States Supreme Court.

prison term. Restrictions governing unethical acts must be broader.

Ergo, for at least a century we have had general rules that are applied to specific acts that are deemed improper, and, in the final analysis, the high courts of each state play an important role in supervising both the conduct of judges and the role of judicial conduct commissions. There is a prompt and reliable review process for judges who wish to challenge the various general standards of the Code.

Those groups or individuals who might urge this Commission to eliminate the general rules should at the very least put forward a persuasive case showing that judges have been disciplined for conduct that they would have no reason to believe was improper. I do not believe such a showing can be made, and in the case of individual excesses by a judicial conduct commission (and I know of none), there is a sufficient review process in place to protect judges.

We must retain enforceable general standards; the specific standards cannot possibly cover all of the unpredictable behavior that gets judges into trouble.[3] Carrying due process to such an unprecedented extreme might immunize judges for acts that the bench, the bar, and the public would find objectionable. Canon 2 places judges on notice that the courts will condemn a judge's conduct that the judge should have known conveyed the appearance of impropriety: failed to

[3] *Arnett v. Kennedy*, 416 US 134 (1974) (upholding a "for cause" standard for federal employees).

respect and comply with the law, failed to act in a manner that promoted public confidence in the integrity and impartiality of the judiciary, or lent the prestige of office to advance private interests. Support for this view can be found in decisions of the New York State Court of Appeals, which continued to use the "appearance of impropriety" standard even after it was dropped from the substantive part of the Canons in 1973. Canon 2 is especially useful, for example, when proof is lacking of bias or corruption, but the conduct nevertheless is improper because the judge's conduct conveys the appearance of such egregious conduct.

Thus, a judge with appellate jurisdiction over a trial judge who advised the trial judge in a private letter that the appellate judge would not reverse a sentence of the trial judge in future cases conveyed the appearance of bias as soon as he sent the letter.[4] In defense, the appellate judge demonstrated that he did thereafter reverse rulings of the trial judge, but that defense would have been appropriate only to a charge that alleged actual bias. A judge who appointed the sons of other judges who were appointing the first judge's son defended by stating that there had been no *quid pro quo*. The Court's response was that even in the absence of a specific agreement among the judges, they should have known that the reasonable impression created by the conduct was that there was a *quid pro quo*, and, in any event, the conduct made it appear that in a state where nepotism is expressly

[4] *Matter of Cunningham*, 57 NY2d 270, 442 NE2d 434, 456 NYS2d 36 (1982).

prohibited, the judges were engaging in disguised nepotism.[5] The New York State Court of Appeals removed a judge from office for escrow fund violations that occurred both before and after he became a judge.[6] That was a Canon 2 violation. There were no other charges, besides Canon 1, to apply to his unique situation, because in New York only the lawyer disciplinary committees may charge violations of specific Disciplinary Rules. The judge had also made false statements to the Commission during the Commission's investigation and during the formal hearing, and had failed to respond to numerous letters from the Commission during the investigation. These were Canon 2 violations as well. (It would be hard to support an argument that judges should be specifically warned by a Canon that they should cooperate and not give false testimony.) A judge was censured for conveying the appearance of impropriety for designating her accountant to several income-producing fiduciary appointments while failing to pay for the accountant's services for the judge.[7] Perhaps the charge could have been that there had been a *quid pro quo*, but the proof could only show the undisputed circumstances since both the judge and the accountant denied the existence of a *quid pro quo* and the judge testified that she did not realize that she

[5] *Matter of Spector*, 47 NY2d 462, 392 NE2d 552, 418 NYS2d 565 (1979).
[6] *Matter of Mason*, 100 NY2d 56, 790 NE2d 769, 760 NYS2d 394 (2003).
[7] *Matter of Lebedeff*, Nov. 5 2003. www.scjc.state.ny.us. If the unpaid accounting services had been charged as a gift, proof would have been lacking that it was either given or accepted as a gift. If a *quid pro quo* had been charged, the charge would probably not have been sustained.

had not been billed. Why should that defense resolve the matter favorably for the judge? A judge has to realize that if he or she is foolish enough to appoint his or her personal accountant (and it is not clear in New York whether that is improper), the judge should at least make certain that the accountant's bills not only are being paid, but reflect the accountant's usual fees.

