Background

The 2007 ABA Model Code of Judicial Conduct: Blueprint for a Generation of Judges

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In February 2007, the American Bar Association, in the first comprehensive revision of its Model Code of Judicial Conduct *since 1990, adopted a new Model Code. The new Code was prepared by an ABA Joint Commission created in 2003. This article describes the processes leading to the Commission's creation, composition, and operation. The significant format changes from the previous Code are explained. A major portion of the article is devoted to an analysis and brief explanation of some of the proposed changes from the previous Code, with a focus only on principal changes and substantive additions and deletions.*

The ABA *Model Code of Judicial Conduct* (referred to here as "the Model Code") was last comprehensively revised in 1990. The ensuing seventeen years have seen significant, often dramatic, developments in the legal, social, and political environment in which judges make decisions about their conduct and in which judicial conduct is evaluated by others. These developments include major changes in the law governing judicial speech, the politicization of state court systems, evolving conceptions of the role of judges, and the increasing involvement of pro se litigants in courts throughout the country. In 2002 the ABA Commission on the 21st Century Judiciary was established and charged with the task of cataloging these developments. In July 2003, the Commission issued its report, which concluded, in light of events transpiring since the Model Code was last revised, that "the time has come for the ABA to undertake a comprehensive review of its Model Code of Judicial Conduct."

The Joint Commission to Evaluate the Model Code of Judicial Conduct

In July 2003, the same month that the Commission on the 21st Century Judiciary called on the ABA to revisit the last version of the Code, the 1990 Model Code, ABA president Dennis W. Archer announced the appointment of a Joint Commission to Evaluate the Model Code of Judicial Conduct under the joint auspices of the ABA's Standing Committees on Judicial Independence and on Ethics. The Joint Commission, funded by generous grants from the Joyce Foundation, was composed of ten members, including lawyers, a public member, a leading academic on the subject of judicial ethics, and judges from the federal and state judiciaries. In addition, a ten-member advisory group of experienced lawyers and judges representing organizations with expertise and institutional interest in judicial ethics and the administration of justice assisted the Commission (they will be referred to collectively as the Commission), participated fully in all Commission meetings, and voted on

issues being discussed until the final year of the Commission's existence. The work of the Commission was substantially facilitated and enhanced by the work of its reporters, Professors Charles Gardner Geyh and W. William Hodes, both of whom have substantial expertise in the field of legal ethics. They drafted proposed code provisions for consideration and participated actively in the Commission's discussions. The work of the Commission was also significantly assisted by knowledgeable senior staff members of the ABA Center for Professional Responsibility, who brought to the work of the Commission extensive experience derived from their involvement in the formulation and adoption of several other model codes relating to legal and judicial ethics and the disciplinary enforcement of the legal profession and the judiciary.[1]

THE MODEL CODE REVISION PROCESS

Over the course of thirty-nine months, the Commission met in person nineteen times, convened via teleconference thirty-two times, and devoted thousands of hours to the Model Code project. The Commission's methodology was completely transparent. In conjunction with its in-person meetings, the Commission held nine public hearings at which it heard and considered testimony from several dozen individuals and organizational representatives with an interest in and expertise pertinent to Model Code issues.[2] For example, at its public hearings, the Commission received comments from representatives of the ABA Standing Committees on Pro Bono and Public Service and on Lawyer Assistance Programs and several committees of the Judicial Conference; various state and local bar associations and Public Citizen (a public-interest consumer-advocacy organization); the Center for Constitutional Litigation (national law firm dedicated to challenging laws that impede access to justice); the James Madison Center for Free Speech (organization dedicated to protecting the First Amendment rights of all citizens); and a variety of other judicial and public-interest organizations. Representatives of the Commission met on several occasions with the Conference of Chief Justices, various entities within the Judicial Division of the ABA, and other interested groups. The Commission periodically posted drafts of the new code on its Web site, and thirty-nine organizations and approximately three hundred individuals interested in judicial conduct and ethics submitted comments on the drafts to the Commission.

The Model Code is the result of vigorous and informed discussion and debate among Commission members and advisors, and the rules and comments contained in the Model Code were ultimately determined by a majority vote of the commissioners. Despite disagreements about various issues, including about which provisions of the Code are the most important and which changes adopted by the Commission were most noteworthy, the Commission was a remarkably cooperative, collaborative group

[1] A roster of the Commission members, advisors, reporters, and counsel appears at http://www.abanet.org/judicialethics/roster.html.

