

MEMORANDUM

To: Executive Committee

From: Daniel J. La Fave, Chair
Legislative Subcommittee of the Bench-Bar Committee

Copy: Bench and Bar Committee
Review Project Participants
Daniel J. La Fave
Judge Paul Lundsten
David Nispel
Judge George Curry

Date: August 31, 2005

Re: **Review and Comments Concerning June 30, 2005 Preliminary Report by ABA Joint Commission to Evaluate the Model Code of Judicial Conduct**

As requested by Executive Director George Brown, we have reviewed the above-referenced report, as well as the latest draft of the proposed Revised Model Code of Judicial Conduct.¹ As our group has previously addressed earlier drafts of Canons 1 through 4, we focused our efforts on draft Canon 5, which addresses acceptable political conduct of judges and judicial candidates.

With one exception, we think it unnecessary to repeat our comments on the earlier draft canons, many of which continue to apply (*e.g.*, the overly extensive use of comments). The exception relates to Draft Rule 2.20 ("Immunity for Discharge of Duties"). In its June 30, 2005 Preliminary Report, the Joint Commission once again specifically asked for comment on whether such a rule is appropriate. We continue to think not, and that rules of immunity are better left to legislatures. As with the existing version of the Code, the Scope section of the current Preliminary Draft states that "The Code is not designed or intended as a basis for establishing civil liability or instituting criminal prosecution." The proposed immunity rule therefore seems unnecessary to us, and in fact seems to contradict this prefatory statement.

Turning to Draft Canon 5, we have concerns about Rule 5.03's apparent prohibition on a judge or candidate for judicial office completing a questionnaire "if he or she knows or has reason to know that the purpose of the questionnaire is for a political organization to decide whom to endorse in a non-partisan judicial election." Rule 5.03, Cmt. 2. The definition for "political organization" is ambiguous since it turns on whether the "principal purpose" of the group in question "is to further the election or appointment of candidates for political office." Terminology Section, p. 3.

¹ A copy of the Joint Commission's June 30 report, as well as a copy of the current draft of the revised code redlined against the current code is attached hereto.

We think that it would be difficult for a candidate to police how a given questionnaire is likely to be used. The requesting organization could have every appearance of being non-partisan, yet the questionnaire could nevertheless end up being used to advance a political agenda (whether by the requesting group, affiliates, or others). Similarly, it would often be difficult to divine what the "principal purpose" of certain groups is.

Draft Rule 5.03 also appears to be more restrictive than the newly adopted Wisconsin SCR 60.06(5), which permits judges and judicial candidates to "solicit and accept endorsements from the types of organizations that ordinarily make recommendations for selection to the office." The comment to that rule recognizes that endorsements are "an important method of informing the electorate of broad-based and presumably informed support for a particular candidacy. . . . Candidates for judicial office may solicit and accept endorsements from entities that regularly endorse candidates, such as newspapers and trade organizations."

We are concerned that if the use of questionnaires becomes more restricted, it could prevent the electorate from becoming adequately informed about a candidate.

Because of the foregoing concerns, the majority of our group would favor an approach more in keeping with the one currently embodied in Wisconsin SCR 60.06(5).

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The Joint Commission has asked that any further comments be submitted by Thursday, September 15, 2005. We recommend that the Executive Committee do so on behalf of the State Bar in connection with Drafts Rules 2.20 and 5.03 along the lines set forth above.

As in the past, should the Executive Committee require any additional input from us in connection with this project, we would be happy to oblige.