THESE COMMENTS ARE UNCHANGED FROM THE VERSION ORIGINALLY SUBMITTED IN JUNE 2004, OTHER THAN TO SUBSTITUTE THE APPROPRIATE RULE NUMBERS FROM THE JUNE 2005 DRAFT AND TO INDICATE WHERE CHANGES HAVE ALREADY BEEN MADE.

(ALAN B. MORRISON – JULY 18, 2005)

COMMENTS OF ALAN B. MORRISON
June 21, 2004
DRAFT OF MAY 2004 ABA MODEL CODE
CANON 2

For the past 32 years I have been with the Public Citizen Litigation Group and beginning this fall I will become a Senior Lecturer at Stanford Law School. I have previously submitted comments on suggested changes to the Canons of Judicial Ethics, and I am submitting these comments on Canon 2 in the May 2004 draft. My comments are divided into three parts: campaign contributions, other recusals, and other matters.

1. Campaign Contributions.

I am very pleased that the draft specifically addresses the issue of recusals and campaign contributions. For too long, too many judges simply disregarded their existence in deciding whether they could properly sit on a case, or whether lower court judges should have recused themselves because of large contributions by lawyers or parties. Rule 2.12(a)(4) of the draft makes it clear that campaign contributions must be considered, and that is a vital first step.

It would be nice if there were a bright line that could be used to determine when a campaign contribution should require disqualification, but other than the line between lawful and unlawful contributions, I believe that any such line will require either too many or too few recusals. There are just too many variables. Some of them include the absolute size of the contribution; the size of the contribution relative to the total amount

of money raised; how long ago the contribution was; whether the donor had regularly given to the judge in the past; whether the donor had other connections with the judge's campaign (such as raising other money); whether anyone else connected with the case or the lawyer (such as his law firm) or parties or amici made other substantial contributions; and whether the donor also made contributions to the judge's election opponent. No rule can be written that can take into account all of these (and many more) circumstances. Therefore, while clarity and a precise line would be desirable, it would certainly be at a cost of over or under inclusion. Since this is not a penal rule, and since it operates only in the context of a specific case, the lack of certainty is a small price to pay for the flexibility needed to avoid, on the one hand, the appearance that campaign contributions may affect a judge's decision, or, on the other, the risk that a judge may have to step aside unnecessarily, for example, when a modest contribution was made many years ago, by a long time supporter of the judge.

Therefore, I recommend that subpart (4) be amended to delete all after "lawyer" on line 20, and to replace it with "has made contributions to the judge's campaign that, under all the circumstances, might reasonably cause the judge's impartiality to be questioned." [In line 20, you might also want to change "or" to "and/or," whether or not you make this change.] Then the comments would have to be expanded to reflect the circumstances listed above and perhaps others. I would be willing to assist the Commission in drafting such comments, if the Commission takes this approach.

One issue that requires separate consideration: what to do about contributions made by amici. My view is that contributions by amici alone should not be a basis for recusal, but that contributions by amici should be taken into account if a party or a

lawyer/law firm has made contributions. Either way, the comments should address specifically whether contributions of an amicus are to be considered at all. [1]

2. Other recusals.

The motion to recuse Justice Scalia from the Cheney energy task force case (in which I was counsel for the party seeking his recusal), and his denial of that motion (a copy of which is attached), have raised at least two issues that the Commission needs to address. First, since Justice Scalia did not recuse himself, and since the language here is essentially the same as in 28 U.S.C. § 455(a), which formed the basis of that motion, does the Commission agree with Justice Scalia, and if not, what changes should be made in Rule 2.12 to alter that result? Difficult as it may be to resolve, the Commission simply cannot duck this issue (pardon the metaphor). In that connection, it would be useful for the Commission to comment on the notion of "the duty to sit," on which Justice Scalia relied, but which many cases say no longer applies, at least in cases outside the United States Supreme Court, where there can be no replacement Justice under the current statutes. [Comment [2] to Rule 2.12 now addresses this issue to some degree.]

