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December 15, 2004

Re: Code of Judicial Conduct-Canon 2

Dear Lisa,

Pursuant to your request, attached is Canon 2 and Canon 8 as approved by the full committee. As you will recall, the debate focused upon a number of issues, including whether current Canon 2 is sufficiently specific and the desirability of adding commentary. (See attached report of Canon 2 subcommittee). As reflected in the transcript of the September 10, 2004 meeting, the full committee believed the existing Canon was sufficiently specific and did not favor commentary. However, the full committee endorsed the addition of the definition of "impartiality" in light of the *White v. Minnesota* decision. In addition, the full committee recommends a change to Subsection C of Canon 2 to prohibit a judge from knowingly holding membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin—a more onerous standard than the current provision merely prohibiting membership in an organization that practices discrimination prohibited by law.

If you should have any questions or require additional information, please let me know. As always, it is an honor and privilege to serve the Court.

Best regards,

Professor Elaine Carlson

## Full Committee Recommendations as to Canon 2 and Canon 8

### **Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities**

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

C. A judge shall not knowingly hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin ~~prohibited by law~~.

## Canon 8

The full committee recommends adding the following definition of impartiality:

**"Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintain an open mind in considering issues that may come before the judge.**

**TEXAS SUPREME COURT ADVISORY COMMITTEE  
ON THE CODE OF JUDICIAL CONDUCT**

**AMENDED REPORT OF CANON 2 SUBCOMMITTEE**

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After the meeting of the entire Advisory Committee on June 11, 2004, the Canon 2 subcommittee reconvened to consider concerns expressed by Justice Kidd pertaining to the subcommittee's proposed inclusion of commentary. The subcommittee is divided on this issue and this Amended Report reflects the Canon 2 Subcommittee's amended recommendations for presentation to the full committee at the September 10, 2004 meeting.

September 3, 2004

**Canon 2 Amended Subcommittee Report Reviewing Canon 2  
of the Texas Code of Judicial Conduct**

Objective: Review Canon 2 of the Texas Code of Judicial Conduct in light of *White v. Minnesota*, 536 U.S. 765 (2002), the ABA Model Code of Judicial Conduct, including 2003 proposed changes, case law and legal commentary to determine if any amendments should be recommended to the full committee and the Texas Supreme Court. The subcommittee, consisting of Professor Elaine Carlson, Guy Harrison, Justice Lopez, Judges Benton and Gonzalez, studied Canon 2 giving due consideration to the judicial, practitioner, and academic perspectives.

Canon 2 of the Texas Code of Judicial Conduct substantially comports with Canon 2 of the ABA Model Code of Judicial Conduct. However, there are several variations.

Texas Canon 2 is entitled: "Avoiding Impropriety & The Appearance of Impropriety In All of the Judge's Activities".

Model Canon 2 is entitled: " A Judge Shall Avoid Impropriety And the Appearance of Impropriety in All of the Judge's Activities."

The distinctions in the wording is significant, as the Model Code is arguably a disciplinary standard.

Texas Canon 2(A) provides that: "A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary."

Model Canon 2 (A) provides: "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and *impartiality* of the judiciary."

Texas Canon 2 (B) provides that: "A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness."

Model Canon 2 (B) provides that: "A judge shall not allow family, social political, or other relationships to influence the judge's judicial conduct or judgment. A

judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness."

Texas Canon 2 (C) provides that: "A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law."

Model Canon 2 (C) provides that: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."<sup>1</sup>

The 2003 proposed amendments to the ABA Model Code do not advance any changes to Canon 2, except to the accompanying commentary.<sup>2</sup> Currently, the Texas Code does not include commentary to Canon 2. Although not a direct amendment of Model Canon 2, it is proposed that a definition of "impartiality" be included in the ABA Model Code definitional section. That term is used throughout the Canons, including Canon 2 (A), as noted above.