[2] A list of the commentators, as well as the text of their comments, can be found at http://www.abanet.org/judicialethics/resources/comments.html.

of knowledgeable, strong-minded individuals who were dedicated to reaching consensus and producing a sound, timely, user-friendly Model Code. As the Commission decided early in its work to change the format of the Model Code, it was necessary to rearrange and often recategorize various provisions, including noncontroversial ones, a challenging process that continued throughout the Commission's work.

As noted above, the Commission knew or learned that a great many provisions of the 1990 Code had served the judiciary well and, therefore, did not spend much time discussing those provisions and did not make substantive changes to them. The Commission endeavored to preserve as much of the 1990 Model Code as possible. In contrast, the Commission spent a tremendous amount of time on subjects not previously covered by the 1990 Model Code and, predictably, revisited those subjects and provisions throughout the life of the project. For example, as will be discussed later, there was sharp philosophical disagreement among the commissioners about the extent to which the Model Code could or should regulate judicial candidates' political activity; the resolution of those disagreements and the adoption of the applicable canon occupied a major portion of the Commission's effort. Most of this article will focus on and explain only the principal changes and substantive additions reflected in the 2007 Model Code. The material discussed here was chosen because, with rare exceptions, the selected provisions provoked the most recurring and protracted debate throughout the Commission's deliberations.

THE FORMAT AND STRUCTURE OF THE NEW MODEL CODE

The most noticeable difference between the Model Code and its predecessors is its format.[3] The 1990 Model Code often compressed multiple and sometimes disparate matters into a single lengthy section and at other times scattered closely related matters across different parts of the Code. Some sections of the 1990 Model Code mixed hortatory pronouncements with enforceable standards, while other sections included commentary elaborating on what judges "must" do that was seemingly unsupported by the black-letter standards accompanying such commentary. Important sections were not illuminated by commentary, and the underuse of captions made the document difficult to use for those less than intimately familiar with its contents.

To remedy these problems, the Commission reached a consensus early in its deliberations that the Model Code should be reformatted to more closely resemble the *Model Rules of Professional Conduct*. Thus, the Model Code has been restructured into four canons stating overarching principles, followed by "black-letter" rules setting forth the enforceable obligations and limitations imposed on judges and judicial candidates. The canons and rules are preceded by four sections—Preamble, Scope, Terminology, and Application—that, taken together, set forth the purposes of the Model Code and provide a blueprint for its interpretation and use.

[3] The full text of the 2007 *Model Code of Judicial Conduct*, as well as Reporter's Explanatory Notes, can be found at http://www.abanet.org/judicialethics/approved_MCJC.html.

Canon 1 addresses a judge's conduct in general; Canon 2, conduct relating to the duties of judicial office; Canon 3, conduct relating to extrajudicial activities; and Canon 4, conduct relating to political and campaign activities. The canons of the Model Code thus follow the same basic structure and sequence as the 1990 Model Code, but the Model Code now combines former Canons 1 and 2 in new Canon 1. The rules (formerly denominated "sections") that relate to each canon have been reorganized and captioned by subject. Comments (formerly "commentary") have been added throughout to offer guidance on rules that were, in the Commission's view, not self-explanatory.

The rules are now limited to statements of what a judge shall, shall not, or (in a very few instances) may do. Statements as to what a judge *should* do are confined to comments. The purpose of this change is not to diminish the critical role that the Model Code plays in providing explanatory and aspirational guidance to judges about how they should behave. Rather, the purpose is to make absolutely clear the distinction between enforceable rules, which can subject judges to discipline if violated, and the guidance in comments, which encourages judges to exceed minimum standards and conduct themselves in the best traditions of the judiciary.

The Commission discussed the relationship between canons and rules at length. With the exception of the directive that judges avoid the "appearance of impropriety" (Canon 2 in the 1990 Code and Canon 1 in the 2007 Code), the Commission was united in the view that the canons themselves articulate overarching principles that provide important guidance in interpreting the spirit and purpose of the rules, but are worded in terms too broad and sweeping to be independently enforceable in disciplinary actions. Rather, in the Commission's view, the rules alone articulate enforceable standards, and the new Scope section confirms that decision.

