

COMMENT

March 9, 2006

Association of Professional Responsibility Lawyers (APRL)

Ronald C. Minkoff
President, Association of Professional Responsibility Lawyers
Chair, APRL Committee on Model Code of Judicial Conduct

Canon 5

The Association of Professional Responsibility Lawyers expresses grave concerns about Canon 5 of the Commission's proposed final draft. They find that the final draft ignores existing case law regarding First Amendment rights of judicial candidates. The cases they cite from different levels of the Federal Court System and several different parts of the country emphasize the constitutional importance of allowing judges and judicial candidates to freely discuss relevant issues in the context of judicial campaigns and to freely associate with the political party of their choice. APRL feels strongly that the ABA should not ignore the existing and perhaps controlling case law that is applicable to Canon 5.

APRL seriously questions even the utility of an approach that fails to recognize this line of case law. They are concerned that the ABA Commission's approach will make the Commission appear hostile to the election of judges, judicial campaigning or even to any application of the First Amendment to speech by judges. They feel that this impression could put the rest of the ABA Commission's important work in jeopardy since it could lead to hostility towards the model code revisions in jurisdictions where judges have to obtain their position through the electoral process. APRL feels that straying too far from existing case law will result in a constitutional debate that will overshadow and possibly drown the other less controversial but valuable proposals that the ABA Commission is making. They also feel that the approach of the final draft, if adopted, could put at serious risk the relevance of the ABA's continued leadership on judicial ethics by essentially refusing to engage the debate on what should be the appropriate public policy on judicial speech in light of existing case law.

APRL finds that if this is the approach finally taken by the ABA Commission, the final draft should be accompanied by a disclaimer or caveat to those states considering its adoption and let them know that they face a significant risk of extended and costly constitutional challenges to this version of Canon 5. APRL finds portions of proposed Canon 5 to be facially unconstitutional under current case law. They strongly believe that the ABA has a duty to propose a Code that is enforceable. In light of this, APRL has recommended their own draft of Canon 2, Rule 2.11 and Canon 5 of the Model Code of Judicial Conduct. Also submitted by APRL is a Red Line version of the Code as it stands now.