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June 30, 2004

ABA Commission on the Model Code of Judicial Conduct
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Dear Colleagues:

The Association of Professional Responsibility Lawyers (APRL) is an independent national organization of lawyers practicing (and often concentrating) in the fields of professional responsibility, legal ethics, and the law of lawyering generally. Our membership includes law professors, bar counsel, counsel for respondents in disciplinary cases, expert witnesses and consultants, litigators involved on both sides of cases raising legal ethics issues (including without limitation legal malpractice cases), in-house ethics counsel for law firms, and in-house counsel to corporations and other entities, including insurance companies.

Consistent with this diverse membership, APRL frequently speaks out on issues of vital importance to the legal profession, especially as they affect our areas of practice and concentration. With respect to the ABA Commission on the Model Code of Judicial Conduct (the "ABA Commission"), APRL President Ronald E. Mallen of San Francisco appointed a committee to formulate a response to the original request for public comment made by the ABA Commission in November 2003. That committee is chaired by Ronald C. Minkoff of New York, New York and includes Murray Abowitz of Oklahoma, Elizabeth Alston of Mandeville, Louisiana, Dianna M. Anelli of Columbus, Ohio, Warren Lupel of Chicago, Illinois, Peter Ostermiller of Louisville, Kentucky and Suzanne Westerheim of Dallas, Texas. The committee has considered not only prior commentary and case law, but also the ABA Commission's May 2004 Draft (the "Preliminary Draft") of Proposed Canons 1 and 2. The committee's recommendations, embodied in this letter, have been approved by the APRL Board of Directors.

Preliminarily, APRL recognizes that the Model Code of Judicial Conduct (the "Model Code") seeks to embody general principles regarding the all-important role judges play as neutral decision-makers in our judicial system. In doing so, however, the Model Code performs multiple functions. First, and maybe even foremost, it is exhortatory, setting forth the basic standards of honesty, fairness, impartiality and integrity that judges must maintain in order to ensure the judicial system maintains

the trust and confidence of those who come before it, and of the general public. Second, the Model Code sets forth rules that serve as the basis for professional discipline. These two functions do not fit together easily, and that should not be surprising: broad general principles, important to establish and maintain public confidence, often are not sufficiently specific to provide judges with clear notice as to what conduct (or misconduct) may subject them to disciplinary sanction. Many of our members have learned this through hard experience, representing judges in disciplinary matters in several different states. Those experiences inform our recommendations.

Consistent with our membership's expertise, we have attempted to focus on three specific areas which deal directly with the representation of judges in matters involving the Model Code, and which we believe the current Model Code does not adequately address.

Reporting Impairments

First, APRL is concerned that under present Canon 3(D)(1), judges who "receive information indicating a substantial likelihood" that one of their colleagues may have a substance abuse problem or another impairment that raises serious questions as to the colleague's fitness for office are required (a) to report the colleague only if the colleague's impairment causes him or her to violate a specific provision of the Model Code; and (b) to make that report to "the appropriate authority." To the extent that the current rule may be interpreted as limiting the reporting requirement to actual Code violations, and as requiring the report to be made to the impaired colleague's superior or to a disciplinary authority, we are concerned that this may discourage judges from reporting judicial impairments to an established judicial or lawyers assistance program, thus causing harm to the impaired judge as well as to litigants, the Bar and the public at large.

Accordingly, we applaud Proposed Canon 2.19, which is very similar to the proposal regarding judicial assistance programs made by the ABA Commission on Legal Assistance Programs ("CoLAP"), and which (with some wording changes) will satisfactorily addresses our concerns. Where our proposal differs from Proposed Canon 2.19, we have placed Proposed Canon 2.19's language in brackets with italics:

> "A judge having personal knowledge that the performance of a lawyer or another judge may be impaired by drugs or alcohol or other mental, emotional or physical condition, shall take [or initiate] corrective [*appropriate*] action, which may be satisfied

> by [*include*] a confidential referral to an appropriate lawyer or judicial assistance program."

