Following are comments from the American Center for Law and Justice.
March 7, 2006

Dear Ms. Kladder:

In response to the invitation of the Joint Commission, I offer the following comments on the final draft report version of the Model Code of Judicial Conduct.

**1. Rule 2.02 Sexual orientation**

This rule enumerates, and thus highlights, "sexual orientation" as a category protected against "bias, prejudice, or harassment".

The Terminology section does not define "sexual orientation". This category is notoriously fluid, having once meant heterosexual or homosexual, then expanded to include bisexual, now expanding to include transgender, and in principle open to further expansion to include the universe of possible sexual proclivities. Hence, use of this term creates a vagueness problem.

In addition, given the traditional, historic criminalization of deviant sexual practices, and given the sharp and deeply felt division of the public over whether sexual proclivities, or any particular subset thereof, should be singled out for special protection, on the one hand, as opposed to condemnation (or at least nonapproval), on the other, the ABA's use of this term entails the imposition by the ABA of a highly controversial and historically revolutionary moral and political position upon the judiciary.

Finally, given the ambiguity and breadth of the term "sexual orientation,"
there is a problem of unintended consequences. What in this rule prevents its use in contexts where even the ABA's Joint Commission would presumably have qualms, such as orientation toward pederasty, pedophilia, bestiality, etc.? Such concerns cannot be cavalierly dismissed as red herrings unless something of substance in the Model Code provides a basis for such dismissal. Ideas have logical consequences, and the unadorned term "sexual orientation" contains no inherent limiting principle.

For these reasons, I recommend that the Joint Commission delete all references to "sexual orientation".

**2. Rules 2.12, 2.16 (Comment 2), 4.10, 4.11 Domestic partners**

These rules employ the term "domestic partner" as a parallel to "spouse"
in the context of disqualification and personal interest. The Terminology section defines "domestic partner" to mean "a person with whom another person maintains a household and conjugal relations" aside from legal spouses. Thus, this term includes not just legally denominated "domestic partners" but also live-in sexual partners regardless of the legal status of the relationship. The term does NOT include sexual partners who reside independently. Nor does it include housemates with whom the judge does not have a sexual relationship.

With regard to disqualification (Rule 2.12) and nepotism (Rule 2.16), the use of "domestic partner" as a category of concern in too narrow. A judge ought not hear a case in which the judge's sexual partner has an interest regardless of the details of their living arrangement. If this category is to be addressed, it would be better to use the term "sexual partner" to address the core concern of undue personal affinity influencing official action. If housemates are a concern independent of sexual relationships, the term "housemate" can be added as well.

With regard to invitations to functions and reimbursements of expenses (Rules 4.10(A)(3), 4.11(B)), the rules already cover any "guest" of the judge, so there is no more need to list "domestic partners" in particular than there is to list "law school classmates". The term should be dropped as superfluous (unless the purpose is to give official approbation to the concept of judges having "domestic partners", which is a nonlegal policy goal that has nothing to do with judicial ethics and, therefore, should be excluded as irrelevant, not to mention as of questionable desirability).

With regard to gifts to people close to the judge (Rule 4.10(A)(4)), the term "domestic partner" suffers the same underinclusiveness and overinclusiveness discussed regarding Rule 2.12. A judge's girlfriend, boyfriend, housemate, etc. ought to be able to receive gifts associated with their professions, businesses, or other separate activities under terms no less favorable than someone as closely connected to a judge as a spouse.

At the same time, the possibility of undue influence is no less real in such circumstances. Thus, the term "domestic partner" should be deleted and replaced with a more comprehensive term such as "or other person".

Finally, the definition of "domestic partner", as noted above, contains the element of "conjugal relations". Does the Joint Commission really desire to hinge the enforcement of these rules upon inquiry into the existence of sexual relationships between the judge and other persons? If the term "domestic partners" is deleted from its usage in these rules, the definition should likewise be deleted as no longer pertinent. But even if the term is retained in the rules, the Joint Commission should consider whether it wishes to modify the definition of "domestic partner" to eliminate the need for sexual inquiries.

**Rule 3.04 Invidious discrimination**

This rule bars a judge from belonging to groups that practice "invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation."

The comments above, regarding Rule 2.02, also apply to this rule.

In addition, Comment 2 of Rule 3.04 frankly concedes that determining what is "invidious" discrimination "is often a complex question".

Plainly, this proposed rule raises serious questions of vagueness and overbreadth.

Yet another concern is why "invidious discrimination" on other bases, aside from those listed, is left untouched. Does the Joint Commision really intend to send the message that invidious discrimination on the basis of age, for example, is acceptable? No list of forbidden categories would likely be complete. Rather than try in vain to list all of the possible forms of invidious discrimination, the rule should simply address "invidious discrimination", period. That would not remove the vagueness and overbreadth problems associated with the term "invidious", but it would eliminate the politically controversial and morally problematic task of selecting which subset of invidious biases to target, and which to leave untouched.

Better still would be to drop this provision altogether and instead to leave to the recusal process, and to the politics of judicial selection, the discipline of judges who belong to genuinely reprehensible organizations.

I hope these comments are helpful to you.

Respectfully,

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