

**NEW YORK
CITY BAR**

March 15, 2006

By Federal Express

Mark I. Harrison, Esq.
Osborn Maledon P.A.
2929 North Central Avenue
Suite 2100
Phoenix, AZ 85012-2794

**Re: ABA Joint Commission on Evaluation
of the Model Code of Judicial Conduct**

Dear Mr. Harrison:

We are the Chairs, respectively, of the Council on Judicial Administration, the Committee on Professional and Judicial Ethics, the Committee on Professional Responsibility and the Committee on Government Ethics of the New York City Bar Association (the "Association"), an organization with approximately 21,000 members from all sectors of the legal profession. As we informed you in a letter dated December 18, 2003, our Committees have formed a joint subcommittee (the "Joint Subcommittee"), chaired by Ronald C. Minkoff, to make recommendations to the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct (the "ABA Commission") and, if appropriate, to comment on any proposals made by the ABA Commission.¹ On August 3, 2004, we submitted Comments with respect to particular provisions of the ABA Commission's draft of Proposed Canons 1 and 2. On or about January 31, 2005, we submitted Comments with respect to provisions of Proposed Canon 2 that we had not addressed previously, as well as with respect to specific provisions of Proposed Canons 3 and 4. We now submit our Comments to the ABA Commission's Final Draft Report dated December 14, 2005 (the "Final Draft").

We were, on the whole, enormously impressed with the Final Draft, which we find to be a significant improvement over the previous drafts that had been circulated. We were particularly pleased that the ABA Commission adopted several of our recommendations, including strengthening the "appearance of impropriety" standard in Canon 1, ensuring that a judge's personal philosophy may "influence" his or her decisions under Rule 2.06, prohibiting judges

¹ Members of the judiciary serving on the Joint Subcommittee are: Hon. Stuart Bernstein (U.S. Bankruptcy Court, S.D.N.Y.), Hon. Robert Levy (U.S. Magistrate Judge, E.D.N.Y.), Hon. Rosalyn Richter (N.Y. Supreme Court, N.Y. Co.), Hon. Jane Solomon (N.Y. Supreme Court, N.Y. Co.), and Hon. Michael Sonberg (N.Y. Criminal Court and Supreme Court (Acting Justice), Bronx Co.). Attorneys serving on the Joint Subcommittee are: Robert J. Anello (Morvillo Abramowitz Grand Iason & Silberberg, P.C.), Jeremy Feinberg (Proskauer Rose LLP), Richard Mattiaccio (Pavia & Harcourt LLP), Michael Patrick (Fragomen Del Rey Bernsen & Loewy, P.C.), and Scott Rosenberg (New York Legal Aid Society)

from conducting their own factual research on the Internet in Rule 2.10, adopting the “*de minimus* economic interest” standard under Rule 2.12, using our proposed definition of “appropriate action” under Rule 2.19, removing proposed Rule 2.20, prohibiting judges from directly soliciting money for community groups under Rule 4.04, and adopting our changes to Rule 4.10 and 4.11. We are also impressed with the re-formatting of the Code, which makes the distinction between Canons, Rules and Comments much more clear, comports more closely with the structure of the Model Rules of Professional Conduct with which most lawyers nation-wide are familiar, and provides a firmer, more rules-based foundation for imposing professional discipline.

There are still a handful of matters that we wish to comment upon. *First*, in Rule 2.10, the ABA Commission’s proposal remains too restrictive with regard to a judge consulting with others about general legal matters. In our earlier submissions, we recommended that judges’ consultations with lawyers, law teachers and others about general legal issues should be permitted as long as the parties and specific factual details of the case are not disclosed. Judges can use these communications to learn about areas of the law with which they are not familiar, and thus enhance the quality and efficiency of their decision-making. This benefit, we feel, outweighs any danger that the outside sources will pursue some personal and/or political agenda that will improperly influence the judge – particularly since the judge will, under Rule 2.07, be obligated *not* to allow him or herself to be “swayed by partisan interests” or to “allow family, social, political, financial or other relationships to influence the judge’s judicial conduct or judgment.”