Those provisions that proved effective and helpful to judges and judicial regulators since adoption of the 1990 Model Code are retained in the 2007 Model Code, although to accommodate the new format and organization, the precise language has often been slightly modified and the provisions rearranged. The balance of this article will focus on and explain only the principal changes and substantive additions reflected in the 2007 Model Code.

PRELIMINARY MATERIAL

Preamble and Scope Sections. The Preamble, as revised in 2007, serves the limited purpose of describing the general, overarching objectives of the Code. The 1990 Preamble also included specific guidance as to how the canons, sections, and commentary were to operate and how the Code was to be enforced. While useful, such guidance was, in the Commission's view, more appropriately discussed in a new "Scope" section. The 1990 Code Preamble also included language discussing the "degree of discipline to be imposed" in enforcing the Code's provisions, which has been deleted completely from the 2007 Code. The issue of how disciplinary authorities should impose discipline under the Code is, in the Commission's view, better left

to the ABA Standards Relating to Judicial Discipline and Disability Retirement, which prescribe standards used in the enforcement process.

Terminology Section. Most terms defined in the 1990 Model Code have been incorporated in the 2007 Model Code. "Domestic partner" has now been defined, because "non-traditional" relationships that exist outside of marriage needed to be taken into account in the same way as marital relationships in evaluating their potential conflict-of-interest implications under the Rules. "Impartiality," as well as "independence" and "integrity," appear throughout the Model Code as elemental goals that judges must protect and preserve, and because of the pervasiveness with which the terms are used, the Commission concluded that definitions are warranted.

Application Section. The Application section establishes when the various rules apply to a judge or judicial candidate. The application of the rules to the administrative-law judiciary is consistent with policy adopted by the ABA House of Delegates, which provided that members of the administrative-law judiciary should be accountable under appropriate ethical standards adapted from the 1990 Model Code in light of the unique characteristics of particular positions in the administrative-law judiciary. The rationale for applying the rules to justices of the peace and members of the administrative-law judiciary derives from the fact that they perform essentially the same function as trial judges hearing a case without a jury.

ANALYSIS OF PRINCIPAL CHANGES

Canon 1: A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.

Canon 1 addresses obligations of judges to uphold the independence, integrity, and impartiality of the judiciary and to avoid impropriety and its appearance. Canons 1 and 2 in the 1990 Model Code were directed toward essentially the same end: articulating a limited number of general, overarching principles that should govern a judge's conduct. However, these canons were inextricably linked because the admonition "avoiding impropriety and the appearance of impropriety," which appeared in former Canon 2, was thought to be instrumental in upholding "the independence and integrity of the judiciary" in former Canon 1. Moreover, the Commission was persuaded that in the 1990 Model Code, the distinction between Canons 1 and 2 was blurred by including in Canon 2A a duty to act in a manner that "promotes public confidence in the integrity and impartiality of the judiciary," which essentially paraphrased the directive in former Canon 1 to "uphold the integrity and independence of the judiciary."

Although one could argue that former Canon 1 was concerned with protecting independence and integrity *in fact*, while former Canon 2 concentrated upon protecting *appearances and public perception*, the overlap between the canons was so great that in the Commission's view, preserving the two as discrete canons was unnecessarily confusing. Accordingly, former Canons 1 and 2 have been combined to underscore

the instrumental relationship between them, thereby reinforcing the importance of both. Combining the two canons adds coherence to the overall structure of the Code, so that Canon 1 now articulates the general principles and underlying rules applicable to judges *at all times*, while Canon 2 now focuses on principles and rules applicable to the duties of judicial office.

At the center of the Commission's deliberations over Canon 1 was the admonition that judges should avoid conduct that creates the "appearance of impropriety" (ED: see Ostermiller, in this issue). The Commission's discussions reflected two competing tensions. On the one hand, a primary purpose of the Code is to advise and inspire judges to adhere to the highest standards of ethical conduct. To preserve public confidence in the courts, it is not enough that judges avoid actual improprieties; they must also avoid the appearance of impropriety. On the other hand, another purpose of the rules is to serve as the basis for discipline. To discipline judges for *appearing* to act improperly—even if they did not act improperly *in fact*—was considered by some judges and commentators to implicate due-process concerns because of the potential vagueness of the terms "appearance" and "impropriety."

