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AMERICAN BAR ASSOCIATION

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Professional Discipline**

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Mark I. Harrison

Chair, ABA Joint Commission on Evaluation of
the Model Code of Judicial Conduct

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Dear Mr. Harrison:

The ABA Standing Committee on Professional Discipline is pleased to submit its comments to the Joint Commission on Evaluation of the Model Code of Judicial Conduct's proposed final draft of Canons 1 through 4 of the Model Code. Given the ongoing work by the Commission regarding Canon 5, the Committee decided not to submit comments regarding that provision at this time. The Committee may provide additional comments regarding Canon 5 at a later date.

Chief Justice Shirley Abrahamson of the Wisconsin Supreme Court is a member of the Discipline Committee. She did not participate in the discussion of the Joint Commission's drafts and abstained from voting on any of the proposals and changes suggested by the Discipline Committee.

The Committee hopes that the Joint Commission finds these suggestions helpful. The Committee has not yet voted as to whether to support or co-sponsor the Joint Commission's upcoming filing with the ABA House of Delegates. The Committee will do so after it reviews that filing.

The Committee's comments consist of this letter, which provides detailed explanations of the Committee's proposals and redlined copies of the Discipline Committee's proposed changes for Canons 1 through 4. The track changes function is activated.

A. General Comments Regarding the Joint Commission's Final Draft

As noted in the Committee's previous submissions, foremost among its concerns from an enforcement perspective is the proposed division of the Code into Canons and Rules. In light of the Joint Commission's determination to maintain that structure, the Committee proposes changes intended to clarify and strengthen the statements in the current draft that only the Rules constitute the enforceable provisions of the Code.

The Committee also suggests that the Application Section be moved to the beginning of the Code. It is currently at the end. The Committee believes that it will be more useful for those using the Code to have information regarding the applicability of its provisions up front.

The Committee urges the Commission to develop detailed Reporters' notes or explanations of the Joint Commission's proposed changes and post those on its web site. Such notes will prove useful to the Committee and other entities in determining whether to support or co-sponsor the Joint Commission's Report and Recommendations before the House of Delegates. The lack of such explanations to date made the process of commenting on certain provisions difficult.

B. Discipline Committee's Comments Regarding Joint Commission's Draft of the Preamble

The Discipline Committee's proposed changes to the Joint Commission's Final Draft of the Preamble are:

- The Discipline Committee recommends adding paragraph numbers to the Preamble. This is consistent with the *ABA Model Rules of Professional Conduct* and the Joint Commission's draft of the Scope.
- The Committee recommends replacing "American" with "United States" as the Code is not intended to apply to non-U.S. Judges. The use of "United States" is also consistent with other Model Rules.
- As noted above, the Committee's suggested additions to the Preamble are intended to clarify and strengthen the statements in the current draft regarding the enforceability of only the Rules, and not the Canons.
- The first sentence of paragraph [4] of the Preamble states that the Code is not intended as an exhaustive "guide" for judges. The Committee believes that language consistent with paragraph [7] of the Preamble of the *ABA Model Rules of Professional Conduct* more accurately reflects how the Code should be described for purposes of this paragraph.

C. Discipline Committee's Comments Regarding Joint Commission's Draft of the Scope

The Discipline Committee's proposed changes to the Joint Commission's Final Draft of the Scope are:

- As with the Preamble, several of the Committee's suggested additions to the Scope are intended to clarify and strengthen statements regarding the enforceability of only the Rules, and not the Canons.
- In paragraph [6], the Committee recommends adding language that a failure to comply with an obligation or prohibition imposed by a Rule of the Code is a basis for invoking the disciplinary process. This is a more accurate statement and is consistent with the *ABA Model Rules for Judicial Disciplinary Enforcement*. The Final Draft states that although each Rule is binding and enforceable it is not contemplated that every violation will result in "disciplinary action." "Disciplinary action" can reasonably be construed to mean the initiation of a disciplinary investigation that could lead to

formal prosecution and the imposition of a sanction or some other disposition. The Joint Commission’s proposed text differs from the Comment to Rule 6 (B.) of the *ABA Model Rules for Judicial Disciplinary Enforcement* which states that, it is not intended that every violation of the Code will result in “the imposition of discipline.” The Committee’s proposed language is also consistent with that of paragraph [19] in the Scope of the *ABA Model Rules of Professional Conduct*. The Committee suggested additional language for determining whether disciplinary action is appropriate and if so, how the degree of sanction should be determined.

