PHILADELPHIA
BAR ASSOCIATION

March 31, 2006

VIA ELECTRONIC MAIL

Benjamin Woodson
ABA Center for Professional Responsibility
321 North Clark Street, 15th Floor
Chicago, IL 60610

Re: Comments on December 2005 Final Draft Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

Dear Mr. Woodson:

On March 14, 2006, the Philadelphia Bar Association's Professional Responsibility Committee sent its Comments on the December 2005 "Final Draft Report" of the American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct. At that time, we noted that the Comments had not yet been reviewed or endorsed by the Bar Association's Board of Governors, and so should not be construed as the official position of the Philadelphia Bar Association. I am pleased to now report that the Board of Governors has reviewed the Comments and, with two changes, has approved them.

The first change is to broaden the language of Comment (2) to Rule 3.04(A) with respect to the type of organizations that might be deemed to fall within the purview of the Rule. Our suggested language is as follows:

> Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership persons of any protected classification as defined by applicable law, including, but not limited to, on the basis of race, religion, sex, gender, ethnicity, sexual orientation, or national origin persons who otherwise would be admitted to membership.

The second change is to revise Comment [2] of Rule 4.04 in order to emphasize the importance of judges supporting lawyers' *pro bono* activities. The Philadelphia Bar Association proposes revising that Comment is as follows:

> In addition to appointing lawyers to serve as counsel for impecunious parties in individual cases, judges may promote broader access for people unable to afford legal services by encouraging lawyers to participate in *pro bono publico* legal

> services programs, if in doing so the judge does not misuse the prestige of the judicial office. Encouragement and support of pro bono legal service by members of the bench is an activity that is included within the phrase "improvement of the legal system and the administration of justice." Therefore a judge who engages in activities intended to foster participation of attorneys in the voluntary delivery of legal services to the poor, to groups typically underserved by the legal profession, or to organizations serving them is appropriate conduct under this Canon. Such activities may include, but are certainly not limited to: service on the board of directors of charitable organizations providing or facilitating such legal services, giving public recognition to attorneys who perform pro bono service, scheduling of cases to accommodate pro bono attorneys' schedules, acting in an advisory capacity to pro bono programs, teaching continuing legal education courses for attorneys who will be performing pro bono service, and attending events limited to attorneys who have provided pro bono service.

The final Comments of the Philadelphia Bar Association, as revised to include this change, are attached. Please do not hesitate to contact me if you have any questions.

Sincerely,

Nancy Winkelman
Co-Chair, Philadelphia Bar Association
Professional Responsibility Committee

Attachment

cc: Mark Harrison, Chair, ABA Joint Commission (w/encl.)
Alan Feldman, Chancellor (w/encl.)
Jane Dalton, Chancellor-Elect (w/encl.)
Michael Pratt, Vice-Chancellor (w/encl.)
Daniel Paul-Alva, Chair Board of Governors (w/encl.)
The Honorable Denis Cohen, Co-Chair Professional Responsibility Committee (w/encl.)
Evelyn Boss Cogan, Co-Chair Professional Responsibility Committee (w/encl.)
Kenneth Shear, Executive Director (w/encl.)

COMMENTS OF THE PHILADELPHIA BAR ASSOCIATION ON THE DECEMBER 2005 "FINAL DRAFT REPORT" OF THE AMERICAN BAR ASSOCIATION'S JOINT COMMISSION TO EVALUATE THE MODEL CODE OF JUDICIAL CONDUCT

March 31, 2006

I. CANON 1

Rule 1.02 Impropriety and Its Appearance

The Philadelphia Bar Association is concerned that the "appearance of impropriety" standard is cast in mandatory terms in both Canon 1 and in Rule 1.02. In the Philadelphia Bar Association's view, the command that a judge "shall avoid . . . the appearance of impropriety" is too vague to be enforced through disciplinary procedures. It is, in our view, unfair and unwise to expect a judge to conform his or her conduct to such a vague standard.

The Philadelphia Bar Association supports the concept that a judge should avoid even the appearance of impropriety as an aspirational goal and, accordingly, urges the Commission to place the appearance of impropriety standard in the Comments accompanying Canon 1 and Rule 1.02, rather than in the Canon and the Rule themselves. We suggest this standard be made part of the Preamble section as well.

* * *

II. CANON 2

Rule 2.08 Demeanor, Decorum, and Communication with Jurors

Rule 2.08(A)

A Comment should be added emphasizing the importance of judges giving their full and undivided attention to the matters before them while sitting on the bench. Just by way of example, we have heard anecdotally of judges who, while presiding over judicial proceedings, played computer games, fixed air conditioning vents, made personal phone calls, held sidebar arguments on a motion in an entirely different case, and even left the bench completely.