In this regard, under certain circumstances, gifts to public employees often are governed by a rule that prohibits gifts that are intended as a reward or connected to past or future action to be taken. The Penal Law generally would cover this subject by a bribery provision. A disciplinary code should be broader. A disgraced judge whose conduct might not be criminal detracts from the integrity of the judiciary nevertheless and should be disciplined, even when those who promulgate the State's code could not have predicted the specifics of the egregious conduct.

In New York, public employees may not accept gifts "under circumstances in which it could reasonably be inferred that the gift was intended to influence [the employee] in the performance of his [or her] official duties or was intended as a reward for any official action…."[8] That is an appearance of impropriety standard, and it gives ample notice that certain gifts would be improper.

The general rules in Canon 2 are essential to maintain the independence and

[8] McKinney's, General Municipal Law, Section 805-a. A similar provision applies to State employees.

integrity of the judiciary. Judges are subjected to higher standards than others in public office because of the important nature of their responsibilities. And without general rules to cover situations that judges should know would apply to their acts, these important values will be sacrificed. Moreover, although changes to the Code should be considered periodically, the distinct advantage of retaining language that has served its purpose is that the case law becomes an important part of the law, which helps provide fair notice to the meaning of the canons.

(2) Campaign Speech: Retain The Present Standards And Add A Standard That Prohibits Biased Statements Against Potential Parties

The United States Supreme Court decision in *Republican Party of Minnesota v. White*[9] will play out in the courts. While there may be some suggestion that the effect of *White* will be to expand greatly First Amendment rights in many areas unrelated to judicial campaign speech, the "strict scrutiny" standard has not replaced less exacting standards in all First Amendment cases because of *White*.

The Court has applied the "strict scrutiny" standard in judicial campaigns precisely because campaign speech is an integral part of elections and both the candidate and the electorate have important rights that should be protected. Strict scrutiny applies in *White* because the restriction "burdons a category of speech that

[9] 536 US 765 (2002).

is 'at the core of our First Amendment freedoms' – speech about the qualifications of candidates for public office."[10] But that test should not be applied to all constitutional challenges to the Code. Moreover, the Court dealt with a single provision, the "announce clause," that most states have not retained, so care should be taken before *White* is extended far beyond where the courts will take it.

My plea is to permit this issue to play out in the courts. It would be a mistake to extend *White* based on a prediction that the extension will some day be the law. The integrity and independence of the judiciary are at stake. Basic due process of law for defendants in criminal proceedings and for unpopular litigants in other proceedings must be assured. All litigants have the right to appear before judges who are unbiased and who appear to be unbiased.[11]

Commentators are making the hazardous prediction that the United States Supreme Court will next strike down the provision that prohibits judicial candidates from making "pledges and promises" or commitments on disputed issues that are likely to come before their courts. The Eleventh Circuit Court of Appeals has apparently established a standard that judicial candidates have the same right to speak to the electorate as candidates have for other public office.[12] The Second Circuit Court of Appeals should soon decide the *Spargo* case where

[10] 536 US at 774.
[11] See generally, Randall T. Shepard, Campaign Speech: Restraint and Liberty in Judicial Ethics, 9 GEO. J. LEGAL ETHICS 1059 (1996).
[12] *Weaver v. Bonner*, 309 F.3d 1312 (11th Cir. 2002).

issues are raised based on *White* that pertain to other forms of restricted campaign conduct. In New York, in two recent, important post-*White* decisions, the State Court of Appeals upheld the existing standards, including the "pledges and promises" rule.[13] And the Florida Supreme Court disciplined a judge for her biased campaign promises under the "pledges and promises" rule.[14]

The unfortunate reality of judicial elections is that candidates can be expected, if they are permitted to do so, to cater to the electorate's strong views on matters of considerable concern to them. Judicial candidates will not get elected on pledges to uphold the rights of defendants in criminal proceedings. In urban areas, landlords may be just a bit more popular than defendants in criminal proceedings, and candidates for civil court where landlord-tenant matters are heard would not be inclined to show their allegiance to landlords since most voters are tenants. If existing standards are diminished, judicial candidates could be expected to rail against unpopular real-estate developers, group homes for the mentally handicapped, and other unpopular users of property about whom heated local issues have surfaced.

