

Canons 1 and 2 - Reorganization
Senior Lawyers Division Judiciary Committee
Judge J. Thomas Greene and Judge James A. Noe
July 14, 2004

Responding to the Commission's 5/11/04 memorandum seeking comment on the First (Partial) Draft Proposals, the Senior Lawyer's Division Judiciary Committee ("SLDJC") finds the combination of canons 1 and 2 satisfactory. The SLDJC observes that maintenance of the "appearance of impropriety" criteria is important, and the Commission's effort to address vagueness issues is a definite improvement.

Rule 2.02
The Duty to Decide
Senior Lawyers Division Judiciary Committee
Judge J. Thomas Greene and Judge James A. Noe
July 14, 2004

Responding to the Commission's 5/11/04 memorandum, the SLDJC recommends retention of the last sentence of the Commentary to Rule 2.02 as a reminder to judges there is a duty to decide.

Rule 2.07 Comment 3
Demeanor and Decorum
Senior Lawyers Division Judiciary Committee
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Responding to the Commission's 5/11/04, the SLDJC notes that it is quite concerned about use of the term "debriefing" a jury in Rule 2.07 Comment 3, and inquires as follows out of concern that there is potential that colloquy with the trial judge could provide a basis for a new trial or appeal.

- What is the definition of "debriefing"?
- Will the definition of "debriefing" appear in the Terminology?
- What is the purpose?
- Who benefits?

Similarly, the SLDJC suggests greater clarity for the phrase "after their jury service is concluded," by posing the following questions.

- What does the phrase mean?
- Does it mean concluded for the trial just finished or will the juror be required to remain on the jury panel for another trial? If so, the issues discussed could carry over to the next trial.

Rule 2.08 Comment 2
Ensuring the Right to be Heard
Senior Lawyers Division Judiciary Committee
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Responding to the Commission's 5/11/04 memorandum, the SLDJC explains its belief that a judge who participates in settlement discussions where evidentiary matters are discussed and factual matters are revealed should not preside at the trial because the losing party may believe s/he lost because of what the judge learned about the case because of the settlement discussions. The SLDJC observes that a judge's engaging in settlement discussions followed by presiding at trial stretches the rule of most courts that offers of settlement cannot be used as evidence at trial.

Rule 2.09 Comment 8
Ex Parte Communications
Senior Lawyers Division Judiciary Committee
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In response to the Commission's inquiry in its 5/11/04 memorandum, the SLDJC agrees that Rule 2.09 should cover use of the internet by a judge. The SLDJC notes that a judge's access of the internet or electronic media to clarify the law, such as reading a law review article, is probably permissible; however, use of the internet for factual research, including opinions of experts, should be covered by Rule 2.09.

Rule 2.09 (a)(3)
Ex Parte Communications
Senior Lawyers Division Judiciary Committee
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The SLDJC cannot respond to the Commission's inquiry in its 5/11/04 memorandum because it is not clear to the SLDJC what the Commission means by "disqualifying interests" attributed to "consulted judges." Similarly, the SLDJC is unable to comment on the Commission's inquiry about "specialized courts."

Rule 2.12A
Disqualification
Senior Lawyers Division Judiciary Committee
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Responding to the Commission's inquiry in its 5/11/04 memorandum, the SLDJC believes the word "might" is too vague and urges the Committee to revise Rule 2.12A as follows. (Additions underlined; deletions struck through.)

- A. General Rule. In addition to disqualifying himself or herself in any of the circumstances in paragraphs (B) through (F) below, a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality would ~~might~~ reasonably be questioned.

The SLDJC observes that disqualification in this circumstance is necessary even if it creates a difficult situation for a lawyer.

Rule 2.20

Immunity

Senior Lawyers Division Judiciary Committee

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Responding to the Commission's inquiry in its 5/11/04 memorandum, the SLDJC urges the Commission to retain this Rule in the Code. The SLDJC observes that while it would be most appropriate if judicial immunity were legislatively created, the scope of judicial immunity is court created. The SLDJC further notes the importance of giving judges support and encouragement to act without fear of reprisal or law suite.

Rule 2.19

Disability and Impairment

Senior Lawyers Division Judiciary Committee

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The SLDJC is concerned that the terms "unimpaired" and "impairment" are vague. SLDJC notes that the ABA Standards for Judicial Retirement (2000) use the term "incapacity," which is defined as a "physical or mental condition that seriously interferes with the discharge of judicial duties . . ." The SLDJC suggests definition of "impair" in the Terminology section if it is used.

Rule 2.05 Comment 1

Bias and Discrimination

Senior Lawyers Division Judiciary Committee

Judge J. Thomas Greene and Judge James A. Noe

July 14, 2004

The SLDJC urges replacement of "could" with "would" in the first sentence of Rule 2.05 Comment 1 because "could" is vague and leaves too much room for speculation. The SLDJC proposes the following revision. (Additions underlined; deletions struck through.)

A judge must refrain from speech, gestures or other conduct that would create in reasonable minds ~~could reasonably be~~ . . .

The SLDJC is also concerned about the identity of persons encompassed by the phrase “. . . subject to the judge’s directions and control.” It notes that lawyers and parties are clearly included, however, some clerks and reporters are independent elected officers. The SLDJC also inquires whether the news media is a party subject to the direction and control of a judge.

Rule 2.09 Comment 1

Ex Parte Communications

Senior Lawyers Division Judiciary Committee

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The SLDJC notes that Comment 1 may conflict with the Rule to the extent that Rule 2.09 requires no advance notice for certain specific types of ex parte communication yet Comment 1 states that “all parties or their lawyers shall be included in communications with a judge.” Use of the phrase “reasonably possible” does not alter the fact that the Rule states no notice is required, but the Comment requires that parties or lawyers “shall” be included. The SLDJC proposes that, at the very least, “shall” should be changed to “should.”