The proposed definition is as follows:

"Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintain an open mind in considering issues that may come before the judge.

The ABA Working Group report informs:

Members of the Working Group determined it was important to reiterate and reinforce the need to preserve the crucial values of judicial impartiality, integrity and independence. Language was added to the commentary sections of Canons 1,

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<sup>1</sup> This Texas variation is a result of a resolution promulgated by Judge Cynthia Steven Kent of Tyler at the 1995 judicial conference in Texas "to make the canon clearer." Schuwerk and Hardwick, Handbook of Texas Lawyer and Judicial Ethics at page 950, West Publication (2003).

<sup>2</sup> ABA Canon 2 Commentary: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3(B)(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of the code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

2, and 3 to supply a clearer definition of the importance of these judicial attributes. Given the scope of the Working Group's project, members did not feel that it was appropriate to completely revise all portions of the Model Code. Therefore, the Working Group decided only to amend portions of the commentary sections of these Canon provision to provide a clearer understanding of judicial impartiality, integrity and independence. The Standing Committee on Judicial Independence and the Standing Committee on Ethics and Professional Responsibility acknowledge that further study of the black letter of these canons might be necessary and support the need for a comprehensive review of the Model Code of Judicial Conduct.

Thus, additional recommended changes to the ABA Mode Code of Judicial Conduct, including Canon 2, will likely be forthcoming.

### The Broad Nature of Canon 2 and the Vagueness Attack

The Canons of Judicial Conduct "are intended to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards of judicial and personal conduct."<sup>3</sup> Canon 2, like Canon 1, is general in nature and, "[a]s with Canon 1, Texas case law seldom reflect the application of Canon 2 as a sole basis for discipline."<sup>4</sup> The Texas Supreme Court has construed Canons 1 and 2 to apply to judges when acting in their official capacity as well as when judges are acting in their personal conduct.<sup>5</sup> While some obligations in Canon 2 may serve as a basis for disciplinary action, the obligations set forth in Canons 1 and 2 that a judge "should" participate in establishing, maintaining, and enforcing high standards of conduct and "should" personally observe those standards so that the integrity and independence of the judiciary is preserved, are directions as to behavior of a judge that is appropriate. They are not binding rules for disciplinary purposes.<sup>6</sup>

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<sup>3</sup> *In re Barr*, 13 S.W.3d 525, 544 (Tex. 1999).

<sup>4</sup> Schuwerk and Hardwick, *Handbook of Texas Lawyer and Judicial Ethics* at page 951, West Publication (2003).

<sup>5</sup> *In re Lowery*, 999 S.W.2d 639, 657 (Tex. Rev. Trib. 1998, no appeal). ("Canon 1 states that a judge should participate in establishing, maintaining, and enforcing high standards of conduct and should personally observe those standards so that the integrity and independence of the judiciary is preserved. Canon 2 states that a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Neither of these Canons limit application of these standards nor suggest that they are to be observed only when the judge is on the bench or acting in some official capacity.")

<sup>6</sup> Texas Code of Judicial Conduct, Canon 8(B) 1 and 2. "Shall" or "shall not" denotes binding obligations the violation of which can result in disciplinary action. "Should" or "should not" relates to aspirational goals and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined.

Broad proscriptions of prohibited conduct that may result in disciplinary action have been criticized by some legal commentators,<sup>7</sup> although that view is not universally accepted.<sup>8</sup> Proponents argue that specificity is necessary and desirable to support disciplinary behavior. Opponents argue:

"[T]he Code should not be relegated to the role of providing penal regulations. Its primary task is to remind judges, not of the possibility of disciplinary sanction, but of the ethical foundations of their role in a free society. The principles in Canons 1 and 2A give a context for the other rules and provide the inspiration for judges to 'freely and willingly' accept restrictions that 'might be viewed as burdensome by the ordinary citizen' and indeed by the ordinary member of the executive or legislative branches. The aspirational parts of the code provide guidance for judges who want not only to avoid discipline but to follow the highest possible standards. An integral part of a code of judicial conduct, references to the ideals of integrity, independence, and impartiality and establish a common ground from which all judges start in fulfilling their duties.... Canons 1 and 2A also provide the backgrounds against which judicial ethics committees and judicial educators interpret the other provisions of the code in proffering advice to judges for their future conduct."<sup>9</sup>