To address the concern that a duty to avoid the appearance of impropriety was too vague for independent enforcement, the Commission's preliminary draft included a comment to the effect that ordinarily, when judges are disciplined for violating their duty to avoid the appearance of impropriety, it is a combination of other, more-specific rule violations that gives rise to the appearance problem. When the preliminary draft was circulated for public comment in June 2005, the draft was criticized for unnecessarily diluting the "appearance of impropriety" standard. Of additional concern was the deletion in the preliminary draft of the directive in former Canon 2A that "a judge shall . . . act *at all times* in a manner that promotes public confidence in the integrity and impartiality of the judiciary" because the "act at all times" clause was the language in the canon through which the "appearance of impropriety" was commonly enforced.

In response, the Commission deleted the questioned draft comment and restored the "act at all times clause." In a later draft, the Commission went further and proposed to include the directive to "avoid the appearance of impropriety" in *both* Canon 1 and in a specific rule. However, continuing objections from the Standing Committees on Ethics and Professional Discipline over the vagueness of the "appearance of impropriety" as an enforceable standard led to reconsideration, and the Commission proposed retaining the "appearance of impropriety" language only in the Canon. As part of its reconsidered proposal and, as a precaution against use of the "appearance of impropriety" as an independent disciplinary standard, the Commission included a statement in the Scope section confirming that the canons could themselves be enforced only when a rule was violated. Ultimately, however, at the urging of the Conference of Chief Justices and other legal organizations, the Commission accepted an amendment during debate in the House of Delegates that reinstated the duty to avoid impropriety *and the appearance of impropriety* as part of Canon 1 and as Rule 1.2. With an enforceable rule governing appearances thus "on the books," objections to the nonenforceability

of the canons generally were withdrawn, and the Scope provision was amended to confirm that only rules, not canons, are enforceable.

Canon 2: A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY, COMPETENTLY AND DILIGENTLY.

After the Commission posted its final, proposed draft of the Model Code in anticipation of the 2007 midyear meeting, various committees of the ABA Judicial Conference proposed comments intended to make clear that judges should, without fear of discipline, engage in activities to encourage and promote professionalism among the judiciary and enhance public understanding of the work of judges. The Commission adopted those proposals (Comment 6 and Comment 2 to Rules 1.2 and 2.1, respectively).

Throughout the course of the Commission's deliberations, various witnesses, including representatives of the ABA Standing Committee on the Delivery of Legal Services, urged the Commission to create special rules enabling judges to assist pro se litigants, while others urged the Commission to disregard calls for such rules (ED: see Goldschmidt, in this issue). The Commission developed language—Comment (4) to Rule 2.2 ("Impartiality and Fairness")—to make it clear that judges do not compromise their impartiality when they make reasonable accommodations to pro se litigants, who may be completely unfamiliar with the legal system and the litigation process. To the contrary, by leveling the playing field, such judges ensure that pro se litigants receive the fair hearing to which they are entitled. The Commission qualified the comment by cautioning judges to resist unreasonable demands for assistance that might give an unrepresented party an unfair advantage and raise questions about the judge's impartiality.

The Commission received considerable testimony about the need to clarify and expand rules and comments relating to harassment of various kinds, including sexual harassment. The 1990 Code included no black letter about harassment, which it relegated to a discussion in the commentary limited to sexual harassment. The Commission agreed that harassment is a form of bias or prejudice that the rules proscribed but wanted to expand the proscription beyond sexual harassment to reach other forms of harassment as well. However, the Commission was persuaded that sexual harassment deserves special mention, given the significance of the problem, and that harassment per se was sufficiently distinct from bias and prejudice to deserve separate mention in the black-letter rule.

The rule governing ex parte communications—Paragraph (C) of Rule 2.9 ("*Ex Parte* Communications")—prohibits judges from undertaking independent *factual* investigations. In the Commission's view, commentary in the 1990 Code to the same effect was insufficiently supported by the black-letter rule. Moreover, the Commission recognized that the judge's duty to consider only the evidence presented by the parties is a defining feature of the judge's role in an adversarial system and, therefore, warranted explicit mention in the rule itself. The prohibition is qualified, however,

by an exception recognizing that facts so generally known as to be subject to judicial notice fall outside the scope of the rule, but Comment 6, Rule 2.9 makes clear that investigating the "facts in a matter" extends to information available in all media, including the Internet (ED: see Ostermiller, in this issue).