In *White*, the majority found the "announce" clause too broad. That is the law of the land. But in doing so, the Court specifically withheld judgment on the

[13] *Matter of Watson*, 100 NY2d 290, 794 NE2d 1, 763 NYS2d 219 (2003); *Matter of Raab*, 100 NY2d 305, 793 NE2d 1287, 763 NYS2d 213 (2003).
[14] *Inquiry Concerning A Judge, No. 99-09 Re:Patricia Kinsey*, 842 So.2d 77 (Fl. 2003). The United States Supreme Court denied certiorari. _US_, 2003 Lexis 6092 (Oct. 6, 2003).

other provisions of the Code, and indeed may have suggested that it would have a different view of any provision that protected parties against candidates' biased comments. Although the "announce" clause covered campaign statements showing bias against parties, it also covered alleged biased comments on issues and views in general, which was the reason for the Court's decision. The clause was overly broad.

I wish to advance the idea that there is room for another standard that appears to be consistent with *White*. There is a pressing need for a standard that would bar biased statements that appear to reflect the candidate's bias against parties or, more particularly, classes of parties.[15]

To explain this point, I begin with a discussion by Justice Scalia about certain views expressed in Justice Stevens' dissent, in which Justice Stevens tried to show the importance of the "announce" rule in prohibiting within its ambit biased statements. Justice Stevens alluded to the example of the appellate judge who suggests that he or she has never reversed a rape conviction. Justice Scalia addressed the point by stating that such a campaign statement would reflect bias against parties (*i.e.,* rape defendants), which may be covered by the "announce"

[15] Mandatory recusal would not be a solution to the problem; indeed, it could suggest to candidates that such biased comments were acceptable as long as the candidate eventually recuses on a matter about which the candidate had expressed discriminatory views about parties. The problem is that biased comments are made against classes of unpopular defendants, such as defendants in criminal proceedings, landlords (particularly in large urban areas), and other potential classes of litigants. A judge seeking a judgeship on a court that deals with criminal cases or landlord-tenant cases would have to recuse from a large segment of the caseload. I suggest that the Code should not offer mandatory recusal as a solution to biased comments by judicial candidates.

rule, but, he observed, the "announce" rule covers a great deal more speech that should not be prevented.

The Commission should take a closer look at this *White* dialogue.[16] It suggests that there might be agreement by seven of the nine Justices that campaign statements that reflect bias against a class of individuals who are likely to appear in court would be improper *under a narrowly tailored rule*.

Such campaign comments could be considered to be pledges or promises or commitments; if so they would be prohibited in most areas as an improper pledge or promise or commitment. But would they be prohibited without a more specific promise to rule that way? I suggest that a carefully-crafted campaign statement could avoid the penalties of the existing standards, be less than a pledge, promise or commitment, but still be biased and a strong hint of how the candidate would rule in the future.

"I have never acquitted a defendant in a rape case," if accurate, might not be a promise or commitment not to acquit such defendants in the future; and a smart candidate would of course add that the statement is not intended as a promise or commitment. The comment and many others like it would be an invidious appeal for votes that tell the voters how the candidate is likely to rule in the future. This and other implied assurances to voters might be implied promises or commitments

[16] Justice Scalia addresses Justice Stevens' illustration at 536 US at 777, n7.

that may slip through the cracks under the existing standards. There appears to be no sound reason why the ABA Model Code could not enlarge the category of prohibited statements by including those statements that reflect bias *against parties*. It would be a simple, clear and concise prohibition that could supplement the existing standards and cover what I believe is a dangerous vacuum that exists today.

I appreciate the opportunity to be here today to express my views on two points that you might be considering. I would like to make other submissions as your important work continues and would welcome the opportunity to comment on any drafts you make available.