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ABA Joint Commission to Evaluate the Model Code of Judicial Conduct
Debra D. Taylor; ABA Center for Professional Responsibility
Chicago, Illinois 60611

Submitted via e-mail

RE: Public Comment on Preliminary Report

To the Chairman and Members of the Joint Commission:

Before getting to the formalities of who we are and formally submitting our comments to the Commission, we feel it necessary to sound a klaxon of warning to all those in the judiciary who are people of faith, having convictions about sin (be they Bible believing Christians, true Roman Catholics, Mormons, Qur'an believing Muslims, or orthodox Jews, etc.); or those who are members of the Boy Scouts of America or like-minded organizations; or those who consider certain chosen behaviors to be deviant, unhealthy and base. We are outraged that the Commission, an arm of the ABA, is forcing the homosexual agenda (and more) on the judiciary, under the guise of "tolerance," by adding "sexual orientation" to the list of factors that define "discriminatory organizations" in Rule 3.04. As currently crafted, this Rule would require any judge who is a member of the Boy Scouts of America to choose between his job and the organization, for that organization staunchly and publically prohibits homosexuals from being troop leaders. (Thus, some claim the BSA "discriminates.") While the Commission is quick to point out that this Rule does not affect religious membership (at present), that proviso is only in a Comment. A Rule is a rule but a Comment is only a comment, as the Commission remarks on p4 of its *Introductory Report*. This is a slippery slope and whether calculated or not, can have the ultimate, undesirable, possibly unconstitutional effect of removing people of faith from the judiciary.

Now, per the solicitation on your web site that "The Joint Commission welcomes public comment on the Preliminary Report," and the several specific invitations for comments in your *Introductory Report*, I am writing on behalf of The Thom Seymour Paine Foundation offering public comment on the June 30, 2005 Draft of the Code of Judicial Conduct.

Judging from your current list of contributors, the Foundation is unique in offering "public" comment since we truly are members of the public. (With due respect to the Commission's one public member.) We are not lawyers. Nor are we in the Beltway. We are "end-users," if you will, the great unwashed masses who suffer outside the system and are powerless to change it. Our input will be more candid than those of your colleagues (even so-called advocates) who make their livelihood within the system. Unlike them, we do not have to play politics because we aren't worried about stepping on toes and becoming outcasts in the profession for challenging the judiciary or the status quo.

Another aspect that makes us unique in our comment on the Code of Conduct is that our members have actually filed complaints of judicial misconduct citing violations of the Code! (As non-litigants, with no ax to grind.) We were shocked to learn that no one who testified before the House Subcommittee on The Judicial Improvements Act of 2002 had ever filed a complaint, so had no real world experience. (Professor Hellman in particular, who helped draft the Act.) Evidently, for most in the profession, this is an intellectual exercise in the theoretical. (Barr & Willging reported only 6% of all complaints are filed by lawyers in their 1993 study.) For us, it is a practical matter grounded in reality. This makes our experience with the system - and therefore our input - infinitely more meaningful than someone with no experience. In fact, we've been supplying input to federal judges on former Chief Justice Rehnquist's Judicial Conduct & Disability Act Study Committee, demonstrating the system is not working. We have received two letters of acknowledgment from two of four judges. We think that gives us standing (in the normal, non-legal sense) to comment to this Commission.

The Foundation, as our website reflects, is a fledgling grassroots citizen organization focused on the judicial complaint process. We are good citizens, who, when we see judicial misconduct, act as Congress charged us, attempting to exercise citizen oversight of the judiciary.

Please pardon the curtness to follow, but time and space do not allow sugarcoating. We will happily elaborate on any point at your request. (Also, please forgive us in advance for the many formatting mistakes we are sure to make as we rush to write this.)

