SPECIAL COMMITTEE TO REVIEW THE CODE OF JUDICIAL CONDUCT

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Comments on the Preliminary Report of the
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct[*]

The New York State Bar Association (NYSBA) Special Committee to Review the CJC is pleased to provide these comments on the Preliminary Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, dated June 30, 2005. These comments have not been reviewed or approved by the House of Delegates of the NYSBA and therefore represent only the views of the Special Committee. Our comments below are divided into substantive and drafting comments. We are not repeating comments we made on earlier drafts and that have not been addressed by the Joint Commission.

Substantive Comments

Canon 2.

Rule 2.09. We believe the comment should give an example of the conduct by a judge to encourage settlement that may be coercive. We recommend the following be added on page 6, line 27, at the end of the current comment:

"It may be deemed coercive for a judge to express an opinion on the relative strength or weakness of a party's position other than at the request of such party."

Rule 2.12. The Joint Commission asks whether a judge should disclose on the record information that the judge believes that parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes that there is no real basis for disqualification. We agree that this disclosure is appropriate, as recognized by New York Code of Professional Responsibility in a similar circumstance with respect to lawyer conflicts of interest. See EC 5-19 ("[T]he lawyer should explain any circumstances that might cause a client to question the lawyer's undivided loyalty."

Rule 2.12(a)(6)(v)(page 12, line 12). We are not sure whether this is a substantive problem or a drafting problem, because the purpose of this provision is not clear. The provision seems inconsistent with established law that what a judge learns in the courtroom or decides thereafter is not disqualifying. Is the objective to disqualify a judge after every appeal resulting in a remand? Does it mean that, if an appeals court judge sat on a panel, he/she is disqualified from an en banc rehearing? Or that a judge who heard pre-trial motions cannot hear the case? That a federal judge who presided over discovery in the case as a federal magistrate is disqualified? All are clearly included in the current proposal and we would disagree with the result in all such cases. At a minimum, we believe the Joint Commission needs to explain the problem it is attempting to address.

[*] The Special Committee is solely responsible for the contents of this report. Unless and until adopted in whole or in part by the Executive Committee and/or House of Delegates of the New York State Bar Association, no part of the report should be considered the official position of the Association.

Canon 3.

Rule 3.04 (page 3, line 2). We believe the Joint Commission should eliminate the final clause, "to a significant extent." Similarly, the Joint Commission should eliminate "significant" in comment 2, line 22, and delete all of comment 3. The Code requires a judge to avoid expressions of bias or prejudice in both official and personal capacities. It also exhorts judges to avoid the appearance of impropriety. We believe it is no longer permissible for judges to use or benefit from the facilities of an organization that discriminates on any of the listed bases. The test for "significance" set forth in comment 3 depends on whether the frequency or nature of the use of the facilities of the organization is "sufficient to create the impression that the judge approves of the organization and its practices." We believe that the classes of people discriminated against are likely to believe that use of the facilities of an organization that invidiously discriminates constitutes support of the organization. Consequently, any such use should be prohibited.

Canon 4.

Rule 4.02(b)(page 2, line 21). We believe the Joint Commission should delete "acquired in the course of the judge's judicial duties". Although most expertise of a judge acquired before ascending to the bench is likely to be subject to the exception for "matters concerning the law, the legal system or the administration of justice", we see no reason to limit appearances before governmental bodies on other matters in which the judge has particular expertise. It is no more likely that testifying based on such expertise will interfere with the proper performance of judicial duties, cast doubt on the judge's capacity to act with integrity, impartiality and independence, or use the prestige of judicial office, than would be the case where the judge testifies based on expertise acquired as a judge. Similarly, eliminate "judicial" in comment 2, line 15.

Rule 4.04(A)(1)(a) (page 4, line 14-15). This section would allow a judge personally to solicit funds for a civic or charitable organization on an "other than de minimis basis." It is our opinion that a judge should not participate in person in any charitable fundraising, whether de minimis or not. We do not believe that the definition of "de minimis" in comment 3 (which includes, but apparently is not limited to, insignificant, incidental, or behind-the-scenes activities that do not use the judge's name or title and situations where the judge's role is no more active or visible that that of other participants (which may, of course, be significant)necessarily reduces the judge's participation to a level that eliminates the possibility that the organization is using or benefiting from the prestige of judicial office.

Rule 4.04(a)(2)(ii)(page 4, line 34). The current Code allows a judge to participate in <u>planning</u> fundraising. The proposed amendment (line 34) would allow a judge to "assist" an organization in all aspects of fundraising, as long as in person solicitation is not more than de minimis (page 4, line 14-15). See also comment 3, which allows a judge to "participate" in fundraising activities by performing tasks other than soliciting or accepting donations at fundraising events. We do not believe that the decision to expand the permitted activities beyond planning has been adequately explained or that the judge's activities have been adequately limited. If activities other than planning are to be allowed, we believe more examples would be helpful. However, it is our opinion that a Judge should not participate in any charitable fundraising, whether de minimus or not.

