September 15, 2005

By Electronic Mail

Ms. Debra D. Taylor
American Bar Association
Center for Professional Responsibility
321 North Clark Street
Chicago, Illinois 60611

Re: Joint Commission to Evaluate ABA Model Code of Judicial Conduct

Dear Ms. Taylor:

The Brennan Center for Justice at NYU School of Law is pleased to submit these comments on the June 30, 2005 Preliminary Draft of the ABA Model Code of Judicial Conduct. Canon 5 is the primary focus of our comments.

In light of the Supreme Court's decision in *Republican Party of Minnesota v. White*,[1] the decisions in its wake, and the substantial interest in the integrity, independence, and impartiality of the judiciary, we recommend that the Joint Commission consider a two-tiered approach in which mandatory prohibitions are combined with parallel hortatory guidance.

In *White*, the Supreme Court held that Minnesota's announce clause prohibiting a candidate from "announc[ing] his or her views on dispute legal or political issues" violated the First Amendment.[2] Since *White*, litigation challenging the canons has proliferated, and courts have reached inconsistent results on the constitutionality of the political activity canons.[3] Although this is not the forum to address the merits of these

[1] 536 U.S. 765 (2002).
[2] *Id.* at 788.
[3] *Compare Republican Party of Minn. v. White*, 416 F.3d 738, 743 (8th Cir. 2005) (en banc) (holding that Minnesota's partisan-activities clause violated judges' associational rights and that Minnesota's solicitation clause violated judges' rights of free speech), *with Raab v. State Comm'n on Judicial Conduct*, 793 N.E. 2d 1287 (N.Y. 2003) (confirming the constitutionality of the state's ethical canons by holding that active judges cannot engage in partisan politics), *and Watson v. State Comm'n on Judicial Conduct*, 794 N.E. 2d 1 (N.Y. 2003) (upholding state canon prohibiting candidates for judicial office from making promises to voters that interfere with the impartial administration of justice).

decisions, the uncertainty they engender provides the backdrop for this Joint Commission's work.

While it remains legitimate for States to impose some measure of binding speech restrictions on candidates for judicial office, clauses such as proposed Canon 5(m) will almost certainly continue to be challenged in court.[4] The uncertainty surrounding the continuing vitality of canons affecting speech should not produce capitulation with respect to the values the canons serve. These values remain essential to fair courts and a just democracy, regardless of whether and to what extent they can constitutionally be enforced through sanctions in misconduct proceedings.

The canons are particularly important safeguards to due process, judicial independence, and the appearance of judicial impartiality in the state judicial context. When voters must choose between two compromised state judicial candidates, they cannot reject them both and start over as with Article III nominees. Without a canon of judicial campaign conduct, unprincipled candidates do not suffer; impartial justice does. A respected state chief justice framed the relationship between the canons and due process as follows:

> First Amendment analysis by its nature tends to highlight the electoral interests of the judge as a candidate and the citizens as voters. It often fails to recognize that these men and women are candidates to a single end, that of becoming judges, and once judges, the interests of the litigants they serve and the judicial system as a whole should be paramount. Once this is appreciated, the restraints on judicial electioneering can be seen for what they are, due process protections for litigants arguing before the elected judges.[5]

Considerations of judicial independence are particularly acute in the context of the political activity canons.

> In the most direct sense, the political activity canons ensure that prospective judges are not entangled in the same political machinery as the political branches. This has two important consequences. First, it reduces the extent to which judges are beholden to the political branches themselves, and second, it prevents judges from being constrained by the political agendas of the parties, thus freeing them to base their rulings on legal rather than political considerations. The harm that the political activity canons seek to address, therefore, does not depend on an assumption that a judge will feel compelled to act in accordance with her

[4] Proposed Canon 5(m) states that judicial candidates shall not "with respect to cases or controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office."

[5] Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059, 1060 (1996) (demonstrating "the seriousness of the threat that free-wheeling judicial campaigns pose to impartiality" and emphasizing "the necessity for a rule prohibiting such activities").

