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By Federal Express
Mark I. Harrison, Esq.
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Re: ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct

Dear Mr. Harrison:

We are the Chairs, respectively, of the Council on Judicial Administration, the Committee on Professional and Judicial Ethics, the Committee on Professional Responsibility and the Committee on Government Ethics of the Association of the Bar of the City of New York (the "Association"), an organization with approximately 21,000 members from all sectors of the legal profession. As we informed you in a letter dated December 18, 2003, our Committees have formed a joint subcommittee (the "Joint Subcommittee"), chaired by Ronald C. Minkoff, to make recommendations to the ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct (the "ABA Commission") and, if appropriate, to comment on any proposals made by the ABA Commission.[1] On August 3, 2004, we submitted Comments with respective to particular provisions of the ABA Commission's draft of Proposed Canons 1 and 2. Since then, we have continued our work. We now respectfully submit Comments with respect to provisions of Proposed Canon 2 that we had not addressed previously, as well as with respect to

[1] Members of the judiciary serving on the Joint Subcommittee are: Hon. Stuart Bernstein (U.S. Bankruptcy Court, S.D.N.Y.), Hon. Robert Levy (U.S. Magistrate Judge, E.D.N.Y.), Hon. Rosalyn Richter (N.Y. Supreme Court, N.Y. Co.), Hon. Jane Solomon (N.Y. Supreme Court, N.Y. Co.), and Hon. Michael Sonberg (N.Y. Criminal Court and Supreme Court (Acting Justice), Bronx Co.). Attorneys serving on the Joint Subcommittee are: Robert J. Anello (Morvillo Abramowitz Grand Iason & Silberberg, P.C.), Jeremy Feinberg (Proskauer Rose LLP), Richard Mattiaccio (Pavia & Harcourt LLP), Michael Patrick (Fragomen Del Rey Bernsen & Loewy, P.C.), Lawrence Piergrossi (Bronx Co. District Attorney), Scott Rosenberg (New York Legal Aid Society) and Robert Tembeckjian (New York State Commission on Judicial Conduct).

specific provisions of Proposed Canons 3 and 4. Our Comments are intended in part to address the questions posed in the ABA Commission's memoranda posted on your web site.

Canon 2.12

We support Proposed Canon 2.12(D). *First,* it appropriately adds a judge's "domestic partner" to the list of those whose economic interests could give rise to disqualification if the applicable conditions are met. Nevertheless, we have not seen the Commission's proposed definition of "domestic partner," and it is important to ensure that the term is not defined too broadly. Accordingly, we offer the following definition:

> "Two individuals, whether of the same or opposite sex, who are married or have a civil union pursuant to the laws of any state or country, are registered in a state or municipality as domestic partners, or who reside together as a couple and are interdependent financially."

We have defined "domestic partner" this way both to ensure that the rule will be clear and understandable to judges and because of an important implication of the proposed rule change: it requires a gay or lesbian judge to disclose relevant economic interests of his or her domestic partner, *even if the judge or the judge's partner has not yet made his or her sexual orientation publicly known.* In other words, the proposed Rule will have the effect of "outing" gay or lesbian judges or their partners who would have otherwise preferred to keep their sexual orientation private. This could lead to adverse employment consequences, and we must note that in many parts of the U.S. discrimination on the basis of sexual orientation is not illegal. Nevertheless, upon careful consideration, we believe the proposed rule should stand, since the importance to the parties and the court system of having judges disclose all potential economic interest conflicts transcends the interests of certain judges in maintaining their personal privacy.

Nevertheless, because of the privacy interests involved, we suggested adding the following language to Comment 2 of Proposed Canon 2.12:

> "A judge who does not wish to make the disclosure to the parties required by this Canon has the option of recusing him- or herself from the case without providing a reason or by simply citing this Canon, without more."

Second, it retains current Canon 3E(1)'s standard of requiring disqualification only when the judge (or another of the listed persons) has a more than *de minimis* economic interest "in the subject matter of the controversy or in a party to the proceeding." (We assume, of course, that the definition of "economic interest" contained in the current "Terminology" section of the Code – *i.e.,* "ownership of a more than de minimis legal or equitable interest" – will be retained.) New York judges who are members of our constituent Committees indicate that the previous, long-standing New York standard, which required disqualification if the judge had *any* economic interest in the case or a party, imposed an unreasonably heavy burden on judges (who had to be aware of and disclose their most insignificant "economic interests") and the judicial system (by requiring disqualification for minor economic conflicts). The *de minimis* standard in the current Model Code, adopted in New York in September 2004, remains more workable.