The Commission considered a great deal of testimony about the emergence and operation of a variety of newly developing courts and related court procedures. These include courts variously referred to as "domestic abuse courts," "drug courts," "restorative justice courts," "therapeutic courts," and many others. In these nontraditional courts that hear matters on an increasingly broad array of issues ranging from drugs to juvenile justice, domestic relations, and crime, judges are routinely called upon to communicate with parties, service providers such as social workers, and others in ways that can be in tension with the requirement that judges be and appear impartial and with traditional rules governing ex parte communications. Several witnesses urged the Commission to create special ethical rules for such courts. The Commission was ultimately unwilling to do so because therapeutic courts are too numerous and varied to enable the Commission to devise enforceable rules of general applicability for such courts. Moreover, the Commission was informed that individual jurisdictions have in many instances provided for permissible ex parte contacts in the operation of "problem-solving" courts by developing specific procedural rules governing the operation of these newly created courts (ED: see Arkfeld, in this issue). These exceptions to the ban against ex parte contacts are specifically addressed in Comment 4, Rule 2.9, and Comment 3, Part I Application Section.

Rule 2.14 ("Disability and Impairment") is a new rule, governing a difficult and extremely important issue. Impairment can specifically undermine judicial competence, diligence, and demeanor, and public confidence in the courts generally. Previously, impairment was an issue the Code addressed only tangentially, after the problem had become so severe as to manifest itself as a lack of diligence, competence, or some other rule violation. This new Rule imposes a mandatory obligation to take "appropriate action" when a judge acquires a "reasonable belief" that another judge or a lawyer's performance is impaired. The objective of this provision is to guide and encourage judges to address impairment problems prophylactically rather than through the disciplinary process, an alternative many judges may be understandably reluctant to use (ED: see Ostermiller, in this issue).

Canon 3: A JUDGE SHALL CONDUCT THE JUDGE'S PERSONAL AND EXTRAJUDICIAL ACTIVITIES TO MINIMIZE THE RISK OF CONFLICT WITH THE OBLIGATIONS OF JUDICIAL OFFICE.

To the extent that Rule 3.1 ("Extrajudicial Activities in General") serves as a general list of restrictions upon a judge's participation in extrajudicial activities, it is chiefly derived from Canon 4A of the 1990 Code. However, the new set of restrictions is somewhat different, as it focuses attention more sharply upon the potential

interference with the independence, integrity, and impartiality of judges caused by extrajudicial activities. The rule is restructured to permit extrajudicial activities generally, but subject to the specified prohibitions. Rule 3.1(D) adds a new provision to guard against overt or subtle efforts by a judge to coerce others into participating in extrajudicial activities favored by the judge. The Commission heard testimony suggesting that coercion of this kind can be a significant problem in small communities with only one judge or a small number of judges, and a small number of lawyers who need to maintain good relations with the judiciary.

Comment 1 to Rule 3.1 was reworded not only to confirm the special role that judges can play in engaging in extrajudicial activities that involve the law, the legal system, and the administration of justice, but also to approve participation in activities that are *not* law related, as long as they are undertaken in connection with not-for-profit organizations. In both instances, the comment encourages such activities more than they were encouraged in the 1990 Code, so that judges will reach out to the communities of which they are a part and avoid isolating themselves.

In the broader discussion concerning the appearance of judges before governmental bodies generally, the Commission discussed extensively the question of whether judges can or should appear before governmental bodies concerned with issues with which judges are particularly conversant. That discussion led to a provision that was added to reflect the growing recognition that in carrying out their judicial duties, judges often gain expertise and special insight into legal and social problems and matters of public policy. The new provision, Rule 3.2(B), makes it clear that it is permissible for judges to share this information with other governmental bodies and officials.

The point underlying Rule 3.5 ("Use of Nonpublic Information") is self-evident, but a new Comment 2 to the rule recognizes the unfortunate reality that physical violence has become a problem increasingly affecting the courts. If a judge learns of nonpublic information that constitutes a credible threat of violence against court personnel or family members, this comment makes clear that the judge may take protective measures based on that information.