Our proposal differs from Proposed Canon 2.19 in three ways. We believe a judge should have personal knowledge of the impairment before a reporting requirement is triggered. In addition, we believe the requirement of taking "appropriate" action is too ambiguous: it suggests that judges, most of whom are untrained in addressing drug and alcohol addiction or potential mental illness, will be subject to discipline if they do not take action which, in hindsight, disciplinary authorities and their hired experts view as "appropriate." We prefer the word "corrective," because it suggests that a judge will satisfy his or her reporting obligation by taking *any* steps to correct the problem. Similarly, we prefer the phrase "may be satisfied by" to "may include." While we recognize that there may be instances in which a judge is so impaired that a referral to a judicial assistance program ("JAP") alone may not be sufficient to protect the public, we wish to ensure that a judge who takes the brave step of alerting a JAP about a colleague will not be disciplined because – again in the bright light of hindsight – someone later determines the reporting judge did not act forcefully enough.

Communications with Ethics Counsel

Second, we are concerned that the Model Code does not adequately address the circumstances in which judges may seek independent legal advice regarding their own obligations under the Model Code, including whether and when this advice may be sought on an *ex parte* basis. APRL members often receive telephone calls from judges seeking advice, and the line between permissible and impermissible advice is not clear. The APRL Board respectfully submits that this issue should be addressed in the Code or its comments, and that judges should be able to seek independent advice privately, except where litigants already have raised the ethical issue in the pending litigation. Thus, we propose the following as a new Canon 3(B)(7)(f) (or, using the formulation from the May 2004 Draft, Proposed Canon 2.09(a)(5)):

> (f [based on current lettering]) A judge may seek confidential legal advice as to the judge's own rights and responsibilities under this Code or [name of professional responsibility code for attorneys in the relevant state], unless the matter about which the judge is seeking advice has already been the subject of a motion or other application before the judge in the proceeding, in which case the judge must give notice to the parties of the person consulted and the substance of the advice, and afford the parties reasonable opportunity to respond.

We are well aware that this proposal does not address *ex parte* communications in the traditional sense. In Canon 17 of the original Canons of Judicial Conduct, *ex parte* communications were defined as "private interviews, arguments or communications designed to influence [a judge's] judicial action, where interests not affected thereby are not represented before him." But the prohibition on *ex parte* communications in current Canon 3(B) – and, for that matter, in Proposed Canon 2.09 -- goes far beyond this: it includes not just "*ex parte* communications" between a judge and one of the parties to the litigation, but also "other communications made to the judge outside the presence of the parties concerning a pending or impending matter." Thus, the current and proposed Canons prohibit a judge from discussing "pending or impending matters" with a third party, unless the third party is a "disinterested expert," another judge or "court personnel whose function is to aid in the judge in carrying out his judicial responsibilities." Canon 3(B); Proposed Canon 2.09 (a)(2) and (3)

This creates a problem for judges and lawyers when judges need certain types of legal advice. To illustrate, we use three examples:

(a) Judge A is the son of a Holocaust survivor, and is asked to serve as the keynote speaker at a charitable dinner by a Holocaust survivor's organization;

(b) Judge B is presiding over a lawsuit, in which the plaintiff has moved to recuse her because of her husband's ownership of substantial stock in the defendant corporation; and

(c) Judge C works in a relatively small city. From time to time, a local criminal defense lawyer, who has strong political affiliations in Judge C's own party, appears on matters in his court, but has nothing pending currently. On the last few occasions when the lawyer appeared before Judge C, however, the judge had noticed that the lawyer slurred his words and smelled of alcohol. Since then, other courthouse personnel have told him the same thing about the lawyer. Last night, Judge C saw the lawyer drink several beers at a party. Judge C wants to know whether he is obligated to report the lawyer to a Lawyers Assistance Program, but is concerned about tarnishing the lawyer's reputation and damaging his own political future.

