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New York State Bar Association
Special Committee to Review the Code of Judicial Conduct*

Substantive Comments on Proposed Amendments to
Canons 1 and 2 of the Code of Judicial Conduct

General Comments

The amendments to the CJC have resulted in complete renumbering the entire Code. While the new numbering system will make section references easier, it initially will make research more difficult. Consequently, we trust the Joint Committee will provide a cross reference chart.

Canon 1

Page 2, lines 8-13. The meaning of the brackets on lines 10-11 is unclear. Although the bracketed language comes from the current comment to Canon 1A, we would support a less redundant list. The current list is completely circular. For example, probity, uprightness and soundness of character are synonyms of integrity – not definitions. Fairness can mean "free of bias" or favoritism, in which case it is a synonym for impartiality, not integrity. We would replace lines 8-13 with the following:

> "A judiciary of integrity is one in which judges are known for their adherence to legal and ethical principles. Independence means being free of inappropriate outside influences and acting without fear or favor. Impartiality means being free of bias or favoritism."

Page 2, line 19. We believe that comment 5 should be subject to Canon 3B(9) [new Canon 2.11 - comment on pending or impending proceedings].

Page 3, lines 1-3. It is not clear why the examples were deleted. We believe they were helpful.

Page 2, line 26 and page 3, line 1. This Canon is about upholding the integrity, independence and impartiality of the judiciary. Line 26 introduces "irresponsible" and "improper" conduct and comment 7 defines impropriety as conduct that compromises "integrity, impartiality and competence." Either the Code should be uniform in referring to integrity, independence and impartiality, or the connections between these terms should be made clearer.

Canon 2

* These comments have not been reviewed by the NYSBA Executive Committee or House of Delegates are reflect solely the views of the Special Committee to Review the CJC.

Page 1, line 28. Canon 2.02 introduces the concept that there may be circumstances where recusal is not required but is appropriate. This concept is not explained, and, because a judge's recusal where it is not required may undercut the duty to decide, we believe a comment, probably in Canon 2.12 with a cross reference here, is in order.

Page 2, line 25. Although the term fairness is used in a number of places in the Code [see, e.g. Canons 3B(5), (8) and (9)], the term is not defined. Fairness could mean "free of bias or favoritism," i.e. the same as impartiality. It could mean "consistent with the rules" or "in accordance with relative merit," which is the result implied by "integrity." See, e.g. the comment to Canon 1A (which defines integrity as including fairness). Alternatively, it could mean "just to all parties," a concept that we would find problematical. The law is not always perceived as "fair," and the judge's responsibility is to uphold the law. We would therefore either delete fairness as duplicative of integrity, independence and unbiased, or define fairness in the comment as "free of bias or favoritism and consistent with the strict application of the law." The current comment concerns only impartiality.

Section 2.05 (a) and (b) are unchanged from Canon 3B(6), except that the Joint Committee has deleted the phrase "by words or conduct" from clause (b) but not clause (a). We see no reason for the distinction.

Page 3, line 37. While it is impossible to catalogue all the manifestations of bias, we would add "gestures" to "acts."

Page 5, line 16-17. In comment 3, we would add a sentence along the following lines to clarify the limits of permissible debriefing:

> "Such debriefing is limited to the jury experience and may not include the jury's reasoning or other information that would impeach the verdict."

Page 5, line 31. We believe "must" should be substituted for "should." This section generated heated debate in our Committee. While most members agree that overseeing settlement efforts is an important part of the judge's case management functions, the Committee is acutely aware that one judge's "facilitate" is another judge's "coerce." We discussed limiting this provision to pre-trial settlements and jury trials, and prohibiting the judge's involvement where another court officer is available to facilitate settlement discussion. But, ultimately, we believe the prohibition against coercion provides the best balance between allowing the judge's participation and protecting parties against coercion.

Page 6, line 30. If we were writing on a clean slate, we would recommend abolition of the expert consultation rule in favor of requiring judges to decide cases on the court record alone. Recognizing that we are not writing on a clean slate, we believe a judge's ability to consult outside experts should be limited to consultation about the law. The elimination of the phrase "on the law applicable" to a proceeding would allow a judge to seek information on principles of chemistry or other non-legal information that goes farther than information of which a judge could take judicial notice, i.e. matters of common knowledge or matters capable of ready determination by resort to sources whose accuracy cannot reasonably be

questioned. We believe that information not appropriate for judicial notice should be introduced into evidence by the parties. Consequently, we believe paragraph (2) should be subject to the same proviso as paragraph (3). In any event, we believe that, if the judge receives advice from an expert in writing, the judge should provide the parties with a copy of the written advice, and not solely the substance of the advice.

Page 6, line 38. Although Canon 3B(7)(c) did not require it, it is not clear why court personnel with whom the judge consults need not be disinterested.

Page 7, lines 19-20. As noted with respect to disinterested experts, we believe that the result of a judge not independently investigating facts is that a judge may consider only the factual evidence presented and other information of which the rules of evidence allow the judge to take judicial notice.

