

## **SUMMARY**

ABA Section of Business Law

September 9, 2005

### **PRELIMINARY COMMENTS ON JUNE 30<sup>TH</sup>**

### **DRAFT OF REVISED CODE OF JUDICIAL CONDUCT**

The Section of Business Law urges retention of the proposed Rules-based format because it is far more user friendly and clearer than the current Code. It also approves the grouping of the Rules under the five distinct Canon topics, but finds that a complete cross-reference index between the 1990 and new Code would be essential. Additionally, more cross-referencing would be desirable.

The Section suggests that the Preamble and Scope be combined under one heading, either “Preamble” or “Scope.”

#### **Terminology**

The Section of Business Law finds that the definitions are drafted with care and should generally work well. However, they suggest that the rule(s) where the term is used should be provided at the end of each definition

##### **Canon 1: Conduct in General**

The Section strongly supports the text of Canon 1 and commends the Joint Commission for making it clearer that violations of law, court rules or other provisions of the Code are only examples of “actual improprieties.” They find 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.

#### **Canon 2: Duties of Judicial Office**

##### **Rule 2.04 (Impartiality and Fairness)**

The Section of Business Law offers the following language 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)**

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

They urge that Comment specifically mention “sexual harassment” as well as other forms of harassment, as does the current Commentary under Section 3B(5). The Section recommends consideration of 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.

##### **Rule 2.10 (Ex Parte Communications)**

The Section of Business Law believes that Rule 2.10(a)(2) misdescribes what must be communicated to the parties, although substituting for “advice,” “information or opinions” is an improvement. They recommend that in line 5 on page 8 of Canon 2, the word “received” be substituted for “sought.”

The Section believes 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. They

find that the limitation should be to “facts in controversy in the case,” or to “facts in a case” to permit a judge to obtain background information of a factual nature that is not in controversy. 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).

#### Rule 2.11(c) (Pledges and Promises)

The Section of Business Law states that the restriction on judicial and candidate speech must be retained here and in Canon 5 respecting campaign speech in order to assure fairness and impartiality in litigation.

#### Rule 2.12 (Disqualification)

The Section recommends 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. They 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

The Section of Business Law suggests that “to any significant extent” be deleted at line 2 on page 3 of Canon 3 and that any ambiguities in Rule 3.04 (as in current Canon 2C) are best left to detailed analysis in judicial ethics opinions. They would urge that no specific organization should be mentioned in comments as practicing invidious discrimination or not.

#### Canon 4: Extrajudicial Conduct

The Section of Business Law suggests that Rule 4.02 have another exception: “when the judge has been duly subpoenaed to appear.”

The Section suggests that the exception in Rule 4.04B(1)(b) permitting a judge to personally solicit funds on a “*de minimis*” basis be omitted because it sets an incorrect standard.

They would word the exception in Rule 4.12 (Gifts) on line 14 of page 12 of Canon 4 to read “except that a judge or such family member may accept...”

They question the inclusion of dollar limits, and if maximum dollar limits are to be set on any gifts, they 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**

The Section suggests 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.

They make 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.”

The Section suggests 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.”