August 3, 2004

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 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. In May 2004 the ABA Commission issued its draft of Proposed Canons 1 and 2 (the "Proposed Draft"). The Proposed Draft was accompanied by a request for responses by July 15, 2004. Because our Committees meet just once each month (and do not meet at all in July or August), and because so many Committees were involved, we were unable to provide a thorough analysis or comprehensive review of the Proposed Draft by the July 15 deadline. We do, however, have responses to specific proposals that we respectfully submit to the ABA Commission.

Proposed Canon 1 (Conduct in General)

In the Commentary to Proposed Canon 1, the language which appears in the Commentary to current Canon 2.A ("A judge must avoid all impropriety and appearance of impropriety") seems to have been replaced by more indirect phrasing ("Avoiding impropriety and its appearance is an overarching principle of judicial conduct embodied in this Canon"). We believe the original language is clearer and should be restored.

Proposed Canon 2.02 (The Duty To Decide)

The commentary to new Canon 2.02, which derives from current Canon 3.B(1), has been expanded, and a sentence has been added stating: "A judge must not use recusal or disqualification to avoid difficult or controversial issues." We endorse this principle. The drafters have asked for input on whether the sentence is best located under Canon 2.02 or 2.12 (disqualification). In our view, the principle would be worth stating in both locations.

Proposed Canon 2.04 (Impartiality and Fairness)

Draft Canon 2.04 reads, "Impartiality and Fairness: A Judge shall apply the law without regard to the judge's personal views and shall decide all cases with impartiality and fairness." The proposed Commentary says that the judge's "personal views, by themselves, should not be controlling," even though "a judge's background and philosophy may influence the way in which the judge analyzes, interprets and applies the law." The Commentary presents the correct nuance to this issue, but the proposed text of the Canon fails to capture the nuance of the Commentary.

We feel the statement that a judge should act "without regard" to his or her "personal views" sets a standard that is neither possible nor desirable to attain. Judges certainly must apply the law as set forth by the Constitution, by the legislative branch, and by higher courts where applicable, even if they personally disagree with these enactments and precedents. At the same time, as the Commentary acknowledges, most judges bring a philosophy and a set of core values to the bench. To expect these to be cast aside would deny the humanity of the judicial process, at least in the case of appellate judges who shape the law, and in the case of trial judges when exercising the discretion that is lawfully committed to them.

Our preference would be simply to delete the phrase about personal views, have the Canon read, "A judge shall decide all cases with impartiality and fairness," and use the Commentary, as proposed, to flesh out what this means.

Proposed Canon 2.08 (Ensuring the Right to be Heard)

The Commission has invited comments on Comment paragraph [2] to Rule 2.08 Ensuring the Right to be Heard. We believe the Comment should remain unchanged. Judges should be encouraged to facilitate settlement in cases pending before them, as settlements typically save time and money and conserve scarce judicial resources. Unless a litigant objects, judges should be permitted to conduct settlement conferences in cases pending before them that will be tried to a jury.

Proposed Canon 2.09 (Ex Parte Communications)

The ABA Commission is seeking input on three questions concerning Proposed Canon 2.09. The first is whether the Rule or its commentary should address directly the newly expanded range of information available to judges through the use of the Internet and electronic research methods. In this regard, the ABA Commission has proposed Comment [8], which states: “The prohibition against a judge investigating the facts of a case independently or through a member of the judge’s staff, extends to information available in all mediums including electronic access.” Because facts obtained on the Internet and in other electronic media are often incomplete or incorrect, we support this important principle.

The second question concerns Proposed Canon 2.09(a)(3), which permits judges to consult with other judges. This is not new; existing Canon 3.B(7)(c) permits the same thing. However, the ABA Commission has proposed adding the following clause: "and the judge does not abrogate the responsibility to personally decide the case and takes all reasonable steps to avoid receiving factual information that is not part of the record." Aside from the syntax – respectfully, the sentence should read "so long as the judge does not . . ." or "provided that the judge does not . . ." -- we believe this addition is a good one. The question posed by the ABA Commission is whether it is also necessary to add a clause addressing the possibility of disqualifying interests that might be attributed to "consulted" judges. We recognize that an analogous issue involving lawyer-to-lawyer consultations (particularly between lawyers in different firms) has been addressed in ethics opinions (*see, e.g.,* ABA Formal Op. 98-411). Nevertheless, we believe regulating judge-to-judge consultations has no place in the Code for both procedural and substantive reasons. First, this involves a point of professional responsibility law that is too narrow for inclusion in the Code; the rules on this point should come from ethics opinions, court decisions and other sources. Second, and in any event, trying to regulate judge-to-judge contacts in this manner is neither necessary nor workable.

The third question posed by the ABA Commission is whether the Code should take account of ex parte communications that are encouraged, or even required, in the course of a judge's service on a "specialized court," such as a "drug court" or "domestic abuse court." We are extremely leery of making exceptions to prohibitions on ex parte communications for any specialized courts. In the past, numerous complaints were received regarding certain Housing Court judges who made a practice of communicating ex parte with the New York City Department of Housing Preservation and Development concerning pending eviction cases. These contacts were wrong and should not have occurred. We resist the invitation to open the door, however narrowly, to ex parte communications of this kind in any judicial proceeding.

Finally, Proposed Canon 2.09(a)(2), and Comment [5] to that section, which have not been changed in the new draft, provide that a judge may seek out the advice of a disinterested expert so long as the parties are given notice and an opportunity to respond, and that "[a]n appropriate and often desirable method of obtaining the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae." We have serious concerns about the breadth of this provision, given that so-called "disinterested experts" may not always be as disinterested as they appear, and that ex parte discussions with such experts risks unfairness to one or both parties, particularly because this seems to permit the judge to consult with the outside expert about very specific issues relating to the case before notifying the parties. Nevertheless, we are reluctant to prohibit judges from consulting with law professors and others about general legal principles. We therefore suggest that the Code include a comment that a judge may independently consult with others regarding general legal issues, without naming parties or giving factual details concerning particular cases.

Canons 2.12 (Disqualification) and 2.19 (Disability and Impairment)

We are still in the process of reviewing these issues, and hope to have a fuller response in a few weeks. We respectfully request that we be given the opportunity to comment on these proposals then.

Canon 2.20 (Immunity for Discharge of Duties)

Canon 2.20 purports to confer an absolute privilege on judges acting pursuant to Canons 2.17, 2.18, and 2.19 (concerning judicial misconduct, lawyer misconduct, and lawyer or judge disability and impairment). Because only the Legislature is authorized to confer such immunity – at least in New York -- such a provision is not appropriately placed in an ethics code.

We appreciate the opportunity to comment on these proposals. While our Committees have not had the time to undertake a comprehensive detailed examination of the May 2004 draft revisions, they appear to reflect an impressive piece of work and we congratulate the Commission on its effort so far.

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

Very truly yours,

Daniel Murdock
Chair, Council on
Judicial Administration

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cc: Betsy Plevan, Esq.
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