

MEMORANDUM

To: Joint Commission to Evaluate ABA Model Code of Judicial Conduct
From: ABA Section of Business Law
Date: September 9, 2005
Subject: Preliminary Comments of Section of Business Regarding Preliminary Draft Revised Code (June 2005)

PRELIMINARY COMMENTS ON JUNE 30TH DRAFT OF REVISED CODE OF JUDICIAL CONDUCT

Although Section of Business Law members and leadership have followed the work of the Commission, the June 30th Draft has afforded the first opportunity to focus on the Revised Code as a whole. We are hopeful that the Reporters and Joint Commission will consider the Comments in its September 16-17th review of the June 30th Draft. These are Comments intended as helpful suggestions based upon a preliminary review of the entire draft. They have been approved by the Officers of the Section. As further changes are published by the Commission, the Section will review later drafts and may have additional comments. Contact Persons in the Section of Business Law to whom your questions should be addressed are listed at the end of this Memorandum.

We have been mindful of the purposes for making the changes to the Code: providing (i) better guidance for judges and candidates for judicial office and (ii) clearer standards to be applied in disciplinary proceedings and by judicial ethics committees. We also have considered the changes from the perspective of the Code's objective to promote judicial integrity, independence, impartiality, and competence and, in so doing, to foster public trust and confidence in each judge as well as in the judicial system itself.

General Organization

1. The Proposed new Code clearly is the product of thoughtful reconsideration of every section of the 1990 ABA Model Code. Those involved are to be commended for the efforts this task has involved. One result is that the new Rules-based format, redistribution of some sections under different Canons and language improvements make the Proposed Code much easier for all readers. **We urge retention of the proposed Rules-based format because it is far more user friendly and clearer than the current Code.**

2. It is also beneficial to group the Rules under the five (5) distinct Canon topics:

Canon 1: Conduct in General (combining Parts of current Canons 1 and 2).

Canon 2: Conduct as a judge (current Canon 3).

Canon 3: Judges' personal conduct (mostly, current Canon 2),

Canon 4: Extrajudicial conduct (current Canon 4).

Canon 5: Political conduct (current Canon 5).

A complete cross-reference index between the 1990 and new Code is, however, essential.

3. Some Rules, of course, apply to a judge's conduct in several of the above categories. Although in some cases, when several Rules may apply to the same conduct, there are suitable cross-references in Comments, **more cross-referencing in the Final Draft is desirable.**

4. **We recommend that the Preamble and Scope be combined under one heading**, either "Preamble" or "Scope." The 1972 and 1990 Code each had only a Preamble. Furthermore, the Preamble should be divided into distinct subject areas, *e.g.*, (i) Role of the Judiciary, (ii) Structure of this Code and (iii) Rules of Construction. That arrangement should

enable the text to be shortened. More important, it makes it easier to find subjects in the Preamble.

Terminology

5. So far as we can determine, the definitions are drafted with care and should generally work well. **The Rule(s) where the term is used should be provided at the end of each definition**, however, including a reference to Rule 4.12 following “gift.”

Certain of the definitions are critiqued under the applicable Rule (*e.g.*, “impropriety”).

Canon 1: Conduct in General

6. **We strongly support the text of Canon 1:**

“A judge shall uphold the Integrity, Impartiality, and Independence of the Judiciary and shall avoid impropriety in all the Judge’s Activities,” **as well as the inclusion of Rule 1:03**: “A judge shall avoid impropriety and the appearance of impropriety.”

7. **We commend the Joint Commission for making it clearer** (than in former Section 2A) **that violations of law, court rules or other provisions of the Code are only examples of “actual improprieties.”** We also believe it helpful to have both the definition of “Impropriety” under Terminology and the manner of applying the standard in Comment [2] under Rule 1.03. The standard is well understood by judges and judicial disciplinary authorities and has helped judicial ethics committees to provide judges clear guidance under specific circumstances.

