NEW YORK COUNTY LAWYERS' ASSOCIATION

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New York County Lawyers' Association
Committee on Professional Ethics
Comments on the Preliminary Report of the ABA Joint Commission To Evaluate the Model Code of Judicial Conduct

The Committee has reviewed the Preliminary Report and while it has not been able to do an in- depth review, makes the following comments.

1. The Committee offers the following comments to Terminology:

We suggest making definitions complete, rather than including cross-references. It is unclear whether the use of the word "See" means that the cross-references are instructive or are part of the actual definition. The definition of "fiduciary," for example, references a second definition of fiduciary in the comments to Rule 2.12(D)(1), which section no longer exists, but reference is presumably to 2.12(C), Comment 6, which is identical except for an "or" instead of "and."

2. The Committee offers the following comments to Canon One:

A. Rule 1.01: We suggest simplifying the proposed rule to: "A judge shall comply with this Code," (see Rule 1.02, Comment [2] "Violations of this Code"), which seems clearer than "observe standards of conduct."

B. Rule 1.01, Comment [2]: We suggest deleting "generally" in line 14.

C. Rule 1.03, Comment [1]: We suggest deleting the final phrase "and should do so freely and willingly" because if a judge "must" do it, then it is not "freely" or "willingly." Either the judge "may do it" but is encouraged to do so freely and willingly, or the judge "must do it," and there is no option.

D. Rule 1.03, Comment [2]: We suggest moving the entire comment to the

Terminology section. The first sentence is an unnecessary restatement of the definition of "impropriety" and may be deleted. We also suggest deleting the word "actual" in line 16 of page 2 to confirm to the rule, which does not distinguish between "actual" and other improprieties. Also, we suggest moving the sentence ("Examples of actual. . . .") to the definition, because the examples tend to further elucidate the definition. Also, we suggest moving the "test for an appearance of impropriety" sentence to the Terminology section and simplifying it as follows: "Appearance of impropriety" denotes conduct that a reasonable person would perceive as an impropriety, even if the conduct does not in fact constitute an impropriety. For example, a judge should not play a prank on a friend feigning acceptance of a bribe if others might reasonably construe it to be actual acceptance of a bribe.

E. Rule 1.04: We suggest revising the definition of "impropriety" to include violations of the law (which is already defined). It seems redundant to have a separate rule calling for a judge to obey the law.

F. Rule 1.04, Comment [1]: We suggest changing "those who come before them" (which could be read to refer to predecessors on the bench) in line 29 to "the attorneys who appear before them" (more clear).

3. The Committee offers the following Comments to Canon 3:

A. We suggest amending Canon 3 as follows: A judge shall conduct his or her personal affairs **in manners that** ~~to~~ preserve the integrity, impartiality and independence of the judiciary. The use of "to" is unnecessarily broad and connotes that everything a judge does in his or her personal life must preserve the integrity, impartiality and independence of the judiciary.

B. Rule 3.01: The proposed rule provides "[a] judge shall not allow his or her financial, political or other personal interests or relationships to influence his or her judicial conduct or judgment." It restates several considerations of Canon 2 and does not indicate why a separate rule is needed. Canon 3 is supposed to address *personal* conduct, but Rule 3.01 focuses on *judicial* conduct. It seems better addressed in Canon 2.

C. Rule 3.02: We suggest amending the proposed rule as follows: "A judge shall

not ~~lend~~ **use** the prestige of judicial office~~, or allow others to do so, to advance the personal interests of the judge or others.~~ **to convey the impression that he or she may be personally influenced by preferential or privileged treatment.** The proposed Rules 3.01 and 3.02 are clearer if they are distinguished between personal conduct by the judge and conduct by people with whom he or she has a relationship.

D. Rule 3.02, Comment [1]: We suggest adding the following statement to Comment [1]: **"It is improper for a judge to use his or her position to gain personal advantage or preferential treatment of any kind for anyone in a familial or personal relationship with the judge."** The purpose of this language is to make it clear that the judge's use of his or her position to obtain special treatment for anyone in a familial or personal relationship with the judge is presumptively improper.

E. Rule 3.02, Comment [5]: We suggest revising Comment [5] as follows: "A judge may provide ~~a~~ **an employment, education or personal** reference or recommendation for an individual based on the judge's personal knowledge." The new language aids the intent of the comment by explaining the types of references that may be made based on the judge's personal knowledge. We also suggest addressing the following statement under Canon 2 as the comment addresses *judicial* conduct: "A judge must not initiate the communication of information to a sentencing judge or a probation or corrections offer, but may provide to such persons information for the record in response to a formal request."

F. Rule 3.03, Comment [1]: We suggest revising Comment [1] as follows: "In the course of performing ~~their~~ judicial duties, judges may acquire information of ~~commercial or other~~ non-judicial value that is unavailable to the public. Judges must not reveal or use such non-public information for personal gain or any purpose unrelated to their judicial duties." The deletion of the word "their" does not affect the intent of the comment. Removing the phrase "commercial or other" and leaving only "non-judicial" broadens the information that should be accorded such protection.

4. The Committee offers the following comments to Canon 5:

Rule: 5.01 (e): We note that the proposed rule (permitting the attendance of judges and

judicial candidates at non-funding raising events sponsored by a political organization or candidates for public office) may be potentially inconsistent with subsection (c) (prohibiting the public endorsement of a candidate). The more public and/or the more political the event, the more the attendance will be deemed an endorsement. We are of the view that attendance at a candidate's function can be seen as a form of endorsement. The fact that this is not always the case does not prove to the contrary. In most situations, the judge or judicial candidate need not say a word— the endorsement is manifest.

Respectfully submitted,

COMMITTEE ON PROFESSIONAL ETHICS

By: Martin Minkowitz, Chair
September 29, 2005