Rule 3.6 ("Affiliation with Discriminatory Organizations") is based on Canon 2C and related commentary in the 1990 Code, but the new rule expands the list of prohibited bases of invidious discrimination by adding gender, ethnicity, and sexual orientation. Commentary in the 1990 Code indicated it was permissible for a judge who was already a member of an organization that engaged in invidious discrimination to remain a member for up to one year, if during that year the judge took steps to change the organization's policy. The Commission believes it is contrary to the policy animating the rule to permit a judge to use or remain a member of a club that practices invidious discrimination for any appreciable period of time. Thus, Rule 3.6(B) instead focuses upon the extent to which the judge actually *uses* the benefits or facilities provided by the offending organization. Building upon ideas in the 1990 Code (commentary to Canon

2C), the new rule effectively provides that a judge cannot be the *initiating party* in scheduling an event or taking advantage of the facilities, but is permitted to attend an isolated event that has been scheduled or arranged by someone else, as long as it is clear that mere attendance at the offending club cannot reasonably be seen as an endorsement of the organization and its policies. Because Rule 3.6(B) does not allow any active engagement with an organization that practices invidious discrimination, the one-year "grace period" to try to effect change has been eliminated. The Commission concluded that any active involvement as a member of such an organization would constitute too much of an endorsement of the organization and that even good-faith, behind-the-scenes activities would not sufficiently negate the public's perception of bias.

Comment 2 to Rule 3.6 provides guidelines—but no hard-and-fast rules—to help determine when an organization engages in impermissible invidious discrimination. In addition, the comment explains that certain organizations practicing some forms of discrimination cannot be said to be practicing *invidious* or *improper* discrimination, either because the discrimination is based upon a rationale that is not socially harmful, or because the members of the organization have a constitutional right to associate without governmental interference.

The Commission received substantial comment—some of it emotionally charged and some thoughtful and well-reasoned—arguing that a particular organization either did or did not practice invidious discrimination. After carefully considering these comments, the Commission determined not to cast judgments about any specific organizations in stone. Policies of an organization might change over time, as might the constitutional standard for judging whether an organization is sufficiently "private" to be immune from governmental regulation of its membership policies. Thus, Comment 4 to Rule 3.6 makes clear that while many religious organizations engage in some forms of discrimination, and some religious organizations may engage in some invidious discrimination, participation by a judge in any bona fide religious organization cannot be prohibited or punished by governmental authorities because of the constitutional guarantee of the free exercise of religion.

Similarly, after receipt of considerable commentary and after substantial debate, the Commission adopted a new comment relating to military organizations. Like religious organizations, military organizations often engage in discrimination and sometimes engage in discrimination that would be found to be invidious in other contexts. The Commission concluded, however, that the practical difficulties involved in enforcing a ban on membership in military organizations, and the necessity for uniform rules applicable to all of the military services, justifies an interpretation that service in state and national military organizations does not violate this rule.

Rule 3.7 ("Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities") substantially reorganizes the material in the 1990 Code on this subject, and Rule 3.7(A) is integral to this reorganization. The prohibition of judges soliciting membership in organizations, *other than law-related organizations*, where charging membership dues is essentially a fund-raising device, is

retained. The rationale is the same as in the 1990 Code: the risk that persons contacted will feel coerced into joining, or will attempt to curry favor with a sitting judge by joining. The Commission decided to limit the permission granted to solicit membership to membership in law-related organizations—one of several places in Canon 3 where this line is drawn, albeit with some misgivings. The Commission concluded that solicitation of membership in a law-related organization, such as a bar association or moot-court society, would be perceived as more natural or more appropriate than soliciting membership in a fine-arts society or the American Red Cross. This perception is related, at least indirectly, to the thematic requirement of avoiding abuse of the prestige of judicial office. A person who loves opera or is a dedicated member of an environmental protection organization, and who also happens to be a judge, should not use that position as an inducement, direct or indirect, to motivate someone else to join and financially support the cause, no matter how worthy. On the other hand, it is not inappropriate for judges to use their positions as leaders in the legal community to increase membership in law-related organizations.

Rule 3.13 addresses the "acceptance and reporting of gifts, loans, bequests, benefits or other things of value." The rule expands the universe of coverage to include "other things of value" and links the overall prohibition of acceptance of the specified items to what "would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality." Although the rule prohibits acceptance of all gifts and things of value that would reasonably appear to undermine a judge's independence, impartiality, or integrity, subsequent provisions reflect the Commission's tiered approach to the subject of gifts and other things of value. Paragraph (A) establishes a first tier of situations in which acceptance is not permitted at all; paragraph (B) deals with acceptance of items that are not problematic and do not require the transparency of public reporting; and paragraph (C) deals with the tier of items that do not warrant being banned, but must be reported to maintain the public's confidence in the judiciary (ED: see Abramson, in this issue).