The ABA Commission has asked whether Proposed Comment [2] – which is currently a comment to Canon 3.E(1) – should be deleted. This comment states that judges "should" disclose on the record information that a judge believes the parties might consider relevant to disqualification, "even if the judge believes there is no real basis for disqualification." We favor retaining this comment. Indeed, we favor *requiring* the judge to disclose the existence of any economic interest, even if the judge believes the extent of the interest falls below the *de minimis* standard. If a judge were to disclose such information only when the judge believed there was a basis in fact and law for disqualification, then the disclosure would be largely meaningless; our proposal would give the parties necessary input into the disqualification decision. While we understand that such disclosures often place the attorneys in an uncomfortable position, particularly where one or more of them disagrees with the judge's position on disqualification, we favor a rule and Comments which require the judge to err on the side of disclosure, and to make a clear record on disqualification issues.

Canon 2.19 (Disability and Impairment)

The ABCNY has long supported lawyer and judicial assistance programs. Indeed, for the past six years we have maintained such a program and encouraged our membership to use it, with considerable success. We also support the public policy behind Proposed Canon 2.19 which, by requiring judges who know that a lawyer's or fellow judge's performance "is impaired by drugs, alcohol, or other mental, emotional or physical condition" to "take appropriate action," aims to ensure both help for the affected judge or lawyer and protection for the public. Still, we are concerned that the proposed reporting requirement is mandatory, and imposes an obligation on judges that is not imposed on other lawyers. We do not believe that a judge who, in the light of hindsight, is deemed to have "known" of her colleague's impairment, should be subject to discipline for failing to take action a disciplinary body later deems "appropriate." In light of these considerations, we respectfully submit that the word "shall" (*i.e.*, "shall take appropriate action") should be changed to "may." This will encourage judges to act without placing them at risk of sanctions for failing to make the correct diagnostic or treatment decision – something which, in any event, they are not trained to do.

We are troubled by the fact that the Comments to Proposed Canons 2.17 and 2.18 define "appropriate action" in the context of a judge learning about a lawyer or another judge's violation of applicable professional responsibility rules, but no such definition is supplied for Proposed Canon 2.19. Because the situation posited by Proposed Canon 2.19 involves an impairment by "drugs, alcohol, or other mental, emotional or physical condition" rather than a disciplinary violation, the standard should be different. We propose the following language, to be added at the beginning of the Comment:

> "'Appropriate action' means action intended or reasonably likely to help the judge or lawyer in question to correct the problem, or to protect innocent third parties. This corrective action may include direct communication with the judge or lawyer who is believed to have the impairment, direct communication with that judge or lawyer's partner or supervisor, or confidential referral to a lawyer or judicial assistance program."

Canon 3.01(Using the Judicial Office for Private Purposes)

In its July 20, 2004 memorandum, the Commission requested comment on Comment 5 of the Rule, which interprets the Rule to limit a judge's use of his or her letterhead for letters of reference or recommendation to situations in which the judge's statements are based upon "information obtained through the judge's expertise and experience as a judge." As we understand it, Comment 5 would permit a judge to write a recommendation for her very first law clerk, but not for one of the former associates she worked with while in private practice the year before. This distinction seems onerous and makes little sense, since it does not address what we believe to be the real concern behind Proposed Canon 3.01: avoiding the *misuse* of a judge's power and position to obtain a job for a friend or a former colleague. Whether this type of misconduct has occurred will turn on a variety of facts and circumstances going far beyond what letterhead the judge used to write the recommendation – a fact suggested by the plain language of Proposed Canon 3.01 itself. Therefore, we recommend limiting Comment 5 to state: "A judge may provide a reference or recommendation on the judge's letterhead for an individual based upon the judge's personal knowledge, as long as doing so does not involve other conduct suggesting the improper use of the prestige of the judge's office."

Canon 3.03 (Affiliation with Discriminatory Organizations)

We support many of the changes to this provision, particularly the expansion of the list of "invidious discrimination" to include discrimination based on "ethnicity" and "sexual orientation." Nevertheless, the language of the final phrase, which prohibits a judge from "us[ing] the facilities of such an organization to any significant extent," troubles us, since it may be construed as creating a loophole that allows judges to "use" the facilities of discriminatory organizations as long as that use is not "significant." For example, if a judge wishes to play golf with his friend who is a member of an all-white golf club, does she violate this rule and subject herself to discipline if she plays at the club once? Three times? Ten times? When does her use, under those circumstances, become "significant?" Proposed Comment 3, which states, on the one hand, that arranging a single meeting at a discriminatory organization is prohibited and, on the other, that a judge must "regular[ly]" attend the organization in order to violate the rule, does not provide sufficient guidance to answer these questions.