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> previous statements. Rather, it depends on a judgment that certain institutional ties are inappropriate for a judge because they interfere with her ability to perform her constitutional role.[6]

It is widely recognized that there is a substantial value not only in the actuality of judicial impartiality, but also in the perception of impartiality.

> Courts have long understood that they must not only be fair, but must be seen to be fair, or they will lose the ability to play their dispute-resolving role in our democracy. The courts do not have armies or police at their disposal, though they may have a marshal or two; they cannot compel anyone to respect their judgments without the cooperation of the other branches of government and the support of the public. Thus, the United States Supreme Court has repeatedly recognized that maintaining the public's perception that the courts are fair is a critical requirement of due process, going beyond the requirement that courts be fair in fact.[7]

To ensure that these values are furthered by the Model Code, the Code should offer an alternative mechanism for promoting them. That mechanism is specific hortatory ethics principles against which a judge's or a candidate's conduct can be measured. A Code consisting only of compulsory propositions is a Code in which many of the canons will be vulnerable to challenge. Unfortunately, limiting the ethics rules to binding all-or-nothing canons similar to those that have been struck down in some jurisdictions may leave certain jurisdictions without any guidelines for judicial candidate conduct unless a hortatory fallback is also in place. The principal advantage offered by a two-tiered method is that where binding rules are deemed unconstitutional, hortatory guidance is already in place to offer candidates clear, objective ethical guidelines without triggering the heightened scrutiny of First Amendment analysis.

The Joint Commission's proposal to change the presentation of the canons to "state overarching principles of judicial conduct, followed by specific 'Rules'" is itself somewhat reflective of a two-tiered approach.[8] It is our view, however, that more must be done. Because the "overarching principles" in Canon 5 are necessarily general, they are entirely dependent on the specific rules to flesh out pragmatically objective interpretations applicable to all candidates. Accordingly, if a specific binding rule is

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[6] Wendy R. Weiser, *Regulating Judges' Political Activity After White*, 68 Albany L. Rev. 651, 688 (2005).
[7] J.J. Gass, *After White: Defending and Amending Canons of Judicial Ethics* 9 (2004) *at* http://www.brennancenter.org/resources/ji/ji4.pdf. *See also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) ("The Due Process Clause may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties."); *Mistretta v. United States*, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."); William H. Rehnquist, *Keynote Address at the Washington College of Law Centennial Celebration*, 46 Am. U. L. Rev. 263, 274 (1996) ("without public confidence, the judicial branch could not function").
[8] Preliminary Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, Introductory Report, June 30, 2005, page 3.

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overturned in court, only the vague, subjective "overarching principle" will remain with respect to the particular political activity addressed in the stricken rule.

If one of the new canons is struck down by a court, given the realities of political contests, the vacuum formerly occupied by the rule will almost assuredly be filled by a race to the bottom with respect to the conduct at issue. In such a scenario, candidates will refrain from once-prohibited conduct only at their peril. Moreover, they will do so without having an objective and specific ethical standard to justify their restraint. Surely, it is a more politically sustainable defense of behavioral restraint for a judicial candidate to say "while not prohibited by law, the ABA Code indicates that a candidate for judicial office should not engage in [the applicable conduct]" than it is for a candidate to say, "I choose not to engage in [the applicable conduct] because I believe it is inconsistent with the impartiality of the judiciary." The latter may be laudable, but it neither pays the bills (as in the case of solicitation), nor registers with voters (as with a party endorsement), to offer just two very real examples. For that matter, the latter is—by definition—only subjective, and an opponent holding the opposite view would feel no external pressure to comply with the stricken rule.

Paradoxically, without the backstop of specific hortatory ABA Code provisions, if a court of law in a particular jurisdiction overturns a binding canon, the result is that *only* a candidate engaging in the behavior the ABA expressly deems "inconsistent with the integrity, independence, and impartiality of the judiciary" can point to an objective authority—the court—for support. These hortatory rules would provide those who seek to act ethically with authoritative support for their decisions.

