November 29, 2004

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

As you know, the Association of Professional Responsibility Lawyers (APRL) is an independent national organization of lawyers practicing in the fields of professional responsibility, legal ethics, and the law of lawyering generally. Among our members are professors, bar counsel, counsel for respondents in disciplinary cases, expert witnesses and consultants, litigators (including the prosecution and defense of legal malpractice actions), in-house counsel for law firms, and in-house counsel to corporations and other entities, including insurance companies.

APRL frequently opines on issues of vital importance to the legal profession as we did in our June 30, 2004 letter regarding proposed Canons 1 and 2 of the Code of Judicial Conduct. As was set forth in that letter, APRL appointed a committee to formulate a response to the original request for public comment made by the ABA Commission in November 2003 regarding the Preliminary Draft to the Code of Judicial Conduct. Chaired by Ronald C. Minkoff of New York, New York, the Committee now 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. Consistent with our June 2004 letter, we have considered prior commentary and case law and the ABA Commission's July 2004 Preliminary Draft of proposed Canons 3 and 4. The APRL Board of Directors has approved the Committee's recommendations.

First and foremost, we would like to thank the Commission for its excellent work in formulating a Preliminary Draft of Canons 3 and 4 ("Preliminary Draft") of the proposed Model Code of Judicial Conduct. APRL appreciates the time and effort that the members of the Commission have taken to formulate clear, precise and workable rules for inclusion in the Model Code of Judicial Conduct.

Toward that end, APRL sees itself primarily as assisting the drafters in promulgating rules that will allow those who are subject to the provisions of the Model Code of Judicial Conduct, including judges, magistrates and other judicial officers (hereafter, "judges") to have a clear understanding of the type of conduct that may run

afoul of these rules and result in a violation of the Model Code of Judicial Conduct. APRL believes this to be an important function since many jurisdictions utilize the Model Code of Judicial Conduct as an enforcement mechanism, the violation of which may result in removal from the bench or suspension of the judge's license to practice law in the forum state. In setting forth clear and precise language within the Model Code of Judicial Conduct, each judge will have fair warning and any violation of its provisions will be less likely to be inadvertent than intentional. APRL believes that such forewarning is necessary to meet the strictures of proper due process in enforcing the provisions of the Model Code of Judicial Conduct, particularly in those jurisdictions that utilize the Model Code primarily for judicial disciplinary purposes.

This report focuses on Canon 4.01(c), which prohibits judges from demeaning the judicial office in their private conduct. Proposed Canon 4.01(c) states:

> 4.01 Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they:
> * * *
> (c) do not demean the judicial office; * * *

APRL believes that the language contained in this Proposed Canon is too broad to give a judge forewarning of the type of conduct that may place him or her in jeopardy of being subject to judicial misconduct proceedings. Consistent with our June 30, 2004 letter regarding proposed Canon's 1 and 2 and the appearance of impropriety standard, APRL believes that vague and overbroad language should be removed from the Model Code of Judicial Conduct because it presents too great a risk of subject interpretation.

In many respects, the term "demean the judicial office" suffers from the same shortcomings as does the term "appearance of impropriety." Its ambiguity presents too great a risk of disciplinary action depending upon the whim of judicial disciplinary authorities. As APRL opined in its June 2004 letter, apart from the apparent due process implications, the judge loses the freedom he or she otherwise would have – and should have -- with regard to private conduct.

The Supreme Court of Ohio in *In re Harper,* succinctly set forth the test for vagueness of a statute as set forth by the U.S. Supreme Court as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. Rockford* (1972), 408 U.S. 104, 108, 92

> S.Ct. 2294, 2298-2299, 33 L.Ed.2d 222, 227. Vague laws may also trap the innocent by not providing fair warning. *Papachristou v. Jacksonville* (1972), 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110. Thus, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. *Coates v. Cincinnati* (1971), 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214; *Gregory v. Chicago* (1969), 394 U.S. 111, 117-118, 89 S.Ct. 946, 950, 22 L.Ed.2d 134, 139- 140 (Black and Douglas, JJ., concurring). A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. See *Edwards v. South Carolina* (1963), 372 U.S. 229, 83 S.Ct. 680, 9 L.Ed.2d 697.
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> *In re Complaint Against Harper*, 77 Ohio St.3d 211, 221, 673 N.E.2d 1253, 1262 (Ohio, 1996).[1]

