ASSOCIATION OF JUDICIAL DISCIPLINARY COUNSEL

September 9, 2005

Mark I. Harrison, Esq., Chair
American Bar Association
Joint Commission to Evaluate the
Model Code of Judicial Conduct
Osborn Maledon, P.A.
2929 N. Central Ave., Suite 2100
Phoenix, AZ 85012

Dear Mr. Harrison:

I write on behalf of the Association of Judicial Disciplinary Counsel (AJDC), the professional association for staff serving state judicial conduct organizations. Founded in 1980, the AJDC today has members in 38 states and the District of Columbia. As professionals practicing in the field of judicial ethics, we interpret and apply the code of ethics on a daily basis in disciplinary matters and, in many states, in formulating advisory opinions to assist judges in conforming to ethical standards. We also enforce and defend the code both in contested disciplinary matters and in challenges undertaken in federal and state courts. Our members have followed the work of the ABA Joint Commission with great interest, and our Board has been pleased to meet with both the full Commission and a delegation of its members.

It was the overwhelming consensus at our annual meeting this July that, as an association, we communicate to you our strong support of Canon 1, as recently posted in your Preliminary Report on the ABA website. We believe it is of utmost importance that the "Appearance of Impropriety" concept, as presently embodied in Canon 2 of the 1990 and 1972 Codes, be retained and enhanced, as the Commission has done in its new proposed Canon 1. We appreciate that critical language from the 1990 and 1972 Codes, which was deleted in the Commission's May 2004 draft, has been restored. (We refer to the obligation that a judge act at all times in a manner that upholds public confidence in the integrity, impartiality and, as you have now added, independence of the judiciary.) We also appreciate the return of the "appearance of impropriety" as a black letter standard, as originally embodied in Canon 4 of the pre-1972 Canons of Judicial Ethics.

Canon 2A, like the proposed Canon 1, both exhorts judges to observe high standards of conduct and, where appropriate, subjects them to discipline for conduct that is not specifically proscribed elsewhere. No code of conduct can anticipate or codify every conceivable permutation of misconduct. "Appearance" or similar standards, as reasonably applied with specific notice to a respondent, are common to ethics and employment codes and have been upheld as constitutional by the US Supreme Court and many state supreme courts. For example, in *Arnett v. Kennedy*, 416 US 134 (1974), the Supreme Court upheld "for cause" against a vagueness challenge in relation to the discharge of a federal employee. Quoting from its own earlier decision in *Civil Service Commission v. National Association of Letter Carriers*, 413 US 548 (1973), the Court stated:

> There are limitations in the English language with respect to being both specific and manageably brief, and it seems to us that although the prohibitions may not satisfy those intent on finding fault at any cost, they are set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with, without sacrifice to the public interest.

416 US at 159, quoting from 413 US 578-79.

The Court went on to state that the "root of the vagueness doctrine is a rough idea of fairness" (416 US at 159). In a passage apposite to the argument that the language of Canon 2A is not void for vagueness, the Court in *Arnett* specifically addressed the efficacy of a conduct code that gave fair notice of disciplinable behavior without having to spell out in detail every conceivable factual possibility.

> Because of the infinite variety of factual situations in which public statements by Government employees might reasonably justify dismissal for 'cause,' we conclude that the Act describes, as explicitly as is required, the employee conduct which is ground for removal. The essential fairness of this broad and general removal standard, and the impracticability of greater specificity, were recognized by Judge Leventhal, writing for a panel of the United States Court of Appeals for the District of Columbia Circuit in *Meehan v. Macy*, 129 US App DC 217, 230..., modified, 138 US App DC 38 *aff'd en banc*, 138 US App DC 41 (1969): "(I)t is not feasible or necessary for the Government to spell out in detail all that conduct which will result in retaliation. The most conscientious of codes that define prohibited conduct of employees includes 'catch-all' clauses prohibiting employee 'misconduct,' 'immorality,' or 'conduct unbecoming.'

Id. at 161-62.

Vagueness and other constitutional challenges are appropriately argued in and decided by the courts. While the Commission must be mindful of constitutional issues as it proposes amendments to the Code, we believe that, whenever challenged, the appearance standard has been upheld as constitutional by our state supreme courts, and we note that it remains in force for federal judges in the Code of Conduct for United States Judges, as adopted by the United States Judicial Conference. We therefore agree with the Commission's evident conclusion that there is no need to correct a "problem" that neither our state supreme courts nor the Judicial Conference have perceived as extant. Moreover, dilution of the appearance of impropriety standard would greatly undermine the objective of setting high standards of conduct for judges.

On behalf of the AJDC, I thank the Commission for the hard work and dedication it has devoted to this Code evaluation, and for the opportunities provided to us to participate.

Very truly yours,

Victoria B. Henley

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