March 13, 2006

AMERICAN BAR ASSOCIATION
Standing Committee on Judicial Independence
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Mark I. Harrison, Esq., Chair
ABA Joint Commission to Evaluate the
Model Code of Judicial Conduct
321 N. Clark Street
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Attention: Marcia Kladder

Dear Mr. Harrison:

I write to you on behalf of the ABA Standing Committee on Judicial Independence (SCJI), a co-partner in the project to review the Code of Judicial Conduct. Although SCJI has not officially commented upon prior revisions proposed by the Joint Committee to Evaluate the Model Code of Judicial Conduct ("the Joint Committee"), the SCJI has followed with interest the progress of your review.

Let me begin by commending "the Joint Committee" for its effort in undertaking a very difficult task. The multitude of issues addressed in the Code of Judicial Conduct are complex to begin with, but in light of the evolving case law, especially with regard to Canon 5 (Judicial Campaigns), the task becomes even more difficult. There are some who contend that, in light of, *Republican Party of Minnesota v. White*, both I and II, there may be little, if anything, that can be done to rein in what judicial candidates can or cannot say to the point where there may not be any hard or fast rules. Questions arise as to whether *White* will be interpreted narrowly or be given a broad interpretation. Will it now be permissible for judicial candidates to engage actively in any type of judicial election or for that matter "appear" at general political events sponsored by political organizations? The decision by the Supreme Court not to take up *White II* raises serious concerns for the future with regard to fundraising and the extent to which judicial candidates may personally engage in such activities. Some might ask whether the ABA should follow *White's* lead and open the process further, or continue with tradition and further the objective of preserving and protecting our judicial officers' independence from the influence of partisan political activity. These are not easy decisions and for this reason we salute your efforts even more.

The SCJI does offer some observations with regard to several provisions contained in your December, 2005 draft. They are as follows:

Rule 4.04 (B)(3), page 6 – Participation in Civic or Charitable Activities

(B) Notwithstanding the provisions of paragraph (A), a judge:

(3) may appear at, speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with an event of a civic or charitable organization concerned with the law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose,

unless the organization's membership includes predominately lawyers who chiefly advocate a particular position or represent a particular client or type of client.

Comment [8], page 8, states that it would be inappropriate for a judge to speak at a fund-raising event for a specialty bar association whose members are closely identified with certain clients or particular positions on certain legal issues.

We believe this position is too restrictive and may cause unintended consequences that may not be in the best interests of effectuating the fair and impartial administration of justice. Let us assume for a moment that a "specialty bar association" in Louisiana, Mississippi, or Alabama, or any state, held a fund-raising event to raise funds for the purpose of restoring a courthouse in the Katrina-ravaged states, or for assisting in providing access to counsel for those in desperate need to put their lives back together. An event is held and the chief justice of an affected jurisdiction is invited to relate the extent of the damages and its devastating impact on the administration of the justice system. Do we truly wish to preclude this? We would hope not. Would we want to curtail a "specialty bar association" from inviting a jurist to speak at a fund-raising event designed to raise funds for a scholarship program for minority and disadvantaged students? Rather than prohibiting this conduct, we suggest that the disqualification or recusal provisions be applicable, and thus available to address the situation where a judge's activities could "reflect adversely upon a judge's independence, integrity, and impartiality."

Rule 4.11, page 19 – Reimbursement or Waiver of Charges for Travel-Related Expenses of the Judge or the Judge's Spouse, Domestic Partner, or Guest

We recognize the sensitivity of this rule given recent reports in the press and media with regard to a few judges. However, we believe it important that judges be permitted to attend seminars and other educational forums to assist them in the execution of their judicial responsibilities. Given the limited state of judicial budgets for travel and education, and modest judicial salaries, it is also reasonable that reimbursement and compensation by sponsors of the events not be prohibited. The many factors listed by the Joint Committee to be considered in accepting such reimbursement or compensation provide excellent guidance for the judges in making their decisions. Including a reporting requirement as set forth in the proposed rule should assist in addressing concerns about such travel and so long as such requirements rise to a level of reasonable transparency we feel comfortable that the goals will be met. We commend you for your effort with this rule.

Rule 5.03, page 11 – Permitted Political and Campaign Activities of Candidates for Judicial Office in Non-Partisan Public Elections

Notwithstanding any restrictions set forth in Rule 5.01, candidates for judicial office in a non-partisan public election:

(A) May seek or use endorsements from any individual or organization, other than a political organization;

Comment [1], page 12 states, in part: In nonpartisan public elections for judicial office, candidates may not seek or accept nominations or endorsements by a particular political organization. . . Comment [3] states in part: although candidates in non-partisan public elections for judicial office are prohibited from running on a ticket or slate associated with a political organization, individual candidates may group themselves into slates or other alliances in order to conduct their campaigns more effectively. . .

In the main, the SCJI believes the final draft strikes an appropriate balance for these difficult issues. However, we urge that Rule 5.03 (A) and Comments 1 and 3 be revisited.

Non-partisan judicial elections have been addressed by at least one federal court, that occurring in September, 2004, when U.S. District Judge Ann Aldrich, U.S.D.C. Northern District of Ohio in *O'Neill v. Coughlin* (Case No. 1:04 cv 1612) enjoined several provisions of the Ohio Code of Judicial Conduct pertaining to utilization of endorsements and advertising.

The Ohio rule in question, Canon 7 (B)(3)(b) of the Ohio Code of Judicial Conduct, provided that "after the date of primary election, a judicial candidate shall not identify himself or herself in "advertising" as a member of or affiliated with a political party." Although the candidate could identify themself "in person" as a member of a political party, the candidate was prohibited after the primary from doing so in an advertisement.

The Ohio canon in question did specifically permit a candidate to state that they were the nominee and/or endorsed by a political party. The issue in this case addressed advertising after the primary.

Judge Aldrich, in addressing the restriction in Canon 7 (B)(3)(b) and citing a number of free speech cases, stated that "Under the First Amendment as interpreted by *White*, judicial candidates are entitled to state their party affiliation or membership in any medium or venue, at anytime, and voters are entitled to have that information and act on it as they see fit. The voters' own beliefs, experience and reasoning may lead them to draw certain inferences from a judicial candidate's party affiliation or membership." If membership or affiliation is acceptable for the voters to hear, why not endorsements from political parties.

A prohibition on a candidate in a non-partisan judicial election from using an endorsement from a political party misses the realities of judicial elections and is less likely to withstand a constitutional challenge in light of evolving case law. There is no way we can stop political parties from announcing and advertising their endorsements during an election season and we can't imagine a judicial candidate, or any candidate, from requesting a political party not to include their name on a slate card mailed to registered voters. Many judges come through the political system as the vehicle for getting to the bench. Is not candor and forthrightness with the public better than attempting to persuade them that politics does not exist? As Justice O'Connor stated so eloquently in *White*, "If the State has a problem with judicial impartiality, it is largely one the State has brought upon itself for continuing the practice of popularly electing judges." *White*, 536 U.S. at 792 (O'Connor, J., concurring).

We hope our comments are of some assistance as you conclude your work on this project. Please feel free to contact us if we can provide any assistance, including further explanation of our thoughts contained in this correspondence.

Sincerely,

Doreen D. Dodson
Chair
ABA Standing Committee on Judicial Independence

cc: Members, SCJI