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COMMENTS OF ALAN B. MORRISON
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TO
ABA JOINT COMMISSION TO EVALUATE
THE MODEL CODE OF JUDICIAL CONDUCT

REVISED DRAFT OF CANON 5

I have previously commented on several drafts of parts of the new Canons, including a prior draft (without commentary) of Canon 5. I note that some of my suggestions were accepted, but others were not. Since in many cases the Commission's comments merely explain what the draft did and did not do, but not why it had taken one path instead of another, these comments will repeat those suggestions that were not adopted.

Rule 5.01(d). Under this provision, no person who is a judge or a candidate for judicial office, even in a partisan judicial election, can make a contribution to a political party or any candidate for elected office. Thus, a candidate for municipal judge in Alaska could not send $10 to support her choice for President of the United States. I am unable to understand why such a broad rule is either necessary or desirable, and it is almost certainly unconstitutional as a violation of the First Amendment. At the very least it is sweepingly overbroad, and if it is to be sustained in any form, there has to be an explanation of why it is needed. Indeed, as written, once a person becomes a judge, he would be forbidden from ever making any political contributions until he retired, even in amounts that fall below the applicable disclosure threshold as applied to individual contributions (currently $200 for federal candidates or parties). Moreover, a judge who is

running in a partisan election would be forbidden from making a small contribution to the party that has selected him, which seems clearly excessive.

Rule 5.01(e). This provision follows through on the previous no contribution Rule by forbidding a judge or candidate for judicial office from buying tickets to a political event if the price exceeds the likely cost of the goods or services received. But in many ways, the conduct permitted by this Rule is far worse than the conduct forbidden by Rule 5.01(d) since attending a political dinner clearly and publicly identifies the judge (candidate) with the political organization, whereas writing a check is not a public act and one that, unless it is very large, will not be made known to anyone other than the recipient and her committee. Indeed, comment 6 to Rule 5.01 specifically allows judges, as well as candidates, to express their private preferences on candidates for *any* public office, which seems very close to writing a small check to the person being supported.

There is also a problem in knowing how much the dinner cost. Unless the amount for the dinner is on the invitation, the judge/candidate will have to speculate about whether the price is for the dinner or something more. Also, this Rule would appear to allow political organizations to set two prices for tickets so that judges (and perhaps other influential people) could come. All in all, this Rule seems inappropriate except when a candidate is running in a partisan election under Rule 5.02, in which case the candidate should be allowed both to attend the event and pay whatever the price is to her own party.

Rule 5.01(i). This rule prohibits use of contributions for private purposes, which is desirable. The FEC has a similar rule, and the comments should cross-reference it. The comments should also make clear that "private benefits," such as eating a meal, sleeping

in a hotel room, or renting a car instead of walking, are proper uses when they are part of a candidate's campaign activities.

Rules 5.01(k) & (l). These Rules, which I support generally, forbid making comments that might affect the outcome of a case or manifesting bias or prejudice based on race, gender, etc. My concern is not about their substance, but about their placement – aren't these Rules applicable not just when a judge is a candidate – and their applicability to candidates. As to placement, if they are generally applicable to judges, they should not be placed in a section on elections, where they may be overlooked. If they are already elsewhere, then they don't need to be here again: a cross-reference in the comments will suffice (see comment 3, which suggests that Rule 2.11 already covers matters contained in proposed Rule 5.01(k)). As to their applicability to candidates, the prohibition on commenting on pending matters may be too broad since that could include a case in which the candidate is currently counsel, and it applies to any case in any court so that a candidate might not be allowed to express his views on a pending Supreme Court case.

As for the bias Rule, it is unclear why a candidate for judicial office, who is not a judge, should be any more subject to such a rule than any member of the bar. Why shouldn't a candidate for judicial office be allowed to say (no matter how much I disagree with the sentiment) that gays should not be treated the same as opposite sex couples, and aren't there First Amendment problems with prohibiting such statements, even for judicial candidates? Indeed, the Rule may be overbroad even as applied to judges (depending on what the word "manifest" means, but once a person assumes a judicial office, there is more of a reason to confine his or her speech.