Judge A obviously may speak to a lawyer about his legal problem without implicating Canon 3(B); there is no "pending or impending matter" involved, and thus no improper communication. But the other two examples raise far more complex problems under the current Code.

Judge B's case sits at the other extreme from Judge A's. By seeking legal advice about a matter raised in a pending motion, Judge B is engaged in a "communication . . . outside the presence of the parties concerning a pending or impending proceeding," and is thus violating Canon 3(B) of the Model Code. Many of our members have reported that when addressing this situation, they treat it as falling under the Canon 3(B)(7)(b) exception for a communication with a "disinterested expert," which would permit them to advise the judge only if the judge discloses the advice to the parties. Telling a judge about the need to disclose usually discourages him or her from going further, but it is not analytically correct under the Code: A lawyer whom the judge wishes to retain is not necessarily a "disinterested expert;" to the contrary, he or she is a retained attorney with a client to protect. And while Judge B may be entitled, under Canon 3(B)(7)(c), to consult with court personnel or other judges in this situation, she may not find this satisfactory; given the high stakes and personal nature of the dispute, she may want her own, more expert counsel to protect her reputation.

The Model Code or its comments should make clear that Judge B may seek independent counsel in this situation. Public policy should support ensuring that Judge B gets the best possible advice in this situation, so as to ensure the integrity of the legal process is maintained. As already noted, under the Model Code – as well as Proposed Canon 2.09(a)(2) -- -she would be permitted to consult a "disinterested expert" on virtually any issue, but commentators have questioned the quality of advice she would receive:

> "Consultation with a 'disinterested expert' may not be as valuable as it appears. With law teachers, for example, expertise about an issue may be more illusory than real. Frequently, the expert offers the advice in a casual manner lacking the seriousness of the judge who must decide the case. Finally, the advice sought from the alleged 'disinterested' expert may instead be from someone who has a specific partisan interest in the issue of the outcome of the case." *See* L. Abramson, "The Judicial Ethics of Ex Parte and Other Communications," 37 Hou. L. Rev. 1343, 1373-74 (Winter 2000) (hereafter, "Ex Parte Communications").

Obviously, a judge's consultation with knowledgeable, retained ethics counsel involves none of these problems, and would provide Judge B with the advice she needs. Equally obviously, the demands of due process require that Judge B disclose to the parties the advice she receives. *See, e.g., Time Warner Entm't Co. v. Baker,* 647 So. 2d 1070, 1072 (Fla. Dist. Ct. App. 1994) (judge must tell the parties the

identity of the expert and the substance of the communication). Accordingly, we have included that requirement in our proposal.

Judge C's situation is even less clear than Judge B's under the current Code. His communications with ethics counsel, though not an *ex parte* communication in the traditional sense, will implicate Canon 3(B), because it involves a "communication . . . outside the presence of the parties concerning a pending or impending matter." Ex Parte Communications at 1358-59 (distinguishing between "ex parte communications" and "other communications" clauses, and saying both are covered by Canon 3(B)). While some may argue that Judge C's problem does not involve a "pending or impending matter," that phrase has been interpreted broadly enough to cover this situation, given that Judge C can reasonably foresee that the lawyer will be assigned to his courtroom again in the near future. *See id.* at 1359 (Canon 3(B) implicated if "the judge has information relating to a particular fact situation that is likely to be filed in the foreseeable future, particularly in that jurisdiction"); A. Kaufman, "Judicial Ethics: The Less-Often Asked Questions," 64 Wash. L. Rev. 851, 858-59 (1989) (Canon 3(B) implicated if judge serves as law school moot court judge on issues likely to come before her). With no action pending, Judge C could not invoke the "disinterested expert" exception, and the practicalities of the situation might make him reluctant to invoke the exception allowing him to speak to other judges or court support personnel. Although some jurisdictions provide help lines and other support systems for judges with ethical problems, the current Comments to Canon 3(B)(7) limit permissible communications to "law clerks or other personnel on the judge's staff," suggesting that communications to others, including judicial support offices, are prohibited.