Second, Comment 5 to Rule 2.12 should be expanded to make clear that a judge who has determined that he or she has *less* than a “de minimis interest that could be substantially affected by the proceeding,” or has *less* “than a de minimis legal or equitable [economic] interest” in the outcome, should disclose to the parties that such a determination has been made and the basis for that determination.

Third, in the Applicability section of the Proposed Model Code, the “Periodic Part-Time Judge” section prohibits the person serving not only from practicing law “in the court on which the judge serves,” but also in “any court subject to the appellate jurisdiction of the court on which the judge serves.” We are not entirely sure what this means. If, as some Committee members believe, it means only that a Periodic Part-Time Judge cannot actually serve on an appellate court with jurisdiction over his or her court, we agree with the change. But if, as more of us believe, it covers the practice of law by a Periodic Part-Time Judge, we have more serious concerns. Given the relatively small populations of many towns and villages that use periodic part-time judges, this latter prohibition is too broad, and will cut down the pool of those qualified to serve in these important positions. If the ABA Commission intended this broader view, we recommend against it.

The proposed prohibition, however, does not just prohibit too much; it prohibits too little. It does not prohibit Periodic Part-Time Judges from appearing before local legislative (*e.g.*, Town Boards of Trustees), administrative (*e.g.*, local planning boards) or quasi-judicial bodies (*e.g.*, zoning board of appeals). The danger of actual or apparent impropriety in this situation is manifest. For example, if the part-time judge, acting in his role as an attorney, represents an applicant for a zoning variance, and the application is opposed by a vituperative group of local residents, it would be inappropriate for that judge, acting in her judicial capacity, to preside over, *e.g.*, a criminal prosecution of the leader of the opposition group. This is particularly true in smaller communities, where these types of conflicts are more likely to arise and where the judge is less likely to recuse herself because of the absence of available alternatives. This prohibition should be included in the Code.

The Association has not commented on Canon 5, both because we have already provided the ABA Commission with several reports that address *Minnesota v. White* and related issues, and because relatively few of our judges have experience with hotly contested judicial campaigns.

Nevertheless, due to very recent developments in New York, *see Lopez Torres v. New York State Board of Elections*, 2006 U.S. Dist. LEXIS 2813 (E.D.N.Y. January 27, 2006), we may attempt to formulate a position addressing Canon 5 specifically, but we will not be able to do so in time to meet the ABA Commission's March 15 deadline.

Finally, the Association would be honored to serve as a sponsor of the proposed Model Code when it is presented to the House of Delegates at the ABA Convention in Honolulu this summer. There is one caveat: because the Association has not yet formulated a position on Canon 5, we cannot serve as a sponsor of that portion of the Code. As just noted, we may be looking into Canon 5 in the coming weeks, and if we do formulate a position that supports that of the ABA Commission, we will notify you. As to sponsorship, please let us know what more we can do to assist the ABA Commission in this regard by contacting the Joint Subcommittee Chair, Ronald C. Minkoff, at rminkoff@fkks.com or 212-705-4837.

Very truly yours,



Paul Dutka
Chair, Committee on
Professional and Judicial Ethics

Peter Sherwin
Chair, Council on
Judicial Administration

Ian Anderson
Chair, Committee on
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David Keyko
Chair, Committee on
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cc: Betsy Plevan, Esq.
Members of Joint Subcommittee
Jeanne Gray, Esq.
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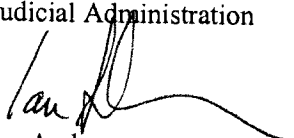
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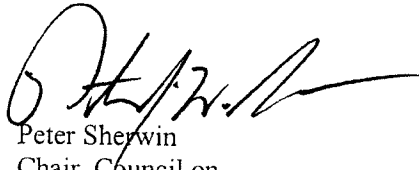
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