NEW YORK COUNTY LAWYERS' ASSOCIATION

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Comments on ABA Proposed Revisions to Canon 5

These Comments were approved by the Executive Committee of the New York County Lawyers' Association at its regular meeting on July 27, 2005.

On behalf of the New York County Lawyers' Association, I thank you for this opportunity to address the Joint Commission. New York County Lawyers' Association (NYCLA) is a voluntary bar association founded almost 100 years ago in New York City. From its inception, NYCLA's doors have been open to all lawyers in good standing – without regard to gender, race, national origin, ethnicity, religion, sexual orientation or disability. Along with its long and continuing commitment to diversity in the profession and on the bench, NYCLA has had an equally distinguished record of advocacy in the public interest, most particularly for its efforts to expand access to the justice system and to maintain and protect the integrity and independence of the judiciary.

NYCLA is no stranger to the work of the Joint Commission. In February 2004, on behalf of NYCLA, I presented testimony at the Commission's hearing in San Antonio, Texas. That testimony focused on two topics of interest to the Commission: Judicial Statements and the Appearance of Impropriety.

When I appeared before you in 2004, I briefly described the work of NYCLA's Task Force on Judicial Selection (Task Force), which I co-chair. That Task Force, which was established under the presidency of Michael Miller, continues under our current President, Norman L. Reimer, who has given the Task Force a broad mandate to look at the wide array of issues involved in judicial selection and judicial conduct. Although some of our work has focused on the various reports and recommendations prepared by the Commission to Promote Public Confidence in Judicial Elections (the New York Commission) appointed by the Chief Judge of the State of New York, Judith S. Kaye, the Task Force has not limited itself to examining the proposals of the New York Commission.

Today our comments will first address the proposals regarding the restrictions on political activities of judges and candidates for judicial office and then turn to Rule 5.06, Campaign Committees.

Political Activities of Judges and Candidates for Judicial Office

We commend the Joint Commission for its careful and thoughtful work in looking at and establishing or revising rules of conduct for judges and for judicial candidates, whether seeking election in partisan or non-partisan elections, in retention elections or through the appointive process.

The drafters have provided blackletter text and comments that should be of extraordinary help in guiding the conduct of members of the judiciary and seekers of judicial office. The comments that we make should in no way be viewed as an attempt to look at this work product in a negative light but rather as an effort to strengthen these excellent proposals.

- Rule 5.01(e) restricts judges or candidates for judicial office from purchasing tickets for dinners or other events sponsored by political organizations unless the tickets are for the judge's personal use and the cost of the tickets does not appear to exceed significantly the value of the goods and services to be received.

  The restriction is a most appropriate one. However, the use of the term "personal use" is vague. If the term is meant to limit the purchase of a ticket to one solely for the judge or candidate, then the Rule should state "ticket" rather than the plural. If "personal use" is intended to include family members, a definition of who family members are, for this purpose, is needed.

  Further, the phrase "does not appear to exceed significantly the value of the goods or services to be received" should be tied to an objective reasonable person standard.

- Rule 5.01(k) We hold to the view continued in New York that it is unseemly for judges to comment publicly on pending cases, since such comments are likely to have a negative impact on the public's perception of judicial impartiality. Separately, as a matter of drafting, we suggest that the word "specific" be added before the word "proceeding"; otherwise, a statement about the law made by a judge could be construed to have an impact on a proceeding somewhere (e.g., comments about strict construction vs. a living Constitution approach in a lecture at a law school).

- Rule 5.01(m) prohibits both judges and judicial candidates from manifesting bias or prejudice "based upon a person's race, gender, religion, national origin, ethnicity, disability, age, sexual orientation or socioeconomic status." We commend the drafters for their inclusive definition, most particularly for the inclusion of socioeconomic status in the definition. We would, however, suggest that the definition be clarified further by including two additional categories that have been offered by our sister bar association in New York City, the Association of the Bar of the City of New York, "gender identity and expression" and "marital and parental status."

- Rule 5.01(m) addresses the issue of judicial or judicial candidate pledges, promises or commitments with respect to cases, controversies or issues likely to come before the court.

  We reiterate the point made in our testimony in February 2004 that the White[1] court, which struck down the provision in the Minnesota Code of Judicial Conduct prohibiting a candidate for judicial office from announcing views on "disputed legal or political issues," did not find standards unconstitutionally vague that bar the appearance of impropriety. See e.g., White at 2534 fn.5 ("statements that commit or appear to commit"); 2535 ("We think it plain that the announce clause is not narrowly tailored to serve impartiality (or the appearance of impartiality")); 2536 fn. 7 ("serves the State's interest in maintaining both the appearance of this form of impartiality and its actuality").

Accordingly, NYCLA continues to support a ban on conduct that appears to be a judicial pledge, promise or commitment. We again state that it is our view that such a proscription does not create an unconstitutionally vague category of restricted speech. We note with approval the decision of the drafters to make impropriety and its appearance a separate, independently enforceable rule, Rule 1.03. Consistent with that Rule, the concept of appearance to commit, pledge or promise should be incorporated in Rule 5.01(m).

Comment 15

We suggest that the language in Comment 15, which refers to "matters likely to come before the court on which the candidate would serve," be conformed with the language in Rule 5.01(k) and the phrase be changed to "might reasonably be expected."

Comment 18

Comment 18 addresses the need to discourage participation in political and campaign activity by a candidate's family or a candidate's employees or other court personnel. We suggest that language be added to Comment 18 clarifying the definition of family for this purpose.

Campaign Committees

- Rule 5.06(b) requires that a dollar cap be set for contributions from any individual and from any entity or organization. However, the Rule does not appear to have considered whether or how to value in-kind contributions. We urge the Joint Commission to recognize that in-kind contributions, such as providing space for a campaign headquarters, can be as valuable as and, at times, even more valuable than, cash support. In-kind contributions should be subject to the same dollar limitations and reporting requirements as monetary contributions.[2]

[1] Republican Party of Minnesota v White, 122.S.Ct. 2528(2002)

[2] Appended to this NYCLA testimony is the earlier NYCLA Report on In-Kind Contributions prepared for submission to the New York Commission.

- Rule 5.06(c) permits the solicitation of campaign contributions for a specified period following an election: 90 days is the period indicated in brackets. We suggest that this proposal be reconsidered. Once a judge has been elected, such contributions are far more likely to be intended to influence the judge or at least to appear to do so.

- Rule 5.06(d) addresses the issues involved in reporting campaign contributions. As stated earlier, NYCLA urges that in-kind contributions be included within the reporting requirements. Further, we urge that the aggregate value of contributions be reported.

Comment 3

In the earlier Comments on Rule 5.06, the drafters expressly stated in what was then Comment 1 that "it would not be appropriate to solicit a lawyer or litigant with cases currently pending or impending before a judge-candidate for a contribution to the judge's campaign for re-election or for higher judicial office." This most essential prohibition has been dropped from the Comments in the most recent draft. It must be restored. Solicitation of lawyers or litigants who are involved in a pending or impending case before the judge for whom campaign contributions are sought undermines the public's confidence in the judicial process and, without question, gives rise to at least appearances of impropriety and lack of impartiality.

Further, we suggest that the ban be extended to cover any knowing solicitation of the lawyer's firm and the law firm's employees." We also suggest the word "cases" be replaced with "a case."

I thank you for the opportunity to appear before you once again. On behalf of NYCLA, I want to again applaud your efforts to strengthen judicial integrity and independence by providing a model framework for judicial conduct.