MEMORANDUM

TO: Mark I. Harrison, Chair
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

FROM: Ray McKoski, Circuit Judge, Lake County, Illinois

DATE: July 15, 2004

SUBJECT: Comments Concerning First Draft of Proposed Revisions to the ABA Code of Judicial Conduct.

Following are my comments regarding Rules 2.02, 2.07, 2.08 and 2.12 of the first draft of the proposed revisions to the ABA Code of Judicial Conduct.

Rule 2.02 The Duty To Decide

The last sentence of the Commentary to Rule 2.02 provides, "A judge must not use recusal or disqualification to avoid difficult or controversial issues."

Because this sentence is a broad statement of principle helping to define the fundamental obligation of a judge to decide cases that is identified in Rule 2.02, I believe the sentence should remain in the Commentary to Rule 2.02. Rule 2.12 (Disqualification) and the Commentary to Rule 2.12, on the other hand, are not concerned with broad ethical principles but identify and explain specific grounds for disqualification.

Rule 2.07 Demeanor and Decorum.

Paragraph three of the Commentary accompanying Rule 2.07 provides that, "Where not otherwise prohibited by law, judges may take the opportunity to debrief jurors on their jury experience, after their jury services has concluded."

Consistent with the practice of the 31 judges in Lake County, Illinois, I have routinely, over the past 19 years, informally met with jurors in the jury deliberation room after the verdict is returned. In my experience, "debriefing" jurors serves several important purposes including:

1. Providing closure for jurors;
2. Reducing the fear, stress, and anxiety brought about by jury service;
3. Providing an opportunity to educate jurors about the legal system;
4. Providing an opportunity for jurors to suggest improvements in the court system and in the performance and conduct of court personnel and lawyers; and
5. Enhancing the public's perception of judges.

In my view, it is essential that the debriefing be held in an informal setting outside the presence of the parties, lawyers and court personnel. It defeats the purpose of the meeting to require that the debriefing be conducted in open court as suggested by Standard 15-4.3 of the ABA Standards For Criminal Justice Discovery And Trial By Jury (1996). This is true for many reasons. First, because one purpose of debriefing is to reduce stress and anxiety, it is only common sense that the meeting be held in a non-stressful, informal setting like a private jury room rather than the intimidating atmosphere of a formal courtroom

with the lawyers, losing party, court reporter, victim's spouse and an array of gang members all staring at a juror eagerly awaiting the juror's first question.

Second, jurors bring closure to their experience and relieve stress by asking questions like, "Did we do the right thing?" or "What would you have done judge?" And although the judge must answer that he or she cannot comment on the verdict, the judge can still compliment the jury on their close attention to the testimony, hard work and dedication to making our system the best in the world and in that way help close out the jury experience and make jurors proud of their contribution to our democracy. Jurors simply will not ask these types of stress-relieving questions in the courtroom.

Third, the educational component of debriefing is adversely affected by the formal setting of the courtroom. For example, a common question asked in criminal cases is, "What will the sentence be, judge?" This question gives the judge an opportunity to educate the jurors in general terms on how the legislature sets the parameters of a sentence, the form a sentencing hearing takes, the role of the presentence report, etc. The likelihood of a juror asking about sentencing with the defendant present is much reduced to say the least.

Fourth, jurors are unlikely to level criticism or make suggestions regarding the performance of lawyers or court personnel in the presence of those individuals with the comment or criticism being made part of the official court record.

Lastly, jurors view the judge coming to the jury room after the verdict as a personal expression of appreciation, an act above and beyond the judge's official responsibilities. This "personalized" act helps enhance the public's perception of

judges. Conducting the debriefing in the courtroom transforms this personalized act of gratitude into just another part of the formal proceedings that a judge is required to conduct as part of his or her job. The fact that jurors consider the informal debriefing as something special is clearly demonstrated by juror comments on exit questionnaires mailed to each juror in Lake County, Illinois. The following remarks are taken from the general comment section of twelve exit questionnaires returned by jurors during the period March through June 2004.