As we understand it, this new language was intended to impose further restrictions on judges, not give them a loophole to avoid anti-discrimination rules. Accordingly, we suggest that the language be changed to "and shall not engage in more than *de minimis* use of the facilities of such an organization." This *de minimis* standard will be both stricter and clearer than that contained in the current proposal.

Canons 4.01 and 4.02 (Appearances Before Government Bodies)

We agree with Proposed Canon 4.02, to the extent it permits broader participation by judges in public controversies. In analyzing the breadth of public participation permitted to judges under the Rule, we have attempted to read it in conjunction with Comment 5 to Proposed Canon 4.01, which permits a judge "as a private individual . . . to engage in writing, speaking, teaching, *or being otherwise active in regard to non-legal subjects.*" (Emphasis added). We find the italicized phrase impossibly vague. For example, does it permit judges, acting anonymously and as private citizens, to participate in political marches or rallies (to the extent doing so "is not in conflict with their obligations under the Code")? To act in network television shows? To operate a side business? Or is it intended, as some of our members believe, just to address academic or intellectual pursuits like writing, speaking and teaching? We respectfully request that this provision be clarified.

Canon 4.04 (Civic or Charitable Activities)

The Commission has requested comments on Proposed Comment 2, which imposes an across-the-board prohibition on judges soliciting funds in person, in writing or by telephone for charitable organizations – even if those organizations are small, school- or neighborhood-based groups such as girl scout troops or the school soccer team. It is simply too difficult to write a rule that permits some types of personal funds solicitation but not others. More importantly, the last sentence of Proposed Comment 2, by permitting judges to "participate in fundraising activities by performing tasks other than soliciting or accepting donations at fundraising events," gives judges sufficient scope to assist civic groups in meaningful ways without putting at risk the prestige of the judicial office.

We are troubled by Proposed Comment 5, which permits judges to serve as honorees at fund raising events for their law schools or a legal organization, but not for their college or high school alma maters. We see no purpose that is served by this distinction, and no danger that speaking at a college or high school will result in the judge/speaker "inappropriately lending the prestige of office" to those institutions. Indeed, speaking engagements of this type might have the beneficial effect of encouraging students to follow legal or judicial careers. We therefore recommend that a third sentence be added to Proposed Comment 5 stating: "A judge may also accept an invitation to speak at or be recognized or honored at an event hosted by his or her college or high school alma mater."

Canons 4.13 (Acceptance of Gifts) and 4.14 (Reimbursement or Waiver of Charges)

While we generally approve of this Proposed Canon, two areas trouble us.

First, Proposed Canon 4.13(a)(3) would permit judges to accept a free invitation (for the judge and the judge's spouse) not only to "bar-related function(s) or any activit[ies] devoted to the improvement of the law, the legal system or the administration of justice," but to any "widely-attended event," which is broadly defined as "a convention, conference, symposium, forum, panel discussion, dinner, viewing, reception or similar event at which more than 25 persons are expected to attend." The accompanying memorandum explains that this proposal is designed to encourage judges "to interact with the public they serve [since judges] would not be in a position to attend the many community events to which they are invited if they were obligated to pay their way." Canon 4.14 would permit judges to accept reimbursement or a waiver of charges for attendance at extra-judicial events so long as the receipt of reimbursement or acceptance of a waiver does not cast "reasonable doubt on the judge's capacity to act with impartiality, integrity or independence." Comments 1 and 2 to Canon 4.14 counsel judges to "evaluate" and "consider" whether to attend events sponsored by entities currently appearing, or likely to appear, before the judge, but they do not proscribe such attendance. Comment 3 to Canon 4.13, on the other hand, makes clear that judges are prohibited from accepting gifts "from lawyers or their firms," or "from clients of lawyers or their firms," if the lawyers, the clients, or the "clients' interests have come or are likely to come before the judge."

We find the interplay between these provisions insufficiently clear. We believe the Code should give clear guidance that free invitations, reimbursements and waivers of charges for attendance at legal events sponsored by entities currently appearing or likely to appear before the judge are prohibited. In other words, Comments 1 and 2 to Canon 4.14 should be made consistent with Comment 3 to Canon 4.13. It should not be left to a judge's discretion to consider whether free attendance at such events would cast

"reasonable doubt" on the judge's capacity to act impartially. Exceptions should be specified so that the judge may attend events sponsored by the judge's employing entity (whether local, state or federal government), any other governmental entity, and events sponsored by Bar Associations and law schools.