Related to the Scalia recusal motion is the Supreme Court's practice of allowing individual justices to have the final word on their own recusals. Most comments that I have seen on this issue believe that the individual justice should not have the final word on whether the impartiality of the justice might reasonably be questioned. In that connection, I note that the American Law Institute recently approved Principles Governing Transnational Civil Procedure, in which the issue of judicial impartiality is discussed. Appended to the Principles, but not formally adopted by the ALI, are a set of

[1] I suggest the same "all circumstances" approach to Rule 2.16(b) dealing with appointments by a judge of contributors to the judge's election.

rules, including Rule 10 dealing with the impartiality of a tribunal. On this point Rule 10.3 is explicit that a judge should not be the final judge of his or her impartiality: "A challenge of a judge must be heard and determined either by a judge other than the one so challenged or, if by the challenged judge, under procedures affording immediate appellate review or reconsideration by another judge." The principle is both clear and correct, although the mechanics would have to be adapted when dealing with the highest court of a jurisdiction. Whether the United States Supreme Court adopts this approach or not, the Commission and the ABA should be on record as affirming the proposition that "no judge should be a judge in his/her own case," let alone the sole and final judge, as Justice Scalia was here.

There are several other issues relating to Rule 2.12:

In (a)(2)(ii), what if a covered person is a member of a law firm, but not the lawyer on the case: is disqualification required or even permitted? [Comment [4] addresses this issue.]

In (a)(2)(iii), has the Commission changed the current *any* economic interest standard applicable in federal law to a de minimis test? That is a big change and would require some explanation, as well as justification. And when combined with a "substantially affected" modifier, that really undercuts the current law. I do not understand the reason for the change from federal law and do not support it.

I strongly support (5); it is the right way to deal with public statements by a judge. But read literally, a judge who wrote a dissenting opinion in a prior case might have to step aside if the issue arose again. Therefore, you might want to add the phrase "(other than in a prior judicial decision/opinion)" to eliminate any such suggestion. Also, why

should the same principle not apply to a lawyer or law professor who has made such a public statement other than in a judicial election, and hence appears to have a closed mind?

In (a)(6)(3), suppose the lawyer was the head of an agency, not a lawyer at the applicable time: the same rule should apply, even if the person is not a material witness. As for the last two lines relating to the merits, if the case is one for judicial review, the applicable legal rules may make the review quite limited and hence "merits" may have an unduly narrow impact. I would move the entire last phrase regarding expressing an opinion to somewhere else, perhaps in (5) as noted above. Instead, I would just say that a judge should be disqualified in any case involving a matter in which the judge personally participated, in whatever capacity, while in government service. You might also look at 18 U.S.C. §§ 205-208 for some specific language.

Finally, in comment [2], line 24, the word "real" seems inappropriate: I suggest legitimate, legal, or lawful. [The word "real" has been eliminated from what is now comment [5] on line 28.]

3. Other provisions.

The Commission asked about whether Rule 2.08 should deal with the issue of whether a judge who attempts to settle a case, but does not succeed, should sit on the case. My sense is that the matter is not a proper subject for these Canons and that saying anything would be difficult and very long. My vote is to stay away from the topic, even though I think there is a potential problem with the way that at least some judges deal with settlements.

Rule 2.10 dealing with ex parte communications would be improved by moving what is now in (a)(5) to the front, so that it is clear that the prohibition does not override situations such as requests for temporary restraining orders (that are covered by specific rules of civil procedure) or communications with class counsel that clearly can have effects on absent class members, but are allowed as a matter of necessity. I suggest you move the thought to the beginning of (a), with a phrase like "Except as otherwise expressly permitted by law."

Two other matters in Rule 2.10. In (a)(1), emergencies may deal with substantive matters, and yet the draft seems to require otherwise. Second, in (3), line 39, it would be clearer if you deleted "and" and substituted ", provided that." [This has been done.]

Finally, in comment [8], the draft seems to proscribe internet factual research, and you asked for comments on that issue. If the comment were to be adopted, a large number of judges would seem to violate it, given the large number of internet citations I see in judicial opinions. The problem is more similar to that of judicial notice than it is to factual investigations, such as the scene of an accident. I would drop this reference here, and if the Canons deal with judicial notice, that is the place to consider it.

In Rule 2.11 on judicial statements, I would reverse the order of the two parts since (b) deals with a general duty and is not case specific, and it should always be followed by the judge to avoid disqualification even if no case is on the horizon. As for what is now (a), it is directed at the impact of a judge's conduct on others. I see no reason to limit the admonition to "public" comments, whatever that means; if the judge says something "privately" that becomes known and has the adverse impact envisioned,

that should also be covered. Comment [3], line 8, should also be amended to delete "publicly." [These have all been done.]

You have asked for comments on whether to include Rule 2.20 on immunity. The issue of whether and under what circumstances to grant an immunity is primarily a legislative one, involving the balancing of competing considerations. For that reason, the issue is not one of placement, but of who should make the decision. Because I do not think that judges should pass on their own immunities, except when the legislature does not, I oppose including Rule 2.20.