Rule 4.04, cmt. 12 (page 8, line 15). The sentence beginning on line 15 states that service on the board of a public educational institution would be prohibited under Rule 4.03. Rule 4.03 is limited to governmental positions that are concerned with issues of fact or policy. It is not immediately evident why service on the board of an educational institution involves issues of fact or policy or why the Code distinguishes between service on the Board of public and private educational institutions (other than law schools). If there is to be a continuance of the distinction between serving on the board of a public or private educational institution, we believe the rationale should be more clearly stated. Compare the language deleted from comment 11
- "the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication."

Canon 5

Rule 5.01, introduction (page 1, lines 12-13). This Rule prohibits a judge from engaging in certain activities "directly or indirectly." A c omment should make clear that the prohibition of "indirect" activity does not apply to spouses and non-minor children acting on their own account.

Rule 5.01(c) and Rule 5.02(e)(page 1, line 19, page 6, line 2). Rule 5.01(c) prohibits publicly endorsing a candidate for any public office. Rule 5.02(e) has an exception, during a partisan campaign, for endorsing candidates for a position on the same court. There is no comment on how these provisions apply to group ads or "running on the same ticket", which is an extremely common occurrence. We believe there should be a comment stating that, in a partisan election, running on a "slate", or group palm cards or lawn signs for which each candidate pays no more than a pro rata amount of the cost, do not constitute "endorsing other candidates" within the meaning of Section 5.01(c).

Rule 5.01(e)(page 1, line 25). We would eliminate the "unless" clause in Section 5.01(e) and move the prohibition against purchasing tickets except for the judge's personal use to Section 5.02. We appreciate the fact that the Joint Committee may have felt that allowing judges to purchase tickets to political events at times when they are not active candidates may be more likely to survive challenge on First Amendment grounds. However we believe that the compelling state interest in the independence of the judiciary is so strong that the ABA should not compromise this important principle without a mandate to the contrary from the U.S. Supreme Court.

Rule 5.01(f)(page 1, line 31). This rule prohibits "publicly identifying oneself as a candidate of a political organization." We believe a judge subject to election should always be able to communicate truthful information as to affiliation and endorsements. For example if a judge is speaking, two years after the judge's last election and 8 years before the end of the judge's term, at a bar association seminar on how to become a judge, what reason is there to prohibit him or her from stating "I obtained the endorsement of the Democratic party and the National Association of Teachers, and found them very helpful."?

<u>Drafting Comments</u>

1. Definitions.

a. The definition of "candidate" indicates when a person becomes a candidate. It does not indicate when a person is no longer a candidate. Is an elected judge always a candidate? Is a judge only a candidate until the date of the election? Is there some grace period after the election when the candidate's committee can continue to engage in fundraising?

b. In the definition of "gift" [paragraph A, page 2, line 2], we believe that "not a corporation" should be amended to read "not a law firm, corporation or other organization." Otherwise, judges would be prohibited from accepting social hospitality only from entities in corporate form. In particular, they would be allowed to accept such hospitality from many law firms not incorporated as LLCs (e.g. to attend a firm outing or holiday party), unions and other entities whose primary purpose in socializing with a judge is motivated by business considerations. While we believe judges should be able to socialize with their neighbors, even if their neighbors are lawyers, we see no reason for social hospitality to be sponsored by entities rather than individuals.

c. In the definition of "impropriety", we believe line 26 should read "integrity, impartiality, independence and competence". Compare Section 1.03, cmt 2 (the test for impropriety is whether the conduct would create . . . a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality, independence and competence is impaired.")

d. The definition of "spouse" has been amended to include domestic partners. But individual sections, e.g. Rule 2.12(a)(2) and (3), include both "spouse" and "domestic partner". We are inclined to have a separate definition for "domestic partner" and propose the following, which is based on a proposal from the NYSBA Committee on Standards for Attorney Conduct in the context of the attorney code:

e. "Domestic partner" denotes a person at least eighteen years of age who has either (i) registered as a domestic partner with any registry of domestic partners or civil unions maintained by the employer of either party or by any country, state, county, city, town or village or (ii) maintains a committed personal relationship with a judge as evidenced by factors including, but not limited to, economic interdependence, shared residence, children in common, intent to marry and common ownership of real or personal property."

2. Rule 1.01, cmt 1, line 4. "foster" should be "fosters".

3. Rule 1.01, cmt 2, line 1. Delete "also".

4. Rule 1.04. Page 3, line 1. "require compliance with statutes and court rules" should read "require the judge's compliance with statutes and court rules". Otherwise, it could be read as requiring the judge to be law enforcement officer.

5. Rule 2.10(a)(2). In the current version of the Rule, the phrase "affords the parties reasonable opportunity to respond" clearly applies to the opinion from the disinterested expert. But in the revision, it appears to apply to the judge's decision to seek the opinion. We believe the clause should be revised to read "and affords the parties reasonable opportunity to respond to the information and opinions provided by such expert".

6. Rule 2.11(b) and comment 4. The comment allows a judge to respond directly (or through a third party) to allegations in the media or elsewhere concerning the judge's conduct in a matter. While we agree with this decision, we believe Canon 2 should have the same admonitions as Canon 5. Compare Rule 5.01 and cmts 12 and 13. (The response must be measured and dignified and it is preferable for someone else, such as a bar association, to make the response.) Indeed, these comments are far more appropriate in a non-election situation, since bar associations are more likely to be willing to come to the aid of a judge when the context is not a contested election.