Vagueness attacks on Canon 2 as well as others Texas Canons of Judicial Conduct have been soundly rejected by the Texas Supreme Court, with the Court observing:

While vagueness and overbreadth doctrines are generally used to challenge the validity of laws defining criminal conduct, the prohibitions against vagueness and overbreadth also extend to regulations affecting conditions of government employment. *In re Lowery*, 999 S.W.2d 639 (Tex. Rev. Trib. 1998, pet. denied) (citing *In the Matter of Seraphim*, 97 Wis.2d 485, 294 N.W.2d 485, 492 (1980)). It appears from the cases which have addressed the question of unconstitutional vagueness in this context that a greater degree of flexibility is permitted with respect to judicial discipline than is allowed in criminal statutes. *Id.* (citing *In the Matter of Seraphim*, 294 N.W.2d at 492). The constitutionality of necessarily broad standards of professional conduct has long been recognized. *Id.* (citing *In re Gillard*, 271 N.W.2d 785, 809 (Minn.1978)).

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<sup>7</sup> See Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations In A Comparative Hermeneutic Framework*, 77 Tulane L. Rev. 527 (2003); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Professional Ethics*, 69 Notre Dame Law Review 223 (1993); Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 Yale L. J. 1239 (1991). The Code of Professional Responsibility regulating the conduct of lawyers was the subject of criticism in these articles, but the complaints would conceptually apply to the Code of Judicial Conduct as well.

<sup>8</sup> *The Need for Hortatory Standards of Judicial Conduct*, American Judicature Society, [www.ajs.org](http://www.ajs.org).

<sup>9</sup> *The Need for Hortatory Standards of Judicial Conduct*, American Judicature Society, [www.ajs.org](http://www.ajs.org).

A statute may be successfully challenged as vague if it does not clearly define the conduct regulated, and thus does not afford an individual fair warning of what conduct is prohibited. [Halleck v. Berliner, 427 F. Supp. 1225, 1240 \(D.D.C.1977\)](#). Moreover, a statute which clearly defines the conduct regulated may be unconstitutionally overbroad if it includes protected conduct within its prohibitions. *Id.* A statute is not necessarily invalid as vague or overbroad merely because it is difficult to determine whether marginal conduct falls within the statutory language. *Id.*

Arguments in other jurisdictions that constitutional and statutory provisions for the discipline of judges were vague or overbroad have been consistently rejected on the ground that the Code of Judicial Conduct furnished sufficient specification of the judicial conduct which warrants disciplinary action. *Id.* Statutes and constitutional provisions which define in similarly broad terms the grounds for removal of judges from office have been upheld in [In re Lowery, 999 S.W.2d 639 \(Tex. Rev. Trib. 1998, pet. denied\)](#); [Napolitano v. Ward, 317 F. Supp. 79 \(N.D.Ill.1970\)](#) ("for cause"); [Keiser v. Bell, 332 F. Supp. 608 \(E.D.Pa.1971\)](#); [Halleck v. Berliner, 427 F. Supp. 1225 \(D.D.C.1977\)](#); [In re Nowell, 293 N.C. 235, 237 S.E.2d 246 \(1977\)](#); [Nicholson v. Judicial Retirement and Removal Comm., 562 S.W.2d 306 \(Ky.1978\)](#); and [In re Gillard, 271 N.W.2d 785 \(Minn.1978\)](#).<sup>10</sup>

Recently, however, a New York federal district court held that the Code provisions requiring a judge to "uphold the integrity and