



**SUPREME COURT ADVISORY COMMITTEE
ON THE CODE OF JUDICIAL ETHICS**

350 McAllister Street
San Francisco, CA 94102

(415) 865-7060

August 26, 2005

Debra D. Taylor
American Bar Association
Center for Professional Responsibility
321 North Clark Street
Chicago, Illinois 60611

Dear Ms. Taylor:

Thank you for the opportunity to comment on the Preliminary Draft of the ABA Model Code of Judicial Conduct, 2005. These comments are submitted on behalf of the California Supreme Court's Advisory Committee on the Code of Judicial Ethics, which met on July 25, 2005, to discuss the proposed changes to the Model Code.¹

The committee's role primarily is to consider issues referred to it by the Supreme Court and to make recommendations regarding changes to the California Code of Judicial Ethics, which is adopted by the court. While the committee typically does not act independently of the California Supreme Court, the court has authorized the committee in this instance to submit comments directly to the ABA. These comments reflect the views of the members of the committee rather than the justices of the California Supreme Court. Please be advised that the committee has not taken a position on the provisions of the Preliminary Draft not addressed in this letter; therefore, no conclusions should be drawn from the lack of comments on other proposed rules. The committee focused primarily on the specific requests for comment set forth on pages 4–8 of the Introductory Report, and responds here to several of them.

The California Code of Judicial Ethics differs in many respects from the Model Code. The California code reflects the judicial experience in this state and we believe our code has worked well to ensure an ethical judiciary. Therefore, the committee uses our code as a standard and offers comments only on certain aspects of the Model Code that relate to provisions in our code.

¹ The committee members are Hon. Richard D. Fybel (Chair), Associate Justice of the Court of Appeal, Fourth Appellate District, Division Three; Hon. Teresa Estrada-Mullaney, Judge of the Superior Court of California, County of San Luis Obispo; Ms. Beth Jay, Principal Attorney to the Chief Justice of California; Hon. Barbara J.R. Jones, Presiding Justice of the Court of Appeal, First Appellate District, Division Five; Hon. David Rothman (Retired); Hon. Laurence D. Rubin, Associate Justice of the Court of Appeal, Second Appellate District, Division Eight; and Hon. Brian Walsh, Judge of the Superior Court of California, County of Santa Clara.

Preamble

For the most part, the committee supports the preamble in the Preliminary Draft. The Preliminary Draft endorses the essential qualities of a good judge, including integrity, impartiality, independence, and competence. It also reflects the principle that judges must promote public confidence in the judiciary. The committee disagrees, however, with the emphasis on promulgating “black letter” rules. We believe the focus on black letter rules detracts from the essence of what it means to be a judge. Although the code must set forth various prohibitions and standards of conduct, the principal focus of the code should be to assure the honesty and integrity of the judicial decision-making process and the decision itself, thereby assuring public confidence in that process and decision. As stated by retired Judge David Rothman, a leading California expert on judicial ethics, the code “is not just a set of rules. It embodies those principles that our system of justice articulates as essential ingredients to preserve the rule of law.” (Rothman, California Judicial Conduct Handbook (2nd ed. 1999), p. 5.) Rather than focus on these judicial principles, the preamble seems to reflect the idea that ethical principles should be reduced to “black letter Rules.” Use of the word “rule” throughout the draft is symbolic of this approach. We also believe there are several instances in which the attempt to frame black letter rules may lead to confusion and ambiguity.

Canon 1, Rule 1.01

The committee wholeheartedly agrees the Model Code should retain the “appearance of impropriety” language. There have been several instances of misconduct in California and elsewhere in which the discipline has hinged on the finding of an appearance of impropriety. To limit the discipline of judges to actual impropriety would preclude addressing conduct that is clearly improper and would adversely affect the administration of justice and undermine public confidence in the judiciary. Moreover, the requirement that judges avoid the appearance of impropriety serves to promote the goals set forth in the preamble.

Canon 2, Rule 2.05

In Comment [3] to Rule 2.05, the Preliminary Draft deletes the word “sexual” before the word “harassment.” Due to increased concerns and awareness about sexual harassment and a few instances in the last several years of the imposition of discipline by the California Commission on Judicial Performance based on such conduct, the California Supreme Court recently moved the prohibition against sexual harassment from the commentary into the body of the canon. California’s canon 3B(5) now provides:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment.

At the same time, the Supreme Court adopted a parallel canon—canon 3C(5)—applicable to judges performing administrative duties.

The committee believes that California's approach of explicitly banning sexual harassment is appropriate given increased attention to and alleged incidents of sexual harassment in recent years. The deletion of the reference to "sexual" harassment in the Preliminary Draft is contrary to California's conclusion that express prohibition is preferable.

Canon 2, Rule 2.10

The Introductory Report states on page five that several commentators informed the Joint Commission that judges presiding in "specialized courts" are sometimes encouraged or required to engage in communications with individuals and entities outside the court system itself. The Joint Commission seeks comments on this issue, although it has made no specific proposals to date. Our committee will be reviewing this issue to determine whether to make a recommendation to the California Supreme Court. The committee believes that because of the evolving nature of certain judicial functions, the Joint Commission should consider formulating appropriate rules to govern the conduct of judges during such proceedings.

Canon 2, Rule 2.12

The Commission seeks comment on whether the disclosure provision set forth in Rule 2.12 "is necessary or desirable, [or] whether such an interpretation may work a hardship on one or both of the lawyers in a proceeding." (Introductory Report, page 5.)

