

2004-2005

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January 12, 2005

Mark I. Harrison

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

Osborn Maledon, P.A.

2929 N. Central Avenue, Suite 2100

Phoenix, AZ 85012

Dear Mr. Harrison:

The ABA Standing Committee on Professionalism is pleased to submit its comments to the Joint Commission to Evaluate the Model Code of Judicial Conduct's proposed drafts of Canons 1 and Rules 4.13 through 4.16 of Canon 4 of the Model Code. The Committee also submits comments regarding the structure of the Model Code as a whole.

In reviewing the Joint Commission's drafts of the Model Code, the Professionalism Committee made reference to comments submitted to the Joint Commission by the ABA Standing Committee on Professional Discipline. The Committee concurs with some of the Discipline Committee's comments and references them below.

Overall Structure of the Code

With regard to the overall structure of the Code, the Professionalism Committee agrees with the Discipline Committee's suggestion that from an enforcement perspective, adopting a pure Model Rules format for the Code rather than the Commission's proposed Canons and Rules format is preferable and would eliminate confusion and redundancy.

If the Commission retains the Canons and Rules format in the Code, the Professionalism Committee suggests that an explanation be provided in the Preamble or elsewhere as to whether the Canons are aspirational or enforceable provisions.

Comments Regarding Canon 1

The Professionalism Committee agrees with the Discipline Committee's recommendation that if the Commission decides to retain its proposed format

and the Canons are intended to be aspirational, the language in Canon 1 of the Joint Commission's draft should be moved to Rule 1.01 and the language in Rule 1.01 should be moved to the Canon. In particular, the Committee agrees with the Discipline Committee's suggestion that the specific prescriptive language stating that a judge "shall avoid impropriety and the appearance of impropriety" is better suited for a Rule than a Canon.

The Professionalism Committee agrees with the Discipline Committee's recommendation to consolidate into Comment [1] to Rule 1.01 all language scattered throughout the Joint Commission's draft and the original Commentary that defines and provides guidance about avoiding impropriety and the appearance of impropriety. However, in that Comment, the Committee questions the use of the word "competence" in the fifth and seventh sentences and inquires whether the word "independence" should be used instead. In particular, the Committee notes that the phrase "integrity, independence and impartiality" is used in the Canon, but the phrase "independence, impartiality and competence" is used in the Comment. The Committee suggests that if the Commission intends to use "competence" rather than "independence" in the Comment, an explanation should be provided.

The Committee suggests that Comment [2] to Rule 1.01 in the Discipline Committee's draft be amended to read as follows:

[2] A judge is encouraged to participate in activities that promote ethical conduct among judges and lawyers, including the implementation and enforcement of codes of conduct and support of professionalism within the judiciary and the legal profession.

The Committee believes that this language would better address the issues of impropriety and the appearance of impropriety and would eliminate language from that Comment that is unrelated to those issues.

Comments Regarding Canon 4, Rules 4.13 through 4.16

The Committee agrees with the Discipline Committee's suggested changes to the definition of "gift" in the Terminology Section, which are intended to increase the comprehensibility of the exceptions to that term.

The Committee also agrees with the Discipline Committee's recommendation that all relevant paragraphs of Rules 4.13 through 4.16 and corresponding Commentary should include reference to the judge's domestic partner.

With regard to Rule 4.13(b) and Rule 4.14(b), the Committee suggests that rather than list a specific minimum reportable dollar amount, the brackets be left blank so that each state can decide an appropriate amount.

The Committee agrees with the Discipline Committee's recommendation to combine in Comment [1] to Rule 4.13 all language explaining why a judge and his or her family, spouse or domestic partner should not accept certain gifts and how other Rules in the Code might prohibit acceptance of a gift even if Rule 4.13 permits acceptance. The Committee, however, recommends that the Discipline Committee's draft of the Comment be edited for clarity and the sentence referring to the "financial or business activities of a domestic partner, spouse or all family members residing in the judge's household" be deleted. The Committee believes that sentence does not pertain to solicitation and acceptance of gifts, which is the subject of the Rule. Therefore, the Committee suggests that Comment [1] to Rule 4.13 read as follows:

[1] A gift to a judge or to a judge's spouse, domestic partner or family member living in the judge's household that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office, and might require disqualification of the judge where disqualification would not otherwise be required. Because a gift to a member of the judge's family, spouse or domestic partner residing in the judge's household could reasonably be viewed as intended to influence the judge, a judge must inform those family members and his or her spouse or domestic partner of the relevant ethical constraints upon the judge in this regard and discourage those individuals from accepting gifts that the judge is not permitted to accept.¹ Regardless of whether Rule 4.13 directly prohibits receipt of a particular gift by a judge, his or her spouse, domestic partner or a member of the judge's family residing in the judge's household, other Rules in this Code may prohibit the gift. For example, Rule 4.01(b) would apply if the gift would

¹ Canon 4.D.(5).

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cast reasonable doubt on the judge's capacity to act with impartiality, integrity and independence. See the Terminology Section for the definition of a gift pursuant to this Rule.

The Standing Committee on Professionalism appreciates the opportunity to comment on the proposed drafts of the Model Code. If the Joint Commission has any questions regarding the Professionalism Committee's comments, please contact Professionalism Counsel Arthur Garwin at (312) 988-5294 or agarwin@staff.abanet.org.

Sincerely,

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