From: lsherman@courts.state.va.us
Sent: Friday, September 09, 2005 8:53 AM
To: Taylor, Debra
Subject: Comments on the Proposed Revisions to the ABA Model of Judicial Conduct

Dear Ms. Taylor:

Over the last several years I have been part of a subcommittee of judges brought together byThe Honorable Margaret McKeown, a member of the ABA Commission to Evaluate the Model Code of Judicial Conduct. I attended the recent ABA convention in Chicago and participated in a meeting chaired by Judge Mckeown during which a number of comments were made regarding the proposed Model Code. Judge Mckeown strongly urged that concerned members of the judiciary should put their views in writing and submit them to the Commission by the September 15, 2005 deadline for consideration by that body. I offer the following comments to the proposed Model Code.

With regard to Canon 1, Rule 1.03, the Commission should retain the language regarding the "appearance of impropriety", as well as the test set forth in subsection 2 of the proposed Comment. As public officials who routinely decide on issues that impact the daily lives of the litigants who appear before us, we should expect that our activities will be closely scrutinized by the public to ensure that our decisions have been made impartially. Judges should avoid activities that not only are improper but have the appearance of impropriety to reasonably minded members of the public. If the public begins to perceive that judicial decisioms are not being fairly and impartially rendered, the independence of the judiciary will be severely compromised.

With regard to Canon 3, Rule 3.02, Comment [5], I agree with the present proposed that allows a judge to provide references based upon the judge's personal knowledge of an individual, whether that knowledge is obtained through the judge's experience as a judge or through a long-term personal or family friendship. Canon 2, subparagraph B, of Virginia's Canons of Judicial Conduct allows a judge to provide a letter of recommendation on court stationery provided that "an indication [is] made that the opinion expressed is personal and not an opinion of the court."

With regard to Canon 3, Rule 3.04, I believe it is important that the language in Comment [1], "Rule 3.04 does not prohibit a judge's membership in any organization dedicated to the preservation of religious religious, ethnic or legitimate cultural values of common interest to its members" be added to the rule. Judges frequently belong to well established religious organizations which may, for example prohibit women from becoming clergy or from fully participating in religious services; or to other organizations, such as women's or African-American judges' associations, which work to advance the legitimate interests of their members within the larger universe of the judiciary. There should not be <u>any</u> doubt the a judge's membership in these legitimate organizations are protected.

With regard to Canon 4 I have great difficulty with the administrative burdens placed upon judges, pursuant to Rule 4.13, Comments [2] and [3], to make the factual determinations set forth in order to decide whether or not to attend privately funded educational programs which would facilitate judges' ethical obligation to remain competent in the law. Even educational programs sponsored by the ABA and other national, state and local bar associations are often sponsored by various

organizations seeking economic benefit from the bench and the bar, including legal research organizations, law book publishers, court reporting groups, office furniture and supply companies and others, in order to help defray program expenses. Simply because a program may held in an exotic locale or is sponsored by a dominant sponsor should not deprive judges of the ability and the right to attend a seminar which would help maintain judicial competence.

I also have difficulty with the administrative place upon judges by Rule 4.15 to report quarterly reimbursements and waivers of expenses, especially as related to attendance at privately funded programs. Perhaps the best way to get at the problem which the rule attempts to address is to have all educational programs submitted well in advance to state and federal judicial administrative agencies, which would then publish annually a list of approved programs which judges may attend in order to maintain competence in the law. I believe a similar process is already used by state bar associations to determine whether educational programs qualify for mandated CLE credits. This may be administratively burdensome, but it would give clear guidance to judges as to approved programs to attend and would avoid unpleasant and unnecessary surprises for judges who, after the fact, learn that program sponsors may have cases pending in their courts.

Overall,I believe the bench, bar and public are better served by allowing judges to have the freedom and independence to determine which programs and seminars best enable to maintain their judicial competence with as few regulations as possible. This standard still leaves the public and the bar with the remedy of requesting that a presiding judge be recused based on the parties and issues involved in a particular case. To me knowledge, most judges typically act with great sensitivity to requests for recusal, and denial of these requests is reviewable by appellate courts. Additionally, litigants and the bar also have the option of pursuing ethical complaints against judges in those extreme cases where they believe that there has been an ethical violation by judges in recusal situations.

Thank you for the opportunity to comment on the Model Code of Judicial Conduct.

Louis A. Sherman, Chief Judge
Norfolk General District Court
811 E. City Hall Avenue
Norfolk, VA. 23510
(757) 664-4914
lsherman@courts.state.va.us