The California code presently contains a disclosure provision nearly identical to the one in the Model Code, and as far as we are aware, it has not caused problems in the areas highlighted in the request for comment. Nevertheless, one may question whether the duty to disclose should turn on the *judge's* belief about what the parties or their lawyers might consider relevant to the question of disqualification rather than what the *parties or their lawyers* might reasonably consider relevant to the question of disqualification. At this time, our committee does not have a comment on this alternative disqualification rule.

Canon 3, Rule 3.04

We note that California's canon 2C already prohibits a judge from holding membership in an organization that practices invidious discrimination based upon "sexual orientation." Our canon does not include ethnicity, but that has not previously been raised as an issue in our state. If the ABA includes it, we will review its addition as well. California's bar does not apply to membership in a religious or official military organization, and as long as membership does not violate other canons, "this Canon does not bar membership in a nonprofit youth organization."

Draft comment [4] in the commentary to Rule 3.04 would provide that a judge must immediately resign from an organization to which the judge belongs when he or she learns that the organization engages in invidious discrimination. The 1990 Model Code allowed a judge one year to resign. The California code does not permit a one-year delay. Using the California code as a guide, the committee supports the proposed amendment in the Preliminary Draft providing that judges should resign immediately.

Canon 4, Rule 4.04

Draft rule 4.04(A)(1)(a)(i) would permit judges to solicit funds for an organization if the fundraising is de minimis. Comment [3] states: “De minimis solicitation includes 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 than that of other participants.” Rule 4.04(A)(2)(ii), as proposed, states that a judge may “assist the organization in ~~planning~~ fundraising” The committee views these changes as one example of an attempt to write black letter rules resulting in confusion and ambiguity.

California’s canon 4C(3)(d)(i) provides that a judge “may assist such an organization in planning fundraising and may participate in the management and investment of the organization’s funds, but shall not personally participate in the solicitation of funds or other fundraising activities, except that a judge may privately solicit funds for such an organization from other judges (excluding court commissioners, referees, retired judges, and temporary judges.)” In short, judges are not permitted to engage in fundraising except from other judges.

The committee is concerned that the Preliminary Draft’s addition of the de minimis exception may lead to confusion. It appears the amendments are designed to allow judges to engage in some fundraising, but it is unclear how much fundraising would violate the rule. The provision in comment [3] stating that judges may solicit funds “where the judge’s role is not more active or visible than that of other participants” is particularly troubling because it would seem to allow a judge to engage in substantial fundraising as long as other fundraisers are more “active or visible.” It may be difficult for a judge to determine where to draw the line between permissible and impermissible fundraising. Using the California code as a guide, the committee prefers barring judges from soliciting funds except from other judges, and believes that the proposed language will result in confusion.

As to the proposed deletion of the word “planning” in the rule on assisting fundraising, the committee sees a significant distinction between assisting in fundraising and assisting in the *planning* of fundraising, which is permitted in California. The committee was unable to distinguish based on the proposed changes how one should draw a distinction between assisting in fundraising and actual fundraising. Notwithstanding our committee’s basic view that no fundraising by judges should be allowed, we concluded in any event that the deletion of the word “planning” may cause ambiguity so that judges will be unclear on the extent to which they are permitted to engage in solicitation.

Canon 4, Rule 4.12(A)(3)

Rule 4.12(A)(3) would permit judges to accept invitations to “widely attended events,” which is defined in the Terminology section as “a convention, conference, symposium, forum, panel discussion, dinner, reception or similar event that more than [25] persons are expected to attend.” The committee is concerned about defining this phrase in terms of numbers rather than in terms of diversity of the attendees. For example, this language would permit a judge to attend an event at which the attendees are all from one particular entity or company, or represent a certain viewpoint. This concern could be addressed if the Model Code makes clear that attendance at such an event is still subject to the rule that the gift, i.e., acceptance of the invitation, must not

cast reasonable doubt on the judge's capacity to act with integrity, impartiality, and independence, although the committee also concluded that an event attended by 25 people is not what generally would be considered a "widely attended event."

Canon 5

The committee has no specific comments on the proposed amendments to canon 5, but we endorse the general emphasis on ensuring the independence and integrity of the judiciary. We also support the idea of attempting to fashion an election system that enhances impartiality. We note, however, that in several respects, our state has developed differences in our code pertaining to elections based on factors applicable in California. For example, the California Constitution states that a trial judge may run for non-judicial elective office provided he or she takes a leave of absence without pay prior to filing a declaration of candidacy. Acceptance of the public office constitutes a resignation from the office of judge. (Cal. Const., art. VI, § 17.) This constitutional provision allows an unsuccessful candidate to return to the bench after the election. Another feature of California's election system is the fact that our primaries are held well in advance of the general election. Proposed Rule 5.06(c) appears to suggest that judges be restricted to soliciting or accepting campaign contributions not more than one year prior to a scheduled election. Such a restriction could cause undue hardship given the timing of judicial elections in California. A candidate might feel constrained from fundraising until four to five months before the primary in March, because the individual must be prepared to run in the November election and may wish to use money raised before the primary to do so.

I hope the Joint Commission finds these comments useful. We note that they were prepared prior to the 8th Circuit's recent decision in *Republican Party of Minnesota v. White* (No. 99-4021, 8/2/05). If you have any questions or if I can be of further assistance, please contact me at 714-564-3660 or richard.fybel@jud.ca.gov.

Very truly yours,

Richard D. Fybel
Associate Justice, Court of Appeal, Fourth Appellate District
Chair, Supreme Court Advisory Committee on the Code of Judicial Ethics

cc: Chief Justice Ronald George
Members of the Supreme Court Advisory Committee on the Code of Judicial Ethics
Mark Jacobson