Accordingly, we propose that the Model Code or the Comments address this situation, and allow judges to obtain legal advice from retained outside counsel without disclosure to real or potential parties. Indeed, we believe that such communications should freely be permitted at any point before a party makes a formal motion or otherwise raises the ethical issue with the court. In addition to addressing concerns on reporting obligations, this would permit judges to obtain candid, expert advice on disqualification issues, speaking to the press about particular cases or attorneys, and other matters.

Appearance of Impropriety

Third, our concerns regarding Canon 2's requirement that judges avoid the "appearance of impropriety in all of [their] activities" (the "AOI Requirement") stems from our general perception that vague and overbroad language should be removed from the Model Code of Judicial Conduct because it presents too great a risk of subjective interpretation, placing judges at risk of disciplinary action depending upon the whim of judicial disciplinary authorities. Beyond the troubling

implications for the due process rights of judicial officers, the public at large also loses, because vague and overbroad standards of judicial conduct inevitably chill courageous and innovative judicial decision-making.

In entering this debate, we are mindful that the AOI Requirement is included in the judicial conduct codes of most states. *See* L. Abramson, "Canon 2 of the Code of Judicial Conduct," 79 Marq. L. Rev. 949, 950 n.3 (Summer 1996) (hereafter, "Canon 2 Article"). The AOI Requirement serves the "institutional" purpose of ensuring "the avoidance of stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system from the actions of a judge." C. Gray, "Canons 1 and 2," 25 Judicial Conduct Reporter, Vol. 3 at 4 (Fall 2003) (hereafter, "Gray"). Thus, at least one court has noted that the AOI Requirement "is as important to developing public confidence in the judiciary as avoiding impropriety itself." *In re Dean*, 717 A.2d 176 (Conn. 1998). Public commentators have recently been vociferous in their view that the AOI Requirement must remain in the Code, and must be vigorously enforced. "Weakening the Rules for Judges," New York Times, May 22, 2004 (critiquing current ABA Commission draft because it "actually weaken[s] the core provision that requires judges to avoid . . . the appearance of impropriety").

Moreover, the AOI Requirement has repeatedly been used in judicial discipline in order to support sanctioning a wide variety of conduct, from making false and misleading statements in public and private contexts [*see, e.g., In re Ferrara,* 582 N.W.2d 817 (misrepresentations at press conference)], to inappropriate sexual behavior or personal relationships [*e.g., Mississippi Comm'n v. Gilling*, 651 So. 2d 531 (Miss. 1995) (living with person judge knew was a fugitive and assisting with his case)], to improper judicial appointments [*Spector v. Comm. On Judicial Conduct,* 47 N.Y.2d 462, 418 N.Y.S.2d 565 (1979)], to inappropriate political activity [*Spargo v. N.Y. State Comm. On Judicial Conduct,* 244 F.Supp.2d 72, *rev'd other grds,* 351 F.3d 65 (2d Cir. 2003), *cert. denied,* 2004 U.S. LEXIS 4047 (U.S. Supreme Court, June 7, 2004). *See,* Gray, *supra,* compiling cases. Judges and judicial prosecutors who have worked with the AOI Requirement for many years, and undoubtedly have become comfortable with it, have already expressed their support for the AOI Requirement to the ABA Commission.

Despite all this, our own analysis of the law, as well as the experience of those of our members who serve as attorneys defending judges and lawyers against disciplinary charges, has led us to conclude that the AOI Requirement collides with the standards of basic fairness and due process that must apply when the Code is used to discipline judges.

We begin with the simple fact that the A.B.A. rejected the inclusion of the prohibition of conduct creating an "appearance of impropriety" as a disciplinary rule

in the Model Rules of Professional Conduct. As stated in Comment [5] to the pre-Ethics 2000 version of Rule 1.9:

> "This rubric [the appearance of impropriety proscribed in Canon 9
> of the ABA Model Code of Professional Responsibility] has a two-fold problem. First, the appearance of impropriety can be taken to include any new client-lawyer relationship that might make a former client feel anxious. If that meaning were adopted, disqualification would become little more than a question of subjective judgment by the former client. Second, since "impropriety" is undefined, the term "appearance of impropriety" is question-begging. It therefore has to be recognized that
> the problem of disqualification cannot be properly resolved either by simple analogy to a lawyer practicing alone or by the very general concept of appearance of impropriety."