The Commission received extensive comment and testimony and discussed extensively the subject of when and how judges should be reimbursed for their expenses or have their fees waived for attendance at various kinds of privately funded seminars. Before the Commission commenced its deliberations, the issue had been the topic of substantial editorial comment and had been considered at length by the ABA Ethics Committee, which did not issue an opinion on the subject. The Commission concluded that it could not and should not attempt to draw "bright line" rules governing the attendance of judges at seminars and worked hard to develop provisions, embodied in Rule 3.14 ("Reimbursement of Expenses and Waivers of Fees or Charges"), that would permit such activity, but would also provide useful guidance to judges in deciding whether and when to participate in such activities without undermining public confidence in the independence of the judiciary.

Specifically, the rule was revised to treat acceptance of such benefits separately from acceptance of gifts and other things of value generally, and to require public

reporting of reimbursement of expenses and waiver of charges. In recognition that continuing judicial education of all kinds is of great value, this rule and other rules in Canon 3 make clear that a judge may not accept the proffered benefits if doing so would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality, or if acceptance would lead to frequent disqualification or otherwise interfere with the proper performance of the judge's judicial duties.

The Commission also expanded and clarified the requirements for public reporting of gifts and other things of value, and an important feature of the reorganization of Canon 3 is the gathering of all the public-reporting provisions in one place, now Rule 3.15(A), and then cross-referencing this rule in the rules where reportable events are discussed. Rule 3.15(C) states that mandatory public reporting of compensation received for extrajudicial activities, gifts and other things of value, and reimbursement of expenses and waiver of fees or charges shall be reported annually, and reporting of reimbursements and waivers of fees or charges for attendance at privately funded seminars is required within thirty days of the underlying event, not on a calendar-based schedule. Reports must be made readily accessible to the public to ensure transparency.

Canon 4: A JUDGE OR CANDIDATE FOR JUDICIAL OFFICE SHALL NOT ENGAGE IN POLITICAL OR CAMPAIGN ACTIVITY THAT IS INCONSISTENT WITH THE INDEPENDENCE, INTEGRITY, OR IMPARTIALITY OF THE JUDICIARY.

Canon 4 of the revised Code is derived from Canon 5 of the 1990 Code, as amended in 1997, 1999, and 2003. Much of the material in former Canon 5 in the 1990 Code was retained but reorganized. The reorganized Canon 4 differentiates more clearly between sitting judges who are and are not also judicial candidates and non-judges who become candidates; it continues to differentiate between judicial candidates running in public elections and those seeking appointment, and within the former category, it further differentiates between partisan, nonpartisan, and retention elections. Rule 4.1 addresses the "political and campaign activities of judges and judicial candidates *in general*."

For several reasons, this canon presented the greatest drafting challenge for the Commission. First, as the Code is supposed to serve judges in all jurisdictions regardless of the method by which judges are selected or elected, the Commission had to devise a canon that serves judicial candidates in all of the states, without regard to the system by which they are selected or elected. Second, the decision of the Supreme Court of the United States in *Republican Party of Minnesota v. White* (536 U.S. 765, 2002), which declared unconstitutional the "announce clause" then included in the majority of state judicial codes, was interpreted by numerous state and federal courts throughout the life of the Commission[4] (ED: see Eakins and Swenson; Raftery, in this

[4] E.g., *Alaska Right to Life Political Action Committee v. Feldman*, 380 F. Supp.2d 1080 (D. Alaska 2005); *North Dakota Family Alliance v. Bader*, 361 F. Supp.2d 1021 (D.N.D. 2005); *Family Trust Foundation of Kentucky v.*

issue). As a result, the Commission had to decide whether to yield to those post-*White* interpretations—some of which went well beyond the holding in *White*—or to limit its proposed rules on the subject of campaign activity to its own view of the appropriate limits of campaign activity articulated in the *White* decision itself.