Canon 2: Duties of Judicial Office

Our comments involve Rule 2.04 (Impartiality and Fairness); Rule 2.05 (Bias and Discrimination); Rule 2.11 (Pledges and Promises), *see also* Comment [15] and [16] under Rule 5.01; and Rule 2.12 (Disqualification).

Rule 2.04 (Impartiality and Fairness)

8. Some commenters, including judges, have expressed concern that Rule 2.04 and its Comment [1] unduly restrict a judge's ability to accommodate to most *pro se* litigants' lack of legal sophistication. We do not believe this to be a problem and oppose any change that is complex and overly detailed, as some suggestions have been. **If, however, the Joint Commission concludes that some provision to permit judges to assure fairness for *pro se* litigants is desirable, the following might be added as a last sentence to Comment [1] under Rule 2.04:**

“A judge's impartiality and fairness is not impaired, however, when the judge makes procedural accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard.”

Rule 2.05 (Bias and Discrimination)

9. **The Section of Business Law strongly supports the provisions of Rule 2.05A and B and the Comments.**

10. **We urge, however, as others have, that Comment specifically mention “sexual harassment” as well as other forms of harassment,** as does the current Commentary under Section 3B(5). We believe it is important to remind judges of the specific types of harassment that can occur, often inadvertently.

11. **The Joint Commission also should consider whether a comment like Comment [3] should be added under Rules 2.13 and 2.14** (especially the latter) to clarify that

a judge's administrative duties include avoidance of sexual harassment and other forms of harassment by judges, court personnel and lawyers. *See* comments of American Judicature Society and National Association of Women Judges.

Rule 2.10 (Ex Parte Communications)

12. We believe that Rule 2.10(a)(2) misdescribes what must be communicated to the parties, although substituting for "advice," "information or opinions" is an improvement. Accordingly, **we recommend that in line 5 on page 8 of Canon 2, the word "received" be substituted for "sought."**

13. **We believe that Comment [3] governing information from electronic media, is ambiguous and simplistic in its reference to "facts of a case" in line 3 of page 10 of Canon 2. First, the limitation should be to "facts in controversy in the case," or to "facts in a case" (see, however, our suggestion 14) to permit a judge to obtain background information of a factual nature that is not in controversy. Second, information and opinions obtained on the internet, at least by trial judges should, we believe, be made specifically subject to notice to parties and opportunity to respond as is accorded information and opinions from a disinterested expert in Rule 2.10(a)(2).**

14. The first suggestion points to **the need to explain in a new Comment the meaning of the term "facts in a case," see line 29 on page 8.** We believe that the same restrictions ought apply to information and opinions obtained from all sources. Care must be taken in implementing the suggestions to avoid overburdening judges or the trial system with unnecessary requirements to afford parties opportunity to respond.

Rule 2.11(c) (Pledges and Promises)

15. **The restriction on judicial (and candidate) speech must, in our judgment, be retained here** and in Canon 5 respecting campaign speech in order to assure fairness and impartiality in litigation.

Rule 2.12 (Disqualification)

16. The changes generally are excellent.

17. **We believe that it is not necessary to include the words “domestic partner” in Rule 2.12 (or elsewhere in rules)**, because “spouse” is defined to include a domestic partner. We do, however, suggest that “domestic partner” be defined in the Terminology Section to remove ambiguities, such as whether it includes a person with whom the judge has an intimate relationship but who maintains a separate abode.

Canon 3: Personal Conduct

18. The changes from current Section 2C made in the text of Rule 3.04 should be retained without substantive change, except for the change we proposed in Suggestion 19 below.

19. We believe that *any* use of benefits or facilities of an organization that the judge knows practices invidious discrimination on the stated grounds evinces creates the perception that the judge approves those practices whether the case is of “any significant extent” or not. **Therefore, we suggest that “to any significant extent” be deleted at line 2 on page 3 of Canon 3:**

20. **We suggest that any ambiguities in Rule 3.04 (as in current Canon 2C) are best left to detailed analysis in judicial ethics opinions.** These include whether a specified organization practices invidious discrimination by barring certain individuals from occupying hierarchical positions because of religious beliefs or from membership because of cultural values

of common interest to its members. Accordingly, **no specific organization should be mentioned in comments as practicing invidious discrimination or not.**

Canon 4: Extrajudicial Conduct

21. This Canon generally is well rewritten and as changed should be retained without substantive change, subject to correcting any inconsistencies and the suggestions below.