Arguably, Rule 5.01(m), forbidding pledges etc, need not be included here since it applied to judges at all times and not just during elections. However, an election makes it much more likely that the problem will arise, and the prohibition cannot and should not apply to lawyers generally unless they are candidates for judicial office. For these reasons, I support retaining Rule 5.01(m), even if it is also set forth elsewhere. Indeed, if it is elsewhere (it may be in Rule 2.11, but I don't have Rule), it would be preferable to leave it in Rule 5.01, and relegate it to a cross-reference or comment in the other place.

Comments to Rule 5.01. Comment 12, line 18. The comment deals with replies to attacks on judges, and it suggests that it is better for persons other than the judge to reply. I agree. The comment also suggests that bar associations might be a better alternative. I disagree for two reasons: first, if a bar is a unified bar, it should not be involved in political matters (even in this context) since it is clear that some members will disagree. Second, even private bar associations will (and should) move slowly, and the election will not wait for them to act. The listing of bar associations and no one else suggests that others are less desirable responders, and I disagree if that is the sentiment being expressed. I suggest that the reference to bar associations and the phrase "to utilize established mechanisms" be deleted: there is no reason to be any more specific, and there are several reasons why the comments should not say what they now say on this topic.

Comment 15, line 42, the words "matters" is too broad. The Rule, as well as line 45 of the comment, refers only to "adjudicative" duties, which means cases (not rules of court etc). Change "matters" to "cases."

Comment 18. This comment suggests that candidates (although its logic would also extend to judges since they are covered by this Rule) should encourage family

members to obey the Rule to the same extent as the candidate. This approach seems much too broad, even if it is not in a black letter rule. Among other things, it would ask family members not to become involved in politics, including not making contributions for any race whatsoever. I would delete this comment or at least re-think its rationale and narrow it substantially.

Rule 5.02(e). This Rule would allow a candidate for judicial office in a partisan election to endorse other candidates running for positions on the same court, but there is no explanation as to why that is desirable or even necessary. Similar provisions appear in Rules 5.03(d) and 5.04(d), dealing with non-partisan and retention elections, where the practice seems even more inappropriate. Comment 3 under Rule 5.03 explains what such a practice would look like, but gives no basis for allowing it to take place. In the context of partisan elections under Rule 5.02, allowing the practice seems redundant because the party label will cause most voters to assume a cross-endorsement. But it may still be harmful. If a candidate does not support someone from his party – which could quite easily be the case in some at least jurisdictions – the pressure to endorse that other person will be difficult to resist. Since it is hard to imagine what useful purpose this Rule (and its companions serve), and it is quite easy to see the negative consequences, these Rules should be deleted.

Rule 5.06. Subsections (b), (c), and (d), which involve contributions limits and other rules, should all be deleted because they have no place in a code of judicial conduct approved by judges. Rather they are proper subjects for legislative action since they involve significant balancing of interests, and they are directly related to other statutes dealing with non-judicial elections. Judges who promulgate their own Rules on

these subjects will be suspected of protecting their own self-interests, and they should avoid even the appearance of such charges. Moreover, what if a judge made-rule is inconsistent with a legislative rule: which one should prevail?

Once those subsections are deleted, nothing of substance remains in Rule 5.06. The right to establish a committee can be left to the places here such a right is created, such as Rules 5.02(c), 5.03(b), and 5.04(b), and the comments can cover the second sentence of (a), which does no more than the state the obvious: a candidate is responsible for the work of her committee. The one matter relating to contributions that might be included here relates to recusals based on large, but lawful contributions, by a lawyer or party in a case before the judge. Hopefully, that issue is dealt with elsewhere, but if not, it surely should be in Canon 5.

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