* * *

Rule 2.08(B)

For the sake of clarity and consistency, the Philadelphia Bar Association suggests that the term "court officials" be added to the first part of this section, and that the term "court" be inserted before the word "staff" in the second part of this section. As so revised, Rule 2.08(B) would provide:

> A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, **court officials,** and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of **court** staff, court officials, and others subject to the judge's direction and control.

* * *

Rule 2.08, Comment [3]

The Philadelphia Bar Association supports the Commission's recognition of a judge's discretion to "debrief" jurors as outlined in the Comment. We suggest that such sessions

take place with the mutual consent of the parties and/or their counsel, and with the parties and/or their counsel present.

* * *

Rule 2.09 Ensuring the Right to be Heard

Rule 2.09, Comments [2], [3]

The Philadelphia Bar Association supports the admonition that judges who will act as factfinders in the case should be particularly mindful of the effect that their role in settlement discussions might have. This concern should be expressed more directly in the Comment, and the distinction between the propriety of a judge conducting settlement discussions when s/he is presiding over a bench trial versus a jury trial should be made more pronounced. The Comments should clearly articulate that, while both demand vigilance, the former situation is of more concern than the latter. In addition, the Comment should be expanded to include a prohibition on a judge who is presiding over a bench trial conducting settlement discussions once the trial has commenced, unless the parties mutually have requested that the judge conduct those settlement discussions and have given their informed consent to the judge's participation therein. Finally, the Comment should acknowledge the practical reality that in some judicial districts (particularly in small, rural districts), there may be no option other than that the judge to whom the case is assigned conducts the settlement discussions.

* * *

Rule 2.10 Ex Parte Communications

Rule 2.10(B)

The Philadelphia Bar Association is concerned about judges "self-educating" themselves on factual matters that come before them. The Philadelphia Bar Association thus supports the deletion of the provision in a prior draft of this Rule that permitted a judge to "obtain information and opinions from a disinterested expert in a proceeding before the judge," and the concomitant clarification in this draft that, "[a]n appropriate and often desirable method of obtaining the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*." *See* Rule 2.10, Comment [8].

Further, the Philadelphia Bar Association supports current Comment [7] to this Rule, which provides that, "[t]he prohibition against a judge investigating the facts in a case independently or through a member of the judge's staff extends to information available in all mediums, including electronic ones." However, this Rule and its companion Comment [7] should make clear that the prohibition on a judge or a judge's staff independently investigating facts in a case does not extend to a judge or a member of the judge's staff conducting legal research through electronic means, nor to matters that would properly be the subject of judicial notice.

* * *

Rule 2.12 Disqualification

Rule 2.12(A)(1), (5)

The Philadelphia Bar Association believes that both of these Rules should be the subject of recusal, not disqualification. (If the Commission chooses to make this suggested distinction between disqualification and recusal, it will also need to consider adding definitions of those terms to the Terminology section.) Our concern is that disqualification is a harsh remedy for matters that are more subjective that objective, such as those at issue in Rules 2.12(A)(1) and (5). With respect to Rule 2.12(A)(1), we recognize that no human being ever is free of all bias or prejudice; a judge needs to be able honestly to evaluate his or her ability to be objective and to follow the law in every case, and to recuse himself or herself if the judge reasonably believes that s/he is unable to fulfill these responsibilities. With respect to Rule 2.12(A)(5), the Philadelphia Bar Association reiterates the concerns expressed in its October 12, 2005 letter (attached) about both the constitutionality of this Rule and the apparent inconsistency between this Rule and Rule 5.01(A)(13) [Rule 5.01(M) of the Commission's prior draft]. We will not repeat those concerns here, but instead refer the Commission to our October 12 letter. The Philadelphia Bar Association also has significant concerns about retaining the language "appears to commit" in this Rule.

* * *

Rule 2.12(A)(4)

The Philadelphia Bar Association supports this Rule in general, but questions whether it should be amended to make clear that the contributions from *all* parties and *all* their lawyers/law firms on the same side of the case are to be aggregated for purposes of the Rule.

* * *

Rule 2.12(A)(6)

The Philadelphia Bar Association suggests that some time constraints be imposed on the limitations set forth in sub-parts (a) and (b).

* * *

Rule 2.16 Administrative Appointments

Given the laudable and important focus of this Rule on anti-nepotism, the Philadelphia Bar Association suggests that the restriction in Rule 2.16(B) apply to contributions made by the lawyer's spouse or domestic partner, as well as those by the lawyer him or herself.

