

**BOSTON UNIVERSITY
SCHOOL OF LAW**

MEMORANDUM

TO: JCLR Subcommittee on ABA Code of Judicial Conduct

FROM: Nancy J. Moore

DATE: January 30, 2006

SUBJECT: My comments on proposed revisions

I must confess that I am not as familiar with the Code of Judicial Conduct as I am with the Model Rules. Nor am I as familiar with judicial practice as I should be. As a result, I have limited myself to just a few instances in which I believe I have something constructive to say.

1. Preamble. "Although the Canons are cast in mandatory terms, it is the Rules that establishing binding or enforceable standards." This is potentially confusing. Is there any other way to phrase the Canons so that they identify the topic without using the terms "shall" or "shall not"?

2. Canon 1:

Rule 1.02. There has been controversy over the question whether to continue the appearance of impropriety standard. I am in favor of continuing it. We might want to take a position on this question.

3. Canon 2:

Rule 2.01. There should be a comment to this rule.

Rule 2.01(B)&(C). The wording is awkward. It should be "A judge shall not, in the performance of judicial duties, by word or conduct manifest bias or prejudice or *engage in* harassment,...." And "A judge shall require lawyers in proceedings before the judge to refrain from manifesting bias or prejudice or *engaging in* harassment, based on race, sex,...."

Rule 2.06, Comment [1]. "Intentional failure to follow the law, however, *may* constitute a violation of this Rule." Is it really the case that intentional failure to follow the law does not always constitute a violation? If so, under what circumstances? Some guidance is needed.

Rule 2.9, Comment [3]. What happens when despite the judge's best efforts, information is obtained during settlement discussions that could influence the judge's decision-making during trial? Is the judge required (or permitted) to recuse himself or herself?

Rule 2.10, Comment [3]. The text of the Rule omits the current provision (3B(7)(b)) that permits the judge to obtain the disinterested advice of an expert, including a law professor, with advance notice & opportunity to comment from the parties. I read somewhere (can't find it now), the Commission contemplates law professors informing the judge through amicus briefs, but those can be onerous for law professors to file. They may not be admitted to practice before the court, and in any event, for those who are not litigators, the necessity of complying with court rules on filing briefs may be unduly cumbersome. Shouldn't judges be entitled to obtain their expertise in a more informal manner, so long as the rights of the parties are protected? (I have no idea how often the current provision is used. I know some judges consult law professors without necessarily notifying the parties that they have done so. This is clearly impermissible.)

Rule 2.10(B), Comment [7]. The Commission is interested in hearing responses to the specific language extending the prohibition against independent investigation of the facts in a case to a judge's use of electronic research methods. I can't see what the objection to this language would be. It's not really an ex parte contact, but I can see why the Commission chose to put the prohibition here.

Rule 2.12(A)(4). One proposed alternative to the disqualification of a judge on the basis of an aggregate amount of campaign contributions is when that amount is greater than what "is reasonable and appropriate for an individual or an entity." I can't see how anyone could be expected to know what those amounts might be. I would much prefer to substitute a specific amount, in which case the provision may need to be amended from time to time.

Rule 2.12, Comment [5]. There is disagreement among the Commission whether the judge "should" disclose information that 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. I believe that is already the current rule. Unless there is evidence that the current rule has been a problem, I would continue it. Should such disclosure be required? The Comment only says that this is what the judge "should" do. If the judge should do so, then why not require the judge to do so?

Rule 2.13. There should be a Comment to this rule.

Rule 2.18(A)&(B), Comment [1]. It would be helpful to identify some additional options other than communicating directly with the lawyer in question and reporting the violation to the appropriate authority. For example, what about communicating with the lawyer's partners or supervisor?

Rule 2.19, Comment [1]. It should be "appropriate *corrective* action," which is the phrase used in the black letter of the rule itself.

Rule 5.03, Comment [2]. Paragraph (A) does not prohibit any conduct. The prohibition must be in Rule 5.01.

Rule 5.05. Why are candidates for appointive judicial office permitted to seek and use endorsements from political organizations when candidates in retention elections and non-partisan elections are not?