Indeed, the AOI Requirement has been roundly criticized in the contexts of attorney discipline and disqualification. In January of this year, in *State v. Davis*, 840 A.2d 279 (N.J. Super. 2004), a New Jersey state appellate court, upholding the trial court's denial of a motion to disqualify an attorney in a criminal case, cited with approval the following words of the New Jersey commission appointed by the state's Supreme Court to review the Rules of Professional Conduct:

> "The appearance of impropriety provisions in the RPC's seek to
> reduce the risk of improper conflicts. Because of their vagueness and ambiguity, those provisions, however, are not appropriate as ethics standards."

The *Davis* court, agreeing with the commission, held that, at most, the AOI standard was one of many factors to be considered in the overall disqualification analysis. *See also In re Entertainment, Inc.*, 225 B.R. 412 (N.D. Ill. 1998) (the appearance of impropriety is a "vague concept of disqualification" and not applicable in the Northern District of Illinois); *Adoption of Erica*, 426 Mass. 55, 686 N.E.2d 967 (Mass. 1997) (favorably citing the *Law of Lawyering* that the appearance of impropriety has been described as a "nebulous standard" which has been "rejected by most Courts as a sole basis for disqualification"); *Golias v. King*, 1995 W.L. 517222 (Tex. App. – Beaumont 1995, no writ) ("appearance of impropriety was eliminated from the new Disciplinary Rules of Professional Conduct because of vagueness.");

Halligan v. Blue Cross and Blue Shield of North Dakota, 1994 W.L. 497618 (N.D. 1994) (court rejects, as have other courts, "vague standard of an appearance of impropriety as a basis for requiring withdrawal.")

We question whether a standard that has been rejected as a basis for disciplining lawyers should continue to be used to discipline judges.[1] We are not alone. Last year a United States District Court in New York, in *Spargo v. NewYork State Commission on Judicial Conduct*, 2003 W.L. 2002762 (N.D.N.Y.), stayed the New York State Judicial Conduct Commission from enforcing certain portions of the Judicial Code pending appeal. Although the Second Circuit eventually reversed its underlying ruling on federal abstention grounds, the District Court's reasoning is very instructive. The District Court held that while the AOI Requirement had been invoked many times in imposing judicial discipline, none of those cases specifically had upheld the constitutional validity of the phrase "appearance of impropriety." As the Court noted, the numerous reported decisions from New York assumed that the AOI Requirement was valid and applied it to a stated set of facts. Perhaps more significantly, the *Spargo* court considered it a "particularly apt comment" that the AOI standard is "very subjective" and is a concept "beset by legal and moral complexity." The court also favorably noted the following language:

> "The lack of specificity as to what conduct makes a Judge vulnerable to a charge of appearance of impropriety may bear serious due process implications."

These comments were neither new nor unique. As long ago as 1969, former United States Supreme Court Justice Arthur Goldberg, echoing the sentiments of former Justice (and former Attorney General) Tom Clark as well as several law professors, characterized Canon 2 as "unbelievably ambiguous," and stated that "to avoid the appearance of impropriety, it helps both the public and the judge to know the guidelines." He went on to say: "Our judges are men, not gods, and like all of us, they can benefit greatly from having some ground rules against which to measure their conduct . . . particularly . . . in this area of avoiding even the appearance of impropriety." *Nonjudicial Activities of Supreme Court Justices*: Hearings on S 1097 and S 2109 Before the Subcommittee on Separation of Powers of the Senate Comm.