As with the "appearance of impropriety" standard, the "demean the judicial office" standard as used in the current Preliminary Draft fails to give to judges fair notice of the type of conduct that may violate the Model Code of Judicial Conduct. Unlike the "appearance of impropriety" standard, however, there has not been wholesale criticism and rejection or even comment regarding this language, which is set forth in many state's Codes of Judicial Conduct. Nevertheless, a review of the case authorities demonstrates that the "demean the judicial office" standard has been used in judicial disciplinary matters to support sanctioning a wide variety of conduct, including arguably private conduct that should not be the subject of public scrutiny or discipline. This conduct ranges from a judge's post decree altercations with his former spouse [*In re Robert H. Campbell,* 522 A.2d 892 (D.C. 1987)], to two judges' public political disagreements over how to administer the judiciary [*In reHonorable Althea P. Korger,* 167 Vt. 1 (Vt. 1997)], to a judge's threat to remove himself from every case in which two attorneys appeared before him because they, on behalf of their client, were evicting him from property upon which he owned a mobile home [*Inquiry Concerning a Judge, No. 97-376 re Steven P. Shea,* 759 So.2d 631 (FL 2000)], to using tobacco products in a county detention facility against

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[1] In *In re complaint Against Harper,* the Supreme Court of Ohio was ruling upon the vagueness of Ohio Code of Judicial Conduct Canon 2A, which states:

"(A) Activities to improve the Law. A judge may engage in activities to improve the law, the legal system, and the administration of justice, provided those activities do not cast doubt on the judge's capacity to act impartially as a judge, demean the judicial office, or interfere with the proper performance of judicial duties."

Unlike 4.01, Ohio Code of Judicial Conduct Canon 2A does not differentiate between public and private conduct and includes the words "do not cast doubt on the judge's capacity to act impartially as a judge" to aid in its interpretation.

The Supreme Court of Ohio held that such language was not void for vagueness. *Id.* at 228.

its rules [*In the Matter of Harry H. "Huck" Nelson*, 340 S.C. 422 (SC 2000)], to a Judicial Ethics Opinion that elected or appointed judges may not continue to sit upon the county bar association's professional responsibility committee which screens ethical complaint against local lawyers [*Judicial Ethics Opinion 2001-8* (OK 2000)].

To take an extreme but illustrative example, if a judge has a proclivity for singing and visits the local Karaoke establishment to sing country music songs, is that the type of conduct that is likely to lead to a violation of the Code of Judicial Conduct? What if the judge consumes alcoholic beverages and becomes inebriated? Will that be sufficient to demean the judicial office? Although one may see such conduct as embarrassing for such an august member of society, it is difficult to say whether either situation would "demean the judicial office." It appears that neither behavior has anything to do with the judicial office. Suppose the conduct occurred outside of the forum state – or in a big city within the forum state -- where no one involved knew at the time that the judge was, in fact, a judge?

In any event, if the private conduct that the Commission is concerned about is the type that would reasonably cast doubt on the judge's capacity to be impartial as is set forth in comment [2], it may be best to include the language that appears in the comment in Canon 4.01(c). This would be especially helpful inasmuch as some jurisdictions may adopt the Model Code and decline to adopt the comments. Thus, 4.01(c) would read:

> 4.01 Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they:
> * * *
> (c) do not reasonably cast doubt on the judge's capacity to act impartially as a judge.

APRL believes this language more clearly forewarns judges of the type of activity that is likely to involve a violation of the Model Code of Judicial Conduct than does the currently proposed verbiage. This change would make particular sense given our earlier proposal to create a Proposed Canon dealing explicitly with illegal conduct (which had previously often been dealt with under the rubric of "demean[ing] the judicial office"). Under our proposal, the judge understands that she will not be prosecuted for private conduct that some may consider embarrassing unless the conduct reasonably casts some doubt as to the judge's ability to act impartially as a judge.

Like the appearance of impropriety standard, APRL believes that the "demean the judicial office" language collides with the standards of basic fairness and due process that must apply when the Model Code of Judicial Conduct is used to discipline judges. For this reason, APRL submits that the use of the term "do not reasonably cast doubt on the judge's capacity to act impartially as a judge" is more appropriate, and more fully informs judges of the type of conduct that is likely to violate the Model Code of Judicial Conduct.

Respectfully submitted,

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