* * *

Rule 2.19 Disability and Impairment

The Philadelphia Bar Association suggests that Rule 2.19 amended to include the words "or initiate" between "shall take" and "appropriate corrective action."

We also suggest that the list of examples of "appropriate action" in Comment [1] be expanded to include making a report to the appropriate disciplinary authorities. (Comment [1] currently sets forth the following examples: "speaking directly to the impaired person,

notifying the individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.")

Finally, we believe that the Comments should address the possibility of having the disabled or impaired judge removed from the particular proceeding over which s/he is presiding while in a disabled or impaired state.

* * *

III. CANON 3

Rule 3.01, Comment [5]

The Committee feels that the prestige of judicial office needs to be respected, but at the same time does not want to unnecessarily restrict judges from being praised for their judicial accomplishments. As such, the last sentence of Comment [5] should be revised as follows (additions in bold, deletions in strikethrough):

In contracts for publication of a judge's writings, the judge should retain sufficient control over the advertising to avoid **such** exploitation ~~of the judge's office~~.

* * *

Rule 3.04, Comment [1]

If the Commission agrees with the Philadelphia Bar Association's suggestion that the "appearance of impropriety" standard be deleted from Canon 1 and Rule 1.02, the reference to that standard and Rule 1.02 likewise should be deleted from this Comment [1] to Rule 3.04.

In addition, the Philadelphia Bar Association suggests that the following point be added to Comment [1]: "A judge should not be a member of any organization which compromises or appears to compromise his or her ability to judge fairly and impartially."

* * *

Rule 3.04, Comment [2]

The Philadelphia Bar Association suggests that the last sentence of Comment [2] should be revised as follows:

> Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership persons of any protected classification as defined by applicable law, including, but not limited to, on the basis of race, religion, sex, gender, ethnicity, sexual orientation, or national origin persons who otherwise would be admitted to membership.

* * *

IV. CANON 4

Rule 4.04 Participation in Civic or Charitable Activities

The Philadelphia Bar Association has a general concern with the distinction drawn in this Rule between a judge's participation in civic or charitable activities (which, subject to the parameters of Rule 4.04, is generally permissible) and a judge's similar participation in private activities (which would appear not to be). (We note that the term "civic or charitable activities" is not defined.) Our concern is that organizations don't always neatly fit into one or the other category. Just by way of example, in our community, Temple University is a public university, and the University of Pennsylvania is not. Would this Rule permit a judge to serve as an officer, director or trustee of the law school of the former institution, but not of the latter? If

so, is that an intended distinction? In similar vein, there are some institutions that, while legally organized as non-profit entities, actually function far more like for-profit entities than charitable entities.

While the Philadelphia Bar Association does not have in mind a solution to this problem, it may be that the issue could be addressed by including a definition of "civic or charitable activities." In any event, we raise the issue for the Commission's further consideration.

* * *

Rule 4.04, Comment [2]

The Philadelphia Bar Association strongly supports judicial encouragement and support of lawyers' *pro bono* activities. To that end, we suggest that the following language be added to Comment [2]:

> In addition to appointing lawyers to serve as counsel for impecunious parties in individual cases, judges may promote broader access for people unable to afford legal services by encouraging lawyers to participate in *pro bono publico* legal services programs, if in doing so the judge does not misuse the prestige of the judicial office. Encouragement and support of pro bono legal service by members of the bench is an activity that is included within the phrase "improvement of the legal system and the administration of justice." Therefore a judge who engages in activities intended to foster participation of attorneys in the voluntary delivery of legal services to the poor, to groups typically underserved by the legal profession, or to organizations serving them is appropriate conduct under this Canon. Such activities may include, but are certainly not limited to: service on the board of directors of charitable organizations providing or facilitating such legal services, giving public recognition to attorneys who perform pro bono service, scheduling of cases to accommodate pro bono attorneys' schedules, acting in an advisory capacity to pro bono programs, teaching continuing legal education courses for

attorneys who will be performing pro bono service, and attending events limited to attorneys who have provided pro bono service.

* * *

Rule 4.06 Service as Arbitrator or Mediator in a Private Capacity

The Philadelphia Bar Association finds the qualification "unless expressly authorized by law" contained in this rule (and in its accompanying Comment[1]) to be unclear. In what circumstances would a judge be "expressly authorized by law" to act as a private arbitrator or mediator? The Commission should provide specific examples of the types of arbitration/mediation services that are and are not permitted in order to clarify the intent and scope of this Rule.