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[1] While judicial disciplinary prosecutors and administrative judges may be comfortable with the AOI Requirement, this hardly supports its continued use. We know of few, if any, defense counsel who make their living defending judges alone; most also defend lawyers. To have two closely related disciplinary systems, one utilizing the AOI Requirement and the other treating it as anathema, makes little sense.

On the Judiciary, 91st Cong., 1st Sess. [1969] at 159, 165, 175, 185. *See Matter of Larsen,* 616 A.2d 529, 580-81 (Pa. 1992) ("Propriety . . . is often in the eye of the beholder. . . . [D]isciplinary rules expressed in terms of 'propriety' risk mercurial existence rising and falling with the temper of the moment").

Moreover, in a scathing dissent in *Spector, supra,* former Associate Judge Jacob Fuchsberg of the New York Court of Appeals criticized disciplinary prosecutors' use of the AOI Requirement to sanction a judge for using the same method of making appointments as that prevailing throughout the State without committing any actual impropriety. Judge Fuchsberg stated:

> "[L]ack of specificity as to what conduct makes a judge vulnerable to a charge of appearance of impropriety may bear serious due process implications. Leaving the rules expected to be observed unidentified is bound to burden our Judges with uncertainty as to whether what is acceptable today will be deemed aberrant tomorrow." *Spector,* 47 N.Y.2d at 473, 418 N.Y.S.2d at 571.

A leading commentator, Professor Leslie Abramson, echoed these words just a few years ago in urging that the AOI Requirement not be "freely applied." Canon 2 Article at 955. Noting the "uncertainty" the Requirement creates for judges in all aspects of their lives, Professor Abramson expressed concern that "[p[utting men and women who have to judge the rights of others under such stress" would "undermine[] their self-worth." *Id.* at 955-56.

The experiences of APRL members throughout the country have made clear that these critiques are not just academic. Members report that disciplinary prosecutors and investigators, in order to put additional pressure on judge respondents, often tack on AOI charges in addition to their more specific claims. This maneuver often causes the judge respondents to settle, because even when they are confident they can defend against the specific charges, they remain fearful of the amorphous AOI count, an "I know it when I see it" standard that can easily be construed against them.

Their fears are well founded. When AOI claims are actually tried at hearings, the result is usually difficult to predict, since the test for AOI is so vague. "The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." Comment to Canon 2. While some have said this "reasonable person" standard is "one familiar to judges" [Gray at 4], that argument is misleading: the "reasonable person" standard is generally used

to impose civil liability, not to take away someone's livelihood. Moreover, as Judge Easterbrook noted in *Matter of Mason*, 916 F.2d 384, 386 (7th Cir. 1990), the "objective" reasonable person standard "creates problems in implementation. Judges must imagine how a reasonable, well-informed observer of the judicial system would react. Yet the judge does not stand outside the system; as a dispenser rather than a recipient or observer of decisions, the judge understands how professional standards and the desire to preserve one's reputation often enforce the obligation to administer justice impartially, even when an observer might be suspicious."

In light of all of these concerns, we read with interest the ABA Commission's proposed Canon 1, which kept the AOI Requirement in the Canon itself, did not mention it in proposed Canon 1.01, and stated in Comment 2 that "ordinarily" a judge being disciplined under the AOI Requirement will also be disciplined under "some other specific rule under this or another canon." We view this proposal as an important first step in limiting the scope of the AOR Requirement. Nevertheless, it troubles us for two reasons. First, the reference to the AOI Requirement in Comment 2 but not in Canon 1.01 creates a drafting imbalance more likely to sow confusion than clarity. Second, and perhaps more significantly, many states have adopted only the Canons and not the Commentary; in those states, the ABA Commission's proposal will achieve nothing. Canon 2 Article at 953 n.13 (listing states that did not adopt Commentary). Accordingly, at a minimum, the concept that the AOI Requirement may not serve as an independent basis for discipline should be moved to the body of the Code itself, either into the Preamble or into Canon 1.01.

