August 11, 2005

SUGGESTED DRAFTING CHANGES

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At the Commission's hearing on Friday August 6th in Chicago, I was asked by several members to propose specific language that would remedy the objections that I saw with the current draft. This is my effort to respond. It contains suggestions only for the most significant issues that I raised in my oral testimony. Because of time constraints, it does not deal with all of the points raised in my previously submitted written comments on Canons 2, 4 & 5.

Disqualification & Campaign Contributions:

My concern is that the specific recusal rules in Rule 2.12(a)(4) are too mechanical and fail to take into account situations in which legal contributions could still raise the appearance of partiality in favor of contributors. It was suggested that the general requirement of 2.12(a) would still apply, but I fear that courts would construe the specific limits in subsection (4) to create a safe harbor in this area, especially because it is very specific and others are more general. One possible solution, which I do not favor, but would be better than the current draft, would be to add the following language to the end of comment [1]: "Subsections (1)-(6) should not be read as safe harbors, so that, for example, disqualification might still be required even if the contribution limitations under (4) were not exceeded because of the number or timing of the contributions."

My preferred solution is to substitute the following language for what is now is 2.12(a)(4): "a party, lawyers for a party (including by the lawyer's law firm and partners), and/or any amici supporting that party (and its lawyers) have made contributions to the judge's campaign that, in the aggregate and in light of such circumstances as the timing of the contributions and other special relationships to the judge's campaign, suggest that the judge might be partial to that party."

There is no comment dealing with Rule 2.12(a)(4). I would also add the following comment: "In those jurisdictions where judges are elected, special problems are raised by the necessity of raising funds for an election campaign, even where the judge does not make a personal solicitation, which is forbidden by Rule 5.01(h). Nonetheless, it is likely that the judge will learn the names of large contributors from the campaign staff, or otherwise, since that information is generally required to be filed publicly and so knowledge should be presumed. If contributions were treated like gifts, then no candidate could both win a judicial election and not be disqualified in a large number of cases. *See* comment [4] to Rule 4.12. On the other hand, the fact that a contribution is in an amount that is lawful does not mean that there are no issues of perceived partiality, especially where contributions may have been made by a party, the lawyer for the party, that lawyer's law firm or partners, and amici and its lawyers, in amounts that approach the maximum allowed. In addition, issues of timing are

important: a contribution made five years ago will be viewed differently than one made while a case was pending before the judge. And if the lawyer were, for example, the treasurer of the judge's campaign committee, that would raise additional questions. Accordingly, the Rule requires judges to consider all of the relevant circumstances in deciding whether disqualification is required."

Rule 5.06

I believe that the substantive provisions in subsections (b)-(d) are inappropriate for a Code of Judicial Conduct and should be deleted. Instead they should be part of a state's general election laws applicable to all elected offices. Rule 5.06(a) can also be deleted as unnecessary since comment [10] to Rule 5.01 specifically permits the formation of campaign committees so that a judge will not have to make personal solicitations for contributions. If these changes are made, everything after "contributions" on lines 39-40 of comment [10] can be deleted also.

Review of a Judge's Decision Not To Disqualify

It is a cardinal principal of our legal system that no person should be a judge in her or his own case. A Code of Judicial Conduct is not the proper place to provide for procedural rules to deal with the manner in which disqualification motions should be made and decided. But the Code should contain a statement affirming the right of all litigants to have some form of review when a judge denies a motion to disqualify that judge.

I suggest adding the following language at the end of either comment [1] or comment [2] to Rule 2.12: "A judge should not have authority to make a decision on a motion to disqualify that judge that is immune from further review, and the rules of procedure provide for an appropriate review mechanism [citation]."

Justice Scalia's decision in *Cheney v. United States District Court*.

The decision of Justice Scalia not to disqualify himself in *Cheney v. United States District Court for the District of Columbia,* 541 U.S. 913 (2004), was highly controversial. I do not propose that the ABA take a position on that decision, but it would appropriate to include at some place, perhaps in a comment to Rule 2.12, a statement along the following lines: "The opinion of Justice Scalia in *Cheney v. United States District Court for the District of Columbia,* 541 U.S. 913 (2004), interpreting similar language in 28 U.S.C. 455(a) should be examined by each jurisdiction, a decision made as to whether that opinion should be the law in that jurisdiction, and Rule 2.12, or its comments, adopted to take into account whether the jurisdiction agrees or disagrees with that opinion."

Definition of Political Organization

The definition of "political organization" in the terminology section (p. 3, lines 15-19) is too narrow in at least two respects: It does not include political action committees, such as those formed by corporations or labor unions, or by trade associations or other groups, and it does not include organizations that are exempt from income taxation under section 527 of the Internal Revenue Code, but do not make contributions to candidates or parties. The language in lines 15-16 "sponsored or affiliated with a political party or candidate" narrows the definition to exclude those other entities. The easiest way to fix the problem is to add ", whether or not" after "group" in line 15.