Whether parallel "should" rules will prove to be effective buffers separating binding rules from a Hobbesian state of judicial politics cannot be known *ex ante*. Nonetheless, we think that the cautiousness of providing those additional buffers is more than warranted under the circumstances and in light of the interests at stake.

Rather than singling out specific rules for additional hortatory support—and thus implicitly leaving states to engage in a prediction-laden, and utterly high-stakes game of Canon-roulette, in which an ethical void is just a court decision away—we think that a comprehensive backup approach is appropriate with respect to Canon 5.[9] This dual layer of protection would be consistent both with the changes already reflected in the Preliminary Draft, and more importantly, with the central leadership role the Model Code plays in defining and setting standards of conduct regardless of whether and how those standards are enforced. Such an approach, while no doubt a significant departure from the status quo, is nonetheless consistent enough with the Preliminary Draft's principles-rules approach as to render the drafting process facile.

[9] If a court were to overturn a binding restriction, and if that binding restriction were *not* one of the specific rules backed up by a parallel hortatory "should" rule, then the race to the bottom referenced earlier would almost certainly occur with respect to the conduct at issue, thus filling the ethical void.

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The revisions required to actualize this proposal are minor. The Joint Commission need only add separate language tracking the language in Rule 5.01 of the Preliminary Draft, but reflecting the non-binding nature of the guidance. For example, Model Code "Tenet 5.01,"[10] if based on the provisions presently in the Preliminary Draft, would state as follows:

> Except as permitted by Rule 5.02 (Partisan Public Elections), Rule 5.03 (Non-partisan Public Elections), Rule 5.04 (Retention Elections), and Rule 5.05 (Appointment to Judicial Office), a judge or a candidate for judicial office should not directly or indirectly
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> (a) act as a leader or hold an office in a political organization;
> (b) make speeches on behalf of a political organization;
> (c) publicly endorse or oppose a candidate for any public office;
> (d) solicit funds for, pay an assessment to, or make a contribution to a political organization or a candidate for public office;
> (e) purchase tickets for dinners or other events sponsored by a political organization or candidate for public office, unless the tickets are for the judge or candidate's personal use and the cost of the tickets does not appear to exceed significantly the value of the goods and services to be received by the judge or candidate at the dinner or other event;
> (f) publicly identify oneself as a candidate of a political organization;
> (g) seek or use endorsements from a political organization;
> (h) personally solicit or personally accept campaign contributions;
> (i) use or permit the use of campaign contributions for the private benefit of the candidate or others;
> (j) knowingly make any false or misleading statement regarding any candidate for judicial office;
> (k) make any comment that might reasonably be expected to affect the outcome or impair the fairness of a proceeding while it is pending or impending in any court;
> (l) manifest bias or prejudice based upon a person's race, gender, religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status; or
> (m) with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.[11]

[10] If adopted, the provisions would plainly be numbered and titled however the Joint Commission deemed appropriate; this is merely one possibility.

[11] Replicating the entire canon in hortatory form is, in our view, necessary. That replication may, however, actually be merely a floor for appropriate action rather than a ceiling. There may be additional activities, which the Joint Commission considers inappropriate for judicial candidates, but which it finds ill-suited for binding restrictions and disciplinary rules. If so, the Commission might wish to make those activities the

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The ABA is, and will continue to be, a leader in defining, defending and promoting a fair, independent, and impartial judiciary. The proposals herein are intended as suggestions through which the ABA might reaffirm and safeguard the principles it has already adopted and promulgated for many years

As longtime defenders of the canons, including in the *White* litigation, the Brennan Center's support for the canons remains steadfast. But given the present circumstances, the goal of impartial justice warrants both the binding canons and the extra protection of ethical bulwarks standing behind them. To put a new twist on an old adage, the time to repair the roof is while the sun is shining—especially if there are hints of rain on the horizon.

We thank you for the opportunity to present our comments and are available to answer any questions and to offer further assistance to the Joint Commission.

Respectfully,

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subject of "permissive" ethical guidance, to use the term embraced by the ABA's Model Rules of Conduct. As to that question, we express no view at this time, but merely flag the possibility for consideration.

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