Moreover, while we endorse the ABA Commission's approach, in proposed Canons 2.01 to 2.06, to make the disciplinary aspects of the Code more specific, we respectfully submit that even more exact language can be used to clarify the rules for the public and the judiciary while maintaining the basic principles underlying the AOI Requirement. We recommend the following amendments to some of the proposed Canons (our proposals are in italics):

> Canon 2.03: Competence in the Law *and Recognition of the Judge's Role in the Legal System*: A judge shall not:
>
> *(a) engage in conduct that is prejudicial to, interferes with, or obstructs the administration of justice; or*
>
> *(b) engage in conduct which involves, or appears to involve, repeated or flagrant disregard of established applicable law.*

Our proposed Canon 2.03(a) will more directly address cases in which judges aid fugitives or otherwise improperly prevent police officers or others from carrying out their functions against the judge's friends, family members, etc. The current

proposed Canon 2.03 risks sanctioning judges just for being wrong. Our proposed Canon 2.03(b) will more clearly delineate when judges may be sanctioned for making improper legal rulings. The "appears to involve" clause will address cases like *In re Best,* 719 So.2d 432 (Louisiana 1998), where a judge was sanctioned because he took a "straw poll" of the courtroom audience before determining whether a criminal defendant was guilty.

> Canon 2.04: Impartiality and Fairness: A Judge shall apply the law without regard to the judge's personal views and shall decide all cases with impartiality and fairness. *A judge shall avoid even the appearance of partiality, unfairness or favoritism.*
>
> Canon 2.05: A Judge shall perform judicial duties without bias or prejudice, *and without the appearance of bias or prejudice.* A Judge shall not, in the performance of judicial duties . . .

Our proposed language would address the AOI Requirement, to the extent it applies to these situations, far more exactly. In our view, the italicized clauses would address cases where no actual impropriety is found, but where the judge's conduct gives the appearance of bias or favoritism. *See, e.g., In the Matter of Johnstone,* 2 P.3d 1226 (Alaska 2000) (appearance of favoritism in hiring coroner who judge knew to be Chief Judge's friend); *In re Chaisson,* 549 So. 2d 259 (Louisiana 1989) (making inquiries on behalf of a litigant regarding settlement); *Kennick v. Commission on Judicial Performance,* 787 P.2d 591 (California 1990) (meeting alone in Chambers with attorney for one of the parties).

Finally, there should be a proposed Canon 2.1_ that states as follows:

Canon 2.1_ Professional Misconduct. It is professional misconduct for a judge to:

(a) commit acts that would constitute a crime;

(b) take action, in connection with the judge's official duties, that reflects adversely on the judge's honesty, integrity, impartiality, or trustworthiness, or raises a substantial question of the fitness of the judge to continue serving in a judicial capacity;

(c) engage in conduct, whether or not in connection with the judge's official duties, involving dishonesty, fraud, deceit or misrepresentation;

APRL believes that this language would provide clearer notice to judges as to what conduct constitutes an ethical violation, and would more closely tie together the standards for judicial discipline with those for attorney discipline [*see, e.g.,* Model Rule 8.4], thereby resulting in more doctrinal consistency between the two bodies of disciplinary law.

Of course, many have defended the AOI Requirement because it forces judges to adhere to higher standards than ordinary citizens, and indeed than ordinary members of the Bar. We respond by once again quoting Judge Fuchsberg in his dissent in *Spector:*

> "Understandably, no Judge can respond with less than pride to the flattering proposition that more may be expected of Judges than of mere mortals. It would be regrettable in the extreme, however, if we were driven to prove this by stripping members of our judiciary of the right they share with all people to be judged fairly. And it would be unfortunate to mistake an unwillingness to accede to a denial of this right as a tolerance of judicial misconduct whenever it truly exists."

We would greatly appreciate the opportunity to discuss these proposals in more detail in at the public hearing to be held in connection with the ABA Convention in Atlanta, Georgia.

We will contact George Kuhlmann in the hope that we can arrange this.

Respectfully submitted,

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