D. Discipline Committee’s Comments Regarding Joint Commission’s Draft of the Terminology Section

The Discipline Committee’s proposed changes to the Joint Commission’s Final Draft of the Terminology section are:

- The Committee believes that the definition of “domestic partner” contained in the Terminology section should be better defined. The Committee conducted research into the manner in which domestic partnerships are defined in statutes, ordinances, and descriptions of benefits issued by a variety of institutions. The Committee suggests using the language that was promulgated by the San Diego State University Research Foundation to more broadly and accurately describe the concept of domestic partnership. The Committee will provide the results of its research to counsel for the Commission.
- The Committee recommends adding “domestic partner” to the definitions of a judge’s and candidate’s family and a judge’s family residing in the household.

E. Discipline Committee’s Comments Regarding Joint Commission’s Draft of Canon 1

The Discipline Committee’s proposed changes to Joint Commission’s Final Draft of Canon 1 are:

- Paragraph [1] of the Comment to Rule 1.01 should state that a judge “must” comply with high standards of judicial conduct and recommends the deletion of “should” from that sentence.
- The Discipline Committee recommends returning to Rule 1.01 the Comment stating that: “The duty to act in a manner that promotes public confidence in the integrity of the judiciary does not imply that judges have an obligation to refrain from criticism that does not violate this Code or other applicable law. Judges are in a unique position to identify and address problems affecting the courts, and should be encouraged to bring those matters to light, as a means of promoting the effective administration of justice.” The Committee believes that returning this Comment is necessary in light of the increased number of specialty courts and the unique role that judges from these courts play in identifying problems and affecting change in the court system and the communities that they serve.

- The Committee recommends deletion of “and should do so freely and willingly” from the end of the last sentence of paragraph [1] of the Comment to Rule 1.02. The concept of a judge engaging in behavior “freely and willingly” contradicts the use of the imperative statement that a judge “must accept restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen...” Further, “freely and willingly” is ambiguous for purposes of enforceability.

F. Discipline Committee’s Comments Regarding Joint Commission’s Draft of Canon 2

The Discipline Committee’s proposed changes to the Joint Commission’s Final Draft of Canon 2 are:

- The Joint Commission should draft a Comment to Rule 2.01.
- The Discipline Committee recommends deleting paragraph (A) of Rule 2.02 as it is redundant of the directives of Rule 2.02(B). The Committee also suggests amending and reordering the Comments to Rule 2.02 as suggested in the attached redlined version.
- The Discipline Committee’s proposed changes to the Black Letter and Comments of Rules 2.05 through 2.09 are stylistic, but improve the sentences. The Committee also believes that paragraph [2] of the Joint Commission’s Final Draft Comment to Rule 2.06 should be moved to paragraph [1]. The former paragraph [1] would then become paragraph [2] of the Comments to that Rule.
- The Committee recommends that the Joint Commission add a sentence at the end of paragraph [3] of the Comment to Rule 2.09 directing a judge to consult with the requirements of Rule 2.12 to determine if disqualification is necessary when the circumstances set forth in the preceding sentence occur.
- As noted in the attached redlined version, the Discipline Committee believes that striking “reasonable efforts” from Rule 2.10(D) is appropriate. In all other Rules a judge is required to prohibit conduct by court personnel under his or her control and direction. It is unclear why the Commission determined that “reasonable efforts” were appropriate in this instance, but the Committee believes that the language of this Rule should be consistent with the others. Additionally, “reasonable effort” is not defined. This is problematic from an enforcement perspective.
- The Discipline Committee recommends deleting Comment [7] because it is redundant. It repeats the black letter of Rule 4.07.
- The Committee recommends that the Joint Commission re-examine the language of proposed Rule 2.11 (C) to ensure consistency with U.S. Supreme Court precedent.
- The Discipline Committee recommends replacing “relative” with “member of the judge’s family” in paragraph [4] of the Comment to 2.12.
- The Joint Commission should draft a Comment to Rule 2.13.