Page 11, line 21. As a result of two recent opinions of New York's Advisory Committee on Judicial Ethics which we believe misconstrues the provisions on economic interests, we recommend the addition of a new comment to paragraph D(1). The opinions, [see, e.g. Opinion 04-51, available at www.nycourts.gov/ip/judicialethics/04-51.htm], advise that a judge need not consider stock ownership in affiliates of a party to a proceeding when considering recusal. They rely on the literal language of the clause "in a party to a proceeding" and do not address the meaning of "other . . . interest." We believe that something along the following lines would be appropriate:

> "Where a judge owns stock of a corporation that is an affiliate of a party, the judge must determine if such interest is an "other more than de minimis interest" that could be substantially affected by the proceeding. Such determination will depend upon such factors as whether a judgment adverse to the party would have (i) a substantial effect on the value of the party's stock held by the affiliate, and, if so, how material such investment is to the investor, or (ii) a material effect on the ability of the party to fulfill financial obligations to its issuer-affiliates."

Cf. N.Y. County Opin. 684, which addresses the situations in which representation of one affiliate will be deemed representation of another affiliate for purposes of lawyer disqualification motions.

Page 11, line 21. Our committee does not plan to recommend that New York adopt the ABA's "more than de minimis" test. Although that test seems to have become popular in other states, it was rejected by the New York State Bar Association a decade ago when the ABA's 1990 amendments to the CJC were considered. The NYSBA report explained:

> "We have decided to address disqualification for financial interest in Section 3E(1)(c) and (d) in the same manner as the Federal disqualification law, 18 USC Section 455. Like the existing 1973 CJC, we recommend prohibiting a judge from sitting on a case if the judge or any of the named relatives has any economic interest, no matter how small. However, as in the case of 18 USC Section 455(f), we have provided that if the judge does not learn of the interest until after the judge

> has devoted time to the case [section 455(f) requires substantial time, but we see no need to so limit the exception], the judge is not disqualified if the person with the interest disposes of it. The new provision is in Section 3E(1)(f). . . .
>
> "The real purpose of the "de minimis" test was to ensure that recusal would not be required when a de minimis interest was discovered after the judge had already devoted time to the case. It has been brought to our attention that the "de minimis" test recreates a problem that existed before the 1973 CJC was adopted. When the U.S. Senate considered the nomination of Clement Haynsworth for the Supreme Court, the CJC required disqualification for "substantial" interest. Judge Haynesworth was criticized for his disqualification practices, and for his "insensitivity" to economic conflicts. Similar concerns led to the resignation of Justice Fortas. These incidents led to the adoption of the present "any interest, no matter how small" standard. Rather than returning to the "substantial interest" test in the guise of a "more than de minimis" standard, we believe that we would be better off addressing the narrow question of what to do after a judge, who believes he or she is free of compromising financial interests, discovers an interest."

Page 11, line 31. The House of Delegates of the New York State Bar Association addressed the subject of political contributions in January, in the context of recommendations made to New York's Chief Judge by the Commission to Promote Public Confidence in Judicial Elections (the so-called Feerick Commission). The New York State Bar Association believes that the recusal provisions will only be meaningful when political contributions to candidates for judicial office are generally available on a searchable database, so that the parties to a proceeding may move for disqualification if the judge's impartiality might reasonably be questioned. Although such a system for the reporting of campaign contributions is not the province of a code of judicial conduct, we believe the ABA should endorse the implementation of such systems.

Page 12, line 15-18. Paragraph 3 seems to be an attempt to overturn the reasoning behind Justice Rehnquist's opinion in Laird v. Tatum, 409 U.S. 824. In that case, while at the Justice Department, Judge Rehnquist gave testimony on behalf of the Justice Department before a Senate Committee as an expert on statutory and constitutional law and gave speeches on the general subject of the case. We believe the new paragraph has several infirmities. Parts of it seem duplicative of other provisions in Section G. For example, what is the difference between "serv[ing] as a lawyer in the matter in controversy" under paragraph G(1) and "participat[ing] as lawyer . . . concerning the proceeding"? If serving as a material witness concerning the matter is covered by Section G(2), why is it necessary to prohibit serving as "material witness concerning the proceeding" in Section G(3)? In any event, the meaning of serving as a material witness "concerning the proceeding" is unclear. We believe that, if a government lawyer served as a lawyer in the matter in controversy or had substantial supervisory responsibility for the matter before becoming a judge, then the language of the existing CJC would require the judge's disqualification in the matter. However, the government lawyer's expressing an opinion on the law should not disqualify the lawyer from acting as a judge in a case that raises the same issues, any

more than a judge who has issued an opinion on a matter of law would be disqualified from acting as a judge in cases that raise the same issue.

Page 15, line 12. We believe the standard in the comment should be the same as the standard in the black letter and should recognize that administrative judges do not always have the means to guaranty a result. Consequently, the second sentence of the comment should exhort judges with supervisory authority to "take reasonable steps available to them to assure."

Page 17, lines 25-27. While we support the concept that judges should have immunity for actions to discharge their duties, we are concerned that the language used may be more limited than existing law. Consequently, we would prefer to end the sentence after "duties."

Typos and drafting suggestions

Canon 1

Page 1, line 33. Change "the" to "these."

Page 6, line 28. Delete "the."

Page 10, line 3. It is not clear why there are brackets around "and." We support consistent use of the phrase "integrity, independence and impartiality."

Canon 2.

Page 17, lines 18-19. Delete "however (i.e. the conduct in response to which action is necessary). Insert "of the impaired lawyer or judge."

Page 17, line 2. Insert "is" after "it."