7. page 10, line 24. We object to the change from "impartiality might reasonably be questioned" to "impartiality might be questioned by a reasonable person. The phrase "impartiality might reasonably be questioned" has been in use for so long that we do not believe it should be changed. The explanation that "impartiality might reasonably be questioned" means "might be questioned by a reasonable person" belongs in a comment and not in the black letter rule. The problem is compounded because, while the standard has been changed in the black letter, it has <u>not</u> been changed in the comments. Thus Comment 1 (page 12, line 36), comment 3 (page 13, line 15) and comment 4 (page 13, line 20) all use the "impartiality might reasonably be questioned" language. Indeed, comment 4 quotes Rule 2.12(a), incorrectly, under the current version of the rule.

8. Rule 2.12(a)(2) and (3). As noted above in the definition of "spouse," the ABA has added "domestic partner" to the list of relatives. They have also added it to the definition of "spouse." It does not need to be in both places. Our preference is to leave it in these Rules, but to remove it from the definition of "spouse."

9. Rule 2.12, cmt 4. The second line of this comment uses the term "relative", without definition. So does the existing CJC. Should this be limited to the knowledge of the judge? Relatives within the third degree of relationship?

10. Rule 2.12, cmt. 6 and 7. Both terms are defined in the definitions and do not need to be defined in this Section.

11. Rule 2.14 and cmt 1. The meaning of ensuring that the judge's staff "act in a manner consistent with this Code" is unclear, since this Code does
not apply to persons other than judges. Under the existing Code, when
there is a provision that the judge's employees are supposed to comply with, it is specified (e.g. ex parte communications, exhibiting bias). We believe that specifying the applicable provisions is the better practice.

12. Rule 2.17. The word "other" on the third line of t his section should not be deleted.

13. Rule 2.17 cmt. 1. Change "fellow judges" to "judicial colleagues," which is more gender neutral.

14. Rule 2.19, cmt. 2. We question whether comment 2 is consistent with comment 1. Comment 1 indicates that what constitutes appropriate action depends on the gravity of the problem. Comment 2 seems designed to protect the impaired judge and not the judicial system. This seems inconsistent with the goal of ensuring that judges can carry out judicial responsibilities with integrity and competence, and thus improper. See Rule 1.03, cmt. 3.

15 . Rule 4.01, cmt. 1, line 16. We believe "understanding of how courts and the judicial system affect their lives, should be changed to "understanding of the courts and the judicial system."

16. Rule 4.01, Cmt. 3, line 29 through line 2 on page 2. Delete the sentence beginning "In many instances." Even activities to improve the law, the legal system and the administration of justice may affect the impartiality of the judiciary.

17. Rule 4.02(c). Delete the words "pro se", because a judge should be able to testify even if the judge is represented.

18. Rule 4.03, cmt. 1. Line 26 refers to impartiality of the judge. We believe independence is also implicated when a judge is appointed to governmental bodies by the Executive, and we recommend adding "independence" to line 26 as a consideration.

19. Rule 4.04. Introduction. All of these requirements are part of Rule 4.01. Is there any reason to repeat them?

20. Rule 4.04(A). "A" should be "a".

21. Rule 4.04, cmt. 1. In the first sentence, delete "for the benefit of the community of which the judge is a part." It is not a requirement of the black letter. Perhaps it should be a declarative statement rather than a condition.

22. Rule 4.04, cmt 2. Note that there are two comments numbered "[2]".

23. Rule 4.04(a), cmt. 2, line 17. There should be a comma between "in person" and "in writing".

24 . On line 19, it is not clear why the comment does not track paragraph
(a)(2) of the rule in allowing solicitation of members of the judge's family as well as judges over whom the judge exercises no appellate or supervisory control.

25. Rule 4.12(a)(7)(ii). On line 17, "r" should be "or".

26. Rule 4.12, cmt 4. It is not clear why line 32 refers to the integrity of the judicial office rather than the integrity of the judge who receives the gift.

27. Rule 4.13, cmt. 2. On lines 24 and 25, the references to Rule 3.03 should be to 3.04.

28. Rule 4.13, Cmt. 3, p. 18, line 5. "Are" should be "is".

29. Rule 4.15. There should be no period at the end of the heading.

30. 2. Rule 5.01(e). If a candidate cannot personally solicit campaign contributions, should a candidate be sponsoring dinners or other events?

31. Rule 5.01(e). The meaning of "personal" use is unclear. Does this mean the judge's own use? Or could it include the judge's spouse or family?

32. Application Section I(B)1)(b). The cross references to Canon 4 after Rule 4.07 are incorrect. (In each case they should be one number lower. In addition, Section 4.11 is called "For Profit" Activities and not "Business Activities".

33. Application Section I(C)(1)(b). Ditto.

34 . Application Section I(D)(1)(b). Ditto, and Section 4.11 is out of order.

35. Application Section II (Time for Compliance). Ditto.