Ban on Political Contributions

The ban on all political contributions in Rule 5.01(d) is too broad, both as a matter of policy and under the First Amendment. I cannot assist the Commission in drafting a modified version without both some explanation of what the goals of such a ban are, and what lines short of an absolute ban the Commission is prepared to accept. The problem is not yet one of drafting, but of the need to reconsider this Rule. Similarly, comment [18], which urges judges to apply all of Rule 5.01 to their family members, is even more offensively overbroad, although perhaps defensible in some regards as applied to employees of the judge and court personnel. It too needs reconsideration and a more targeted application. An alternative approach to comment [18] might be as follows: "Judges should be aware that, if members of their families or court personnel engage in the activities covered by Rule 5.01, that may be seen by others as being done at the behest of the judge, which would be improper. Judges are cautioned to be aware of this phenomenon and urged to take appropriate action to minimize the possibility of any such misunderstanding."

Attendance at Political Dinners

Judges should not generally attend political dinners etc. Rule 5.01(e), which allows such attendance for all judges, should be deleted, and an exception should be added to Rule 5.02, which applies only to judges who run in partisan elections and who should be allowed to attend such events. In addition, the judge should pay the full cost of the ticket: there is no reason for a judicial discount for the judge and any members of the judge's family, including a spouse. Therefore, everything after "public office" in line 25 of what is now Rule 5.01(e) should be deleted when it is moved to Rule 5.02.

Endorsement of Other Judicial Candidates

Rule 5.02(e) allows a judicial candidate to endorse publicly candidates running for office on the same court, but gives no policy reason why such a practice, which can be seen as creating a debt from the recipient to the endorser, should be allowed. I would delete it entirely. Running on the same party ticket will be enough of an implied endorsement that it obviates any need to allow anything more.

Manifesting Bias or Prejudice in a Judicial Election

Rule 2.05 forbids a judge from manifesting bias or discriminating generally against various groups of persons. It is unclear what Rule 5.01(l), which appears to apply only to elections and includes candidates, adds to Rule 2.05. Because Rule 5.01(l) applies during elections, it may be used to attack a candidate by filing charges based on an expanded notion of what the term "manifest" means. I doubt that it can be constitutionally applied to candidates for elected office for statements made during a campaign, but even if it can, I would delete it and leave Rule 2.05 in place for judges since I doubt that any candidate who does what is plainly within Rule 2.05 will win election as a judge. And if he or she does, that may be the price we have to pay for having judicial elections.

Judicial Immunity

The issue of whether there should be judicial immunity and, if so, whether it is absolute or qualified, is a matter of substantive law and not ethics. Therefore, it has no place in a Code of Judicial Conduct, and I would delete Rule 2.20. Judges may have to act where legislatures do not, but will do so in an actual case in which the parties can brief the issues, not in a rulemaking proceeding adopting a Code of Judicial Conduct.

Non-Judicial Activities of Judges

Rules 4.03 and 4.04 distinguish between appointments of judges to governmental and to non-governmental bodies, making it easier for a judge to serve on the latter than on the former. I see no basis for that distinction, and, if there is a distinction to be made, I would do it the other way. To me the real issue is whether the appointment will, in the language of Rule 4.04, "reflect adversely upon a judge's integrity, impartiality and independence, or interfere with the judge's judicial duties" as further elaborated in that Rule. That principal applies to government bodies as well, and I would, therefore, delete Rule 4.03 and add governmental bodies to Rule 4.04. However, the "unless" qualifier in Rule 4.04(b) also should be made applicable to the requirements of Rule 4.04(a)(iii). As is, the groups covered are too broad and may raise problems of the kind that the "unless" restriction will eliminate. I also note that, because some appointments to governmental bodies are mandate by statute (the Chief Justice as a member of the board of the Smithsonian, 20 U.S.C. 42), at least the comments should recognize that obeying a legislative direction is never a violation of this Rule. I think that this Rule as a whole, especially with these suggestions, could be tightened, but I do not have the time to attempt it.

Spousal Travel & Dinners

Rules 4.12 & 4.13 allow a judge and, in some cases, a spouse to accept gifts of dinners or travel expenses. I would prefer that judges never receive special treatment (if

all speakers do not pay for dinner or get reimbursed that is fine), but I do not oppose that. However, I see no reason to do anything for spouses since the only purpose of paying for them is to curry favor with the judge, as reflected in the caveat to gifts to spouses in Rule 4.12(a)(4). The modifier "where appropriate to the occasion" in Rule 4.13(b) (but not in Rule 4.12) does nothing to explain the dividing line between appropriate and inappropriate. To make these changes, delete "the judge's spouse or guest" in lines 14-15 in Rule 4.12(a)(3), and everything after "judge" in lines 33-34 in Rule 4.13(b).