While we realize we are late to the party (time and staff being what it is in grassroots organizations), the timing may be Providential. We just received a long overdue (violating the law requiring an "expeditious" review) Order in response to a complaint of judicial misconduct against a federal judge who intervened to save his "good friend" in a prominent, national election. This Order is typical of other Orders our members have received and Orders we've found on the Internet. It is a representative exemplar of the disdain the judiciary has for the Code of Conduct and the legal sophistry judges will engage in neuter it, despite the ABA's attempt at clear, black letter Rules. (If sitting on the case of your good friend, who's a politician in the party you once chaired, who's losing an election, and the case at trial can win that election for him - if that doesn't constitute misconduct, demanding discipline, what does?) The Order is available for your inspection at <www.thomspaine.org/examples/piersol_2.pdf >

While the judicial side of the equation is not specifically an ABA issue, any dilution of the current Code of Conduct only aides and abets the judiciary by preventing good citizens from mounting good challenges to evil conduct. Without a good Code as part of the equation, the hapless citizen cannot hope to tally up enough counts for a valid claim of misconduct.

Now, to start: In our booklet, "You be the Judge!" <www.thomspaine.org/book.html > we praised the current Code of Conduct. Specifically, we wrote, we "don't mean to sound blasphemous, but these words could've come down from Mt. Sinai. They echo the ethics God gave Moses regarding judges. For those of us who love Justice, these are beautiful words." <http://www.thomspaine.org/step_3.html> We think the current code is fine as is.

Nonetheless, the Commission claims there's a "convincing argument for an examination of the adequacy of the current Code." One would think that implies the Code could be - and will be - strengthened more. But that is not what the Commission has done. We concur with Mr. Kendall of

the Community Rights Council in his July 14, 2004 written submission: "We must nonetheless express our profound disappointment with the proposed revisions to the Code contained in the new draft Canons 1 and 2. In a time of unprecedented public attention and concern over judicial ethics and extrajudicial conduct, the Model Code should be made stronger and less ambiguous. Instead, all of the proposed revisions either weaken judicial ethical obligations or make them more difficult to enforce." Since the Commission has not acted on Mr. Kendall's input, we assume it will not act on ours either. Nonetheless, we second his comment. For the sake of brevity, we will not reiterate them, but encourage the commission consider them anew in light of our comments.

The Code claims to provide black letter Rules to regulate the conduct of judges. Whether it does or not, there are two, more fundamental issues: the applicability of the Code and the toothlessness of it. On applicability: even judges can't make up their mind if the Code is binding. In a complaint of judicial misconduct against Judge Guido Calabresi in April 2005 citing violations of the Code of Conduct, the 2nd Circuit dismissed the complaint, claiming the Code is merely "advisory." More recently, in our Order mentioned above, the chief judge claims he is not bound by the Code of Conduct. (p3) This in spite of the DC court of appeals statement that "The Code of Conduct is *the law* with respect to the ethical obligations of federal judges." United States v. Microsoft Corp., 253 F.3d 34, 113 (D.C. Cir. 2001) To dismiss the Canons as merely being "advisory in any event" is like saying a judge's oath of office is "advisory," or that swearing on oath to tell the truth in court is only "advisory." Nonetheless, this is what the judiciary is saying. There needs to be a clear statement in the Code as to whether the Code is binding or not. Specifically, we suggest wording that "Violation of the Code of Conduct constitutes bad behavior by a judge."

Next is the toothlessness of the Code. We appreciate defining "shall" to establish mandatory obligations in the *Scope Section*. But like the requirement for an "expeditious review" of a complaint, mandated by 28 U.S.C. § 352, there are no consequences when a judge is severely tardy, thus violating the law. The commission mentions the "force of the Rules" on p4 of its *Introductory Report*. But our experience is that there is no force behind the Code and judges routinely thumb their noses in blatant disregard of it.

Technically, the task of putting bite into the Code is for Congress to legislate, but if there's any way for the ABA to add a penalty, it should do so. Otherwise, the Code is defining sin without hell. You don't have to be as smart as King Solomon to see that "When the sentence for a crime is not quickly carried out, the hearts of the people are filled with schemes to do wrong." As a minimum, we suggest "Not abiding by the mandatory obligations in this Code automatically and unequivocally constitute bad behavior in a judge."