The Commission was not unanimous about how to resolve this tension. However, a substantial majority of the Commission believes that judges are different from legislators and executive-branch officials and that in view of the increasing politicization of the judiciary, the Commission should not gratuitously anticipate further liberalization of the rules governing permissible campaign activity by judges and judicial candidates. This limitation is at odds with the split decision of the Eighth Circuit Court of Appeals on remand from the Supreme Court in the *White* case (see Morrison, in this issue). As a result, the rules proposed by the Commission in Canon 4 are admittedly conservative and reflect the view of the majority of the Commission that further expansion of the rules governing political activity by judicial candidates should occur only if and when the Supreme Court again addresses the subject and its decision mandates further change (ED: see Bopp and Woudenberg; Goldberg, in this issue). This conservative view of this subject is perhaps most directly expressed in new Comment (1) to Rule 4.1 that states "judges and judicial candidates must, to the greatest extent possible, be free and appear to be free from political influence and political pressure." The comment could have served as a preamble to Canon 4. Two key points are involved: states have a compelling interest in the quality of their judiciary and in the regularity of the selection process, and restrictions on political and campaign-related speech must be narrowly tailored and the least restrictive possible, even when serving such a compelling state interest.

The 1990 Code did not advert to the distinction between partisan and nonpartisan or retention elections, but this distinction was evident in the discussions of the Commission, which reflected the sharply differing and strongly held views of Commission members, especially the elected judges, depending upon the system with which each member had personal experience. By distinguishing between the three modes of public elections—partisan, nonpartisan, or retention—Rule 4.2(A) sets up the possibility of applying further restrictions and permissive provisions to all three modes or to some designated subset, as required by the political process required in each jurisdiction.

Reflecting the strongly held views of Commission members resident in states with nonpartisan elections for judicial office, Rule 4.2(C) permits only candidates in partisan elections to identify themselves as candidates of political organizations and to seek the endorsements of such organizations. The 1990 Model Code had permitted the first of these two activities for candidates in both partisan and nonpartisan

Wolnitzek, 345 F. Supp. 2d 672 (E.D. Ky. 2004), motion for stay denied, 388 F.3d 224 (6th Circuit 2004); *Watson v. State Comm'n on Judicial Conduct*, 794 N.E.2d 1 (N.Y. 2003); *In the Matter of Raab*, 793 N.E. 1287 (N.Y. 2003); *In the Matter of Raab*, 793 N.E. 1287 (N.Y. 2003); *Weaver v. Bonner,* 309 F.3d 1312 (11th Cir. 2002); *Smith v. Phillips*, 2002 WL 1870038 (W.D. Texas, 2002).

elections. Rule 4.1(A)(5) generally prohibits the attendance of judges at political-organization functions; Rule 4.2(B)(4) permits an exception, but only during a candidate's candidacy and after a specific time. Rule 4.1(A)(7) does not permit judges and candidates to seek, accept, or use endorsements from a political organization, which is limited, by definition, to political parties and candidate committees. Rule 4.2(B)(5) continues this prohibition for all public-election judicial candidates during the specified time period, because all are permitted to accept endorsements only from organizations that are not political organizations. As noted earlier, the rules remove this restriction, but only for judicial candidates running in partisan elections—see Rule 4.2(C)(2). The rules allow all candidates for judicial office to make contributions to political organizations or other candidates for public office, but only during the time period determined by the jurisdiction—see Rule 4.2(B)(6). The rules also permit judicial candidates in partisan public elections to identify themselves as candidates of a political organization and to accept endorsements from political organizations (ED: see Morrison, in this issue).

CONCLUSION

At the turn of the twentieth century, there was no prescribed Code of Judicial Conduct. Apparently, no one thought about developing written standards affecting the conduct of judges until the early 1920s, and those canons were entirely hortatory. The first meaningful, enforceable Code of Judicial Conduct was adopted by the ABA House of Delegates on August 16, 1972. The 1972 Report engendered very little debate in the House of Delegates but represented the first attempt to provide meaningful regulation of judicial conduct. The next comprehensive revision of the Code occurred in 1990. Although the 1990 Code has been amended three times in the intervening years, it is the Code that has both guided judges throughout the country and served as the basis for disciplinary enforcement for the past seventeen years. As noted earlier in this article, the Standing Committees that proposed the current evaluation and revision were persuaded that societal changes and changes in the role of judges warranted a complete evaluation and revision of the 1990 Model Code.

The Commission believes it has produced a Model Code that provides an excellent foundation for the states and federal courts to adopt to improve and clarify the standards of conduct for the judiciary for many years to come. Unanimous adoption of the Model Code by the ABA House of Delegates was the Commission's penultimate reward. Adoption of the Model Code by the highest court in each state and by the federal judiciary will be the Commission's ultimate reward and a permanent legacy from the Commission to the judiciary throughout the country. **jsj**