Though we support its use, we are troubled by the phrase "are likely to come before the judge." We are concerned that it may be construed to require judges to conduct some kind of investigation, either to determine the identity of the entity sponsoring a particular event or to determine whether that entity is likely to appear before the judge. We believe the Comments should make clear that no such inquiry is required.

Beyond this, we are concerned by the general broad scope of both Proposed Canon 4.13(a)(3) and the definition of "widely attended event." They allow too much room for corporate sponsors, political parties, and religious groups to provide free invitations for judges to attend fancy dinners, receptions and openings. Indeed, this proposal would permit judges and their spouses to receive all-expenses paid trips to corporate-sponsored seminars in exotic locations – without the judges even having to give presentations – as long as more than 25 others attend. The potential for political, religious and corporate groups of all persuasions to use this opportunity to curry favor with judges, and the danger that the public would perceive this as taking place, is manifest.

Second, Proposed Canon 4.13(a)(7) would allow judges to accept individual gifts from certain donors valued at less than $50, or a "series of gifts from the same source whose value in the aggregate does not exceed $150." Meanwhile, Proposed Canon 4.13(b) would require judges to report gifts "that alone or in the aggregate with other gifts from the same source in the same calendar year exceeds $250 in value." These provisions strike us as inconsistent: if the judge may not "solicit or accept" gifts larger than those listed under Proposed Canon 4.13(a)(7), why should the judge at the same time be permitted to accept larger gifts under Proposed Canon 4.13(b) so long as they are reported?

Moreover, we recommend against setting specific dollar limits in the Model Code. The amount should be left blank, so that each state can determine the acceptable limits on gift giving based on local customs and economic conditions. For example, a $50 gift might not be considered unduly large in a state or locale with a higher cost of living, but might be where the cost of living is lower.

In sum, the proposed dollar limits should be eliminated, and the amounts left blank for a state-by-state determination. If the Commission nevertheless decides to include dollar limits, the limits in Proposed Canon 4.13(a)(7) and Proposed Canon 4.13(b) should be consistent.

Proposed Canon 4.16 (Reporting of Compensation, Reimbursement and Waiver of Charges)

Proposed Canon 4.16(b) requires judges to report "at least quarterly" any "compensation, reimbursement or waiver of charges," the name of the "payor or waivor," and the amount of compensation, reimbursement or waiver received. While we recognize the importance of such reports, we wish to ensure that they do not become so burdensome to judges and confusing to members of the public that their usefulness is lost. As written, Proposed Canon 4.16(b) would require the judge to report *any item* of compensation, reimbursement or waiver, whether or not considered a "gift" under the Code or permitted under Proposed Canons 4.13, 4.14 and 4.15. We believe the reporting requirement should be limited to "gifts" as defined by the Model Code.

Furthermore, we believe that a quarterly reporting requirement is far too onerous. Judges should be required to report annually, or in a manner consistent with the laws of the jurisdiction in which the judge serves. Most jurisdictions have reporting requirements of their own; judges should not be subjected, through the Model Code, to multiple or dual reporting requirements. Moreover, we fear that requiring judges to report more than once each year will place an undue burden on them and the court administrators who will have to monitor compliance with the reporting requirement. The recent press coverage of gift reports filed by the Justices of the U.S. Supreme Court shows that annual reports are more than adequate to disclose the extent to which a particular judge is willing to accept gifts. *See, e.g.,* "Thomas' Acceptance of Gifts Tops Justices," Los Angeles Times, December 30, 2004, p. 1.

There should, however, be one exception: judges should be required to report immediately the receipt of any "gift" to any parties who the judge reasonably believes might consider that gift relevant to disqualification. This will enable those parties to take whatever steps they deem necessary to protect their interests.

We appreciate the opportunity to comment on these proposals. Our Committees, and the Association in general, again congratulates the ABA Commission on its excellent work so far. We remain committed to the process of assisting the ABA Commission in any way we can. To that end, the Association would greatly appreciate the opportunity to have its representatives testify at the public hearing scheduled in Salt Lake City on Friday, February 11, 2005. We will contact Eileen Gallagher in the hope that we can make those arrangements.

Please call us if we can be of any further assistance, or if you have any questions.

Very truly yours,

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