22. **We suggest that Rule 4.02** (“A judge shall not appear at a public hearing before or otherwise consult with an executive or legislative body or official except...”) **should have another exception: “when the judge has been duly subpoenaed to appear.”**

23. Rule 4.04 (Participation in Civil or Charitable Activities) in Rule 4.04B(1)(b) by an exception permits a judge to personally solicit funds on a “*de minimis* basis.” **We suggest that the exception be omitted because it sets an incorrect standard.** In addition, Comment [4] purports to explain “*de minimis*” as excluding incidental or behind-the-scenes activities, but those activities do not involve *personal solicitation*, which is where the bright line should be drawn (“in-person solicitation” might be a better term and might be explained in Comment). Moreover, “*de minimis*” is a defined term in Terminology with an entirely different meaning than as used here.

24. **The exception in Rule 4.12 (Gifts) on line 14 of page 12 of Canon 4 should read “except that a judge or such family member may accept...”**

25. **We question the inclusion of dollar limits, and if maximum dollar limits are to be set on any gifts, the amounts here are too low** – we suggest aggregate annual limits of [\$500] with required reporting of all gifts as currently specified in Rule 4.12B, line 26 on page 13, [\$250] in a calendar year.

Canon 5: Political Conduct

26. We suggest that **the words “directly or indirectly”** in line 13 on page 1 of Canon 5 that have been added to current Section 5A(a) **create a serious ambiguity and should be omitted**. Substantially all the listed prohibitions apply, or should apply to the judge’s personal and direct conduct, and hence the language is not necessary.

27. The Joint Commission undoubtedly **will reexamine and** change some of the limitations on judicial and candidate speech and political activity in view of *White II*. We are hopeful that the Commission will resolve the First Amendment issues in its best judgment based on the current state of the decisional law. It would, for example, be incorrect to concede the propriety of such conduct as personally soliciting campaign funds that adversely affects independence and impartiality and is an abuse of prestige of judicial offices. On the other hand, it would invite trouble to prohibit candidates who must run in public elections from seeking support of political parties after the decisions in *White I* and *White II*. It is imperative that the ABA stand firm when freedom of speech and association are not directly implicated by a necessary limitation on campaign conduct because courts look to the ABA to provide leadership on issues of judicial ethics and conduct and often follow the ABA’s positions on these issues.

28. Please consider the following suggestions:

- (a) **Judges and candidates should be prohibited from soliciting and receiving campaign contributions personally** – the language, however, should be clarified as suggested by the *White II* decision.
- (b) **Judges and candidates subject to “public election”** (see definition below), **should be allowed to:**
 - “(i) purchase tickets for and attend political gatherings**
 - “(ii) identify as a member of a political party**
 - (iii) contribute to a political organization.”**

29. We also suggest retaining the current division made in the 1990 Code between (i) judges and candidates who are not subject to public election and (ii) judges and candidates who are subject to “public election,” defined in Terminology (page 9, 2004 ABA Model CJC), as

“primary and general elections; it includes partisan elections, nonpartisan elections and retention elections.”

This suggestion results from our conclusions that some of the additional restrictions made applicable to judges under Rule 5.03 (Non-Partisan elections) and Rule 5.04 (Retention elections) are likely unconstitutional and that candidates and judges must be permitted to engage in the following political conduct when subject to “public election”:

Conduct described in Items (i)-(iii) quoted in paragraph (b) of Suggestion 27 above and, when a candidate, also seeking or using support from any organizations, including political organizations.

See current Section 5C for permissive campaign conduct.

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