> Judge _____ took the time at the end of the day to explain the case, etc. This was very informative and seemed above the call of duty. This was really impressive and appreciated.
>
> I was impressed that he took the time to speak with us personally after the case.
>
> It was very nice that the judge talked and explained everything to us in the end.
>
> It was nice that the judge took the time after the verdict to answer our questions.
>
> I appreciated him talking to us after our verdict.
>
> My compliments to the judge for coming to the jury room and explaining the case to us afterwards and shaking our hands and thanking us.
>
> The judge came in later and actually asked if we had any questions.
>
> Judge _____ was very nice. It was good to meet with him after the case ended. It was greatly appreciated.
>
> Really appreciated the judge talking with us after we reached our verdict.
>
> The judge was great! Came to meet everyone after the case was over. That was terrific.
>
> Judge _____ made it a great experience with his follow-up with us after our verdict.
>
> He also answered all of our questions after the case was over.
>
> I appreciate him talking to us after we had given our verdict.

For the reasons stated above I am certainly a proponent of conducting jury debriefing in the informal, private setting of a jury room rather than in open court. However, when the debriefing is to be held outside the presence of the parties

and their attorneys, the invitation by the judge to meet with the jurors should be made in open court as part of the proceeding in which the verdict is returned. This allows the parties to lodge an objection to the debriefing process and preserve the issue for appeal. I recommend that the following provision be added to the third paragraph of the Commentary to Rule 2.07:

> If the debriefing is to be conducted outside the presence of the parties and their attorneys, the judge's invitation to the jurors to attend the debriefing session should be made in open court as part of the proceedings in which the verdict is returned. This procedure will insure that the parties and attorneys are aware of the judge's intention to meet with the jurors and will provide the opportunity to register an objection to the process.

Rule 2.08 Ensuring the Right to be Heard.

Many civil cases are settled, with the judge's assistance, on the day of trial. If a judge is prohibited from presiding over the trial of a case in which he or she participated in unsuccessful settlement negotiations, the judge would be virtually precluded from assisting in settlement discussions on the trial date. This is so because if negotiations on the trial date are not successful the trial judge would be required to, (1) attempt to locate a judge who was willing and able to forego his or her own courtroom duties to conduct the trial, or (2) transfer the case to another judge's docket for the purpose of setting a new trial date. Both of these alternatives are contrary to the judge's duty to supervise cases so as to reduce or eliminate dilatory practices, avoidable delays and unnecessary costs. The problem is exacerbated further if lawyers request judicial participation in settlement sessions for the ulterior purpose of obtaining a change of judge or trial continuance.

Rule 2.12 Disqualification.

The second paragraph of the Commentary to Rule 2.12 provides:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Although the ABA Code Commentary is not intended as a statement of additional rules (see Preamble to the 1990 ABA Model Code, the Commentary cited above reads like a rule. More importantly, this provision has been interpreted by the courts to have the force of a rule imposing upon judges an ethical duty to disclose. See, e.g., In re Edwards, 694 N.E.2d 701, 711 (Ind. 1998) ("this Commentary reveals a separate obligation to disclose that is broader than the duty to disqualify."); Collier v. Griffith, 1992 Tenn. App. Lexis 245 (the "1990 version of the Model Code of Judicial Conduct. . . recognizes a judge's broad responsibility to disclose. . ."); American Textile v. Limited, 190 F.3d 729, 742 (6th Cir. 1999) ("Judges have an ethical duty to disclose on the record information which the judge believes the parties and their lawyers might consider relevant to the question of disqualification.") and U.S. v. Cooper, 283 F. Supp. 2d 1215, 1223 (D.Kan.) (same). Indeed, at least one judge has been disciplined, in part, for failing to disclose. See In re Judge Frank, 753 So.2d 1228 (Fla. 2000). See also Florida Ethics Advisory Committee Opinion 2004-06 (judge must disclose the familial relationship whenever cousins or members of their respective law firms appear even though disqualification is not mandated).

If the provision in paragraph 2 of the Commentary regarding disclosure is intended to impose an obligation upon judges, it should be incorporated into Rule 2.12. In that event, however, the obligation to disclose should be limited to information that the judge believes that the parties or their lawyers might consider relevant to a "reasonable argument that disqualification is required." See Illinois Judicial Ethics Committee Opinions 94-18 and 98-17. To require a judge to disclose information that a biased, partisan and possibly suspicious litigant "might" consider relevant, without any limitation that the information be relevant to a "reasonable argument concerning disqualification," is an unworkable and fatally vague standard.

If the disclosure provision is not intended to impose an obligation but is intended only to recommend disclosure, then the provision should be either deleted or reworded. I would suggest the following language to clarify the aspirational nature of the comment:

> Although not required by Rule 2.12 , it is recommended that a judge disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

Respectfully submitted,

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