- The Joint Commission should delete “corrective” from Rule 2.19. In the context of this Rule, the Committee believes that “corrective” suggests broader conduct than that intended. The Committee also suggests adding language regarding referral to a lawyer or judicial disciplinary agency to the Comment to Rule 2.19 so that any necessary disability or incapacity proceedings may be initiated as set forth in the *ABA Model Rules for Lawyer Disciplinary Enforcement* and the *ABA Model Rules for Judicial Disciplinary Enforcement*.
- Rule 2.20 is new and the Joint Commission should provide commentary. The Committee also recommends that Rule 2.20 (B) be amended to state that a judge shall not engage in the designated behavior in any disciplinary investigation.

G. Discipline Committee Comments Regarding Joint Commission’s Draft of Canon 3

The Discipline Committee’s comments regarding the Joint Commission’s Final Draft of Canon 3 are:

- The Committee recommends adding a Comment to Rule 3.02 that states that a judge should not testify as a character witness in a disciplinary proceeding.
- Consistent with the intent of Rule 3.04, the Committee suggests adding “disability” to the Black Letter and Comment. The Discipline Committee recommends substituting “gender” for “sex” in paragraph [2] of the Comment to Rule 3.04.

H. Discipline Committee’s Comments Regarding Joint Commission’s Draft of Canon 4

The Discipline Committee’s comments regarding the Joint Commission’s Final Draft of Canon 4 are:

- The Committee suggests adding “the Rules of” before “this Code” in Rule 4.01 (E) to clarify that, violations of the Canons are not enforceable. The Committee has made similar suggestions throughout the Rules and Comments under Canon 4.
- The Committee recommends deleting the phrase “...unless the organization’s membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client” from Rule 4.04 (B)(3) and the accompanying Comment. The Committee understands that the Commission may intend to limit a judge’s attendance at certain charitable or civic activities if the judge may be perceived as endorsing a particular cause by virtue of his or her appearance at certain bar associations or organizations. Such attendance may impact the perception of the judge’s ability to be impartial, fair, and unbiased. However, the proposed language is problematic. The Committee understands that every witness at the Joint Commission’s February Hearing expressed concerns with this part of Rule 4.04. Further, in the Comment, the term “specialty bar association” is not defined.

- The Discipline Committee suggests adding domestic partners to Rules 4.05, 4.08, 4.09, and 4.10 if the Joint Commission decides not to add “domestic partner” to the definition of a judge’s or candidate’s family in the Terminology Section.
- Rule 4.05 (C) should include reference to Rule 4.08.
- Rule 4.07 conflicts with the reality that there are part-time judges in the United States who are permitted to practice law under certain circumstances. The Committee’s suggests adding “full-time” before “judge” in the Black Letter and that language regarding the applicability of this Rule to part-time judges be added to the Comment.

The Discipline Committee appreciates the opportunity to comment on the proposed Final Draft and looks forward to reviewing the Joint Commission’s filing with the House of Delegates. If the Joint Commission has any questions regarding the Discipline Committee’s submission, please contact Regulation Counsel Mary M. Devlin at 312/988-5311 or devlinm@staff.abanet.org.

Sincerely,



Hon. Barbara K. Howe
Chair, ABA Standing Committee on
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enclosures

cc: Standing Committee on Professional Discipline
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