While we realize the commission cannot possibly foresee every conceivable act of judicial misconduct, we think, being the clever lawyers that you are, you could do a better job of anticipating loopholes in the Code and closing them off.

While not exhaustive, this ends our overarching comments. Now here are specific comments in response to the specific requests in Commission's *Introductory Report.*

Canon 1- the appearance of impropriety

There is a Biblical principle that elders in the church must be "above reproach." We expect no less of our judges. Any appearance of impropriety erodes, and has already eroded, public confidence in

the judiciary. Quoting from the DC court of appeals in the Microsoft antitrust case,

> Judge Learned Hand spoke of "this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire...." Learned Hand, The Spirit of Liberty 132-33 (2d ed. 1953). Judges are obligated to resist this passion. Indulging it compromises what Edmund Burke justly regarded as the "cold neutrality of an impartial judge." Cold or not, federal judges must maintain the appearance of impartiality. What was true two centuries ago is true today: "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." (Code of Conduct Canon 1) Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.

"Justice should not only be done, but should manifestly and undoubtedly be seen to be done." Therefore, the language regarding the appearance of impropriety must stay as is.

Any straw man arguments constructed by lawyers representing judges in disciplinary proceedings are false. First, regarding the worry over what conduct might constitute a disciplinable offense: virtually no federal judge has ever been disciplined, let alone disciplined for the appearance of impropriety, so the concern is moot. Even in the most famous recent case of former Judge Thomas Penfield Jackson of Microsoft fame, where the DC Court of appeals essentially found Mr. Jackson guilty of judicial misconduct, giving the appearance of impropriety, no discipline resulted.

As for any constitutional issues: the appearance of impropriety has been in play for a long time now. Justice Scalia, at the Supreme Court level has said, "what matters is not the reality of bias or prejudice, but its appearance." If this was truly a constitutional concern, it would have been challenged long ago.

The courts have demonstrated they're loathe to find actual bias. In Mr. Jackson's case, where the evidence seemed overwhelming to this lowly member of the public, where the court observed Mr. Jackson's "violations were deliberate, repeated, egregious and flagrant," it still insisted "we find no evidence of actual bias..." Since the courts have set an impossible standard to establish actual bias (we hope bribery being an exception), if one were to eliminate the concept of appearance of impropriety from the Canon, it would effectively neuter it, rendering it totally impotent. We need to retain the current language.

[Perhaps the ABA should clean its own house first? Apparently, some chapters of the ABA are scornful of Canon 1 as well. See our Poster Child for Judicial Discipline at
< http://www.thomspaine.org/graphics/jackson.jpg >]

Canon 2, Rule 2.10(B) - "independently investigating facts in a case."

Let's take a giant step backward. Silly as it may sound, this public is not so much interested in whether the law was followed but rather whether Justice was served. The Bar is already aware of "lawyer jokes" and the general disdain the public has for Pharisaical lawyers who strain at gnats but swallow camels. We are not happy with ridiculous, often heartbreaking, travesties of justice, where one wins, or "get's away with it" on a "technicality." We think judges (as well as juries) should be allowed independent investigation of the facts. As teenagers, we expected our mothers to check our story if we came home late, claiming to be "studying at the library." We have the same expectation that facts will be checked and discerned at trial, as in the famous case of King Solomon and baby.

Canon 2, Rule 2.12- Disqualification

Only honorable judges recuse themselves. The dishonest ones will not. Nor will a dishonest judge disclose information that could result in his disqualification if there was something to gain in court. We know of a complaint where a judge had sworn a secret oath of allegiance to an organization at trial (attested to by various current and former members of that organization) and yet would not disclose this fact when asked in two of four motions for recusal!
< http://www.ripoffreport.com/view.asp?id=50954&view=printer >

In this case, the 10th Circuit ran interference and denied a petition for a writ of mandamus to force the judge to be more forthcoming. Still, this Rule is necessary. Not because it will force a bad judge to be good, but if ever a higher court decides to do the right thing, the violation of the Rule will provide a count of bad behavior against the judge.