* * *

Rule 4.10 Solicitation, Acceptance, and Reporting of Gifts

In the Philadelphia Bar Association's view, an aspirational Comment should be added to the Comments to this Rule, noting that judges should be mindful of the impact that their personal relationships may have on how litigants perceive the fairness of the court, and, advising that there may be certain situations as to which the court should consider disclosing of the fact of the gift to the litigants.

* * *

V. CANON 5

RESERVED AT THIS TIME

Schnader
ATTORNEYS AT LAW

1600 MARKET STREET SUITE 3600
PHILADELPHIA, PA 19103-7286
215.751.2000 FAX 215.751.2205 schnader.com

October 12, 2005

Nancy Winkelman
Direct Dial 215-751-2342
E-mail: nwinkelman@schnader.com

VIA ELECTRONIC MAIL

Ms. Brenda Taylor
American Bar Association
ABA Justice Center
321 N. Clark Street
Chicago, IL 60610

Re: Preliminary Comments on Proposed Canon 5

Dear Ms. Taylor:

I am writing to the Commission in my capacity as Chair of a subcommittee of the Professional Responsibility Committee of the Philadelphia Bar Association. The subcommittee is charged with reviewing and, as appropriate, providing comments to the ABA's Joint Commission to Evaluate the Model Code of Judicial Conduct.

For the past year, the subcommittee has been reviewing the Commission's proposed changes to the Model Code of Judicial Conduct. Although our work is not yet completed, we would like to provide our input on Canon 5 at this time in view of the Commission's further deliberations on that Canon later this month. Canon 5 is, of course, a particularly important issue in Pennsylvania, since this is a jurisdiction in which both trial and appellate judges are elected in partisan elections. Please be advised that, in view of their preliminary nature, these comments represent *only* the views of our subcommittee; they have not been reviewed or endorsed by the Philadelphia Bar Association as a whole.

As presently drafted, the provisions of Rule 5.01(m) are inconsistent with those of Rule 2.12A (5) in light of the Supreme Court's decision in *Minnesota v. White.* Rule 2.12A provides that:

> A judge **shall disqualify** himself or herself in any proceeding in which the judge's impartiality **might be questioned** by a **reasonable** person, including but not limited to circumstances where: ... (5) the judge while a judge or [judicial candidate] has made a public statement that commits, or appears to commit the judge with respect to an issue in the proceeding or the controversy in the proceeding. (Emphasis added.)

Rule 5.01(m) provides that:

> [A judge or a candidate for judicial office shall not directly or indirectly] with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office.

As required by *Minnesota v. White,* the prohibitions in Rule 5.01(m) are based on an objective standard and extend only to actual "pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office." In other words, Rule 5.01(m) permits judges and judicial candidates to make statements about issues or controversies, provided they do not make pledges, promises or commitments and that they are still able to render decisions in accordance with applicable law as required by their judicial function. Under this standard, the judge or judicial candidate is not required to avoid making comments because of the perceptions of others who might be aware of those comments. The comments are constitutionally protected by the First Amendment. On the other hand, failure to disqualify in the circumstances enumerated in Rule 2.12A (5) then becomes grounds for a disciplinary action. This creates an inherent and, in our view, irreconcilable tension between the two rules.

While Comment 14 to Rule 5.01 references Rule 2.11, it does not address the contradiction found in Rule 2.12, nor does the Comment's suggestion that candidates for judge who express their view emphasize their "duty" (and presumably willingness and ability) "to uphold the law regardless of their personal views" resolve the issue. As presently drafted, a judge can be disciplined under Rule 2.12A (5) for engaging in activity that is both constitutionally protected and specifically permitted by Rule 5.01(m).

We respectfully ask the Commission to review the conundrum faced by the judicial candidate caused by the interplay between Rules 2.12 and 5.01(m). If the judicial candidate is permitted by law to state his or her views on a topic as part of an election campaign, it cannot be cause for mandatory disqualification for the judge to have done so.

We believe that Rule 2.12 should be redrafted to remove disqualification as a requirement where a judge or judicial candidate has articulated a view or position that is allowed under Rule 5.01(m). One way to accomplish this would be to change the language in Rule 2.12 to eliminate disqualification and replace it with the suggestion that a judge in such circumstances should consider recusal if appropriate. By phrasing the rule in terms of recusal rather than disqualification, the matter becomes a discretionary one (subject, of course, to appellate review), rather than a disciplinary one, and thus the inconsistency (of constitutional proportions) between the two rules is alleviated.

In closing, we would like to thank you for this opportunity to provide our input on this particularly important question, and look forward to providing further comments in the months ahead.

Very truly yours,

Nancy Winkelman