Canon 2, Rule 2.20 "Immunity for Discharge of Duties"

This new rule is fraught with trouble. Even though the word "honorable" has been removed from this revision, the ABA is presuming judges are honorable people and will never abuse this rule. We have no such delusions. A bad judge could easily make life miserable for any enemy by simply alleging misconduct and never suffer the consequences of a false claim.

There have to be some consequences for capricious claims or they will increase unabated. The Code already requires a judge do the right thing when he sees misconduct in other officers of the court. If he's a good judge, we trust he will do his duty, regardless of the potential consequences. Sadly, the reality is, judges rarely act against other judges (never at the federal level for year ended Sept 04), and we don't think it's for fear of civil action. No, it's more like doctors in the AMA who never act against each other. Or lawyers in the ABA?

If a bad judge makes a false allegation, the legal system, in the form of a civil action, is the corrective check & balance.

Rule 3.04 "Affiliation with Discriminatory Organization"

We have already squawked about this on our first page. This appears to be a thinly veiled attempt to promote the homosexual agenda. "Sexual orientation" speaks volumes about a person and is a choice. Many of us call that choice "sin." While we agree that a judge should not discriminate in matters of law simply because someone is a homosexual (for example, a homosexual thief should be treated the same as a normal thief), we don't agree a judge should be forced to associate with any unsavory characters he doesn't want to. Good people must necessarily remove themselves from the influence of evil people. If one considers homosexuality evil, then a judge should be allowed to participate in organizations that don't allow homosexuals.

By invoking this rule, the ABA will effectively eliminate all Bible believing judges from the Bench, as their churches will, by definition, not tolerate homosexuality. It also possibly eliminates Islamist judges too, for homosexuality is a sin in Islam as well. Further, this rule will force a judge to decide between wholesome organizations, like the Boy Scouts of America, and the Bench. The rule is

discriminatory on its face, is probably unconstitutional, and in classic perversion, the very rule that is ostensibly tolerant of some is intolerant of a judge's religious beliefs.

The commission claims the comment allowing religious exception assuages our concerns. If that is the commission's sincere belief, and if the commission is adamant this new allowance for homosexual behavior be codified, then codify the exemptions in the Rule too. Otherwise, a comment is only a comment and has no force.

We're not sure where the commission is coming from with the reference to "ethnicity." Race is already properly covered in the Rule. We aren't aware of any problems of discrimination over someone's "ethnicity," whatever that is; we're suspicious this has some political motives behind it; could be easily abused to attack judges who support various and sundry traditional civil organizations; and we think this is opening a can of worms. Neither of these two additions is wise.

Canon 4 - "Solicitation and Acceptance of Gifts"

Oh, come on. On the one hand, the ABA is saying judges should avoid the appearance of impropriety (a high, lofty standard) and on the other hand, is saying a judge can receive a gift? (Otherwise perceived as being lobbied or receiving small bribes.) As if a small bribe isn't as bad as a big one?

The Bible is full of warnings concerning judges and bribes.

> Do not pervert justice or show partiality. Do not accept a bribe, for a bribe blinds the eyes of the wise and twists the words of the righteous. (Deuteronomy 16:19)

Judges and bribes go hand in hand and are historically a natural focal point. (By contrast, no one is going to offer a bribe to the founder of a grassroots citizen organization.) We have no sympathy for judges who have to "pay their own way." We have to pay our own way to attend industry meetings and we don't earn the large salary of a federal judge. Besides, we think judges should be busy working, not gallivanting around the country.

There are certain sacrifices people make in life for their jobs or their belief systems. No one is forcing anyone to be a judge. It should be recognized that part of being a judge forgoing payment to give a speech or forgoing remuneration to attend a conference, etc.

We say "Junk the junkets." There should be NO solicitations nor acceptance of gifts by any politician, especially a judge. As a plus, by adopting this policy, there is no overhead in reporting compensation, reimbursement and waiver of charges. Taxpayer monies can be put to better use.

Thank you for putting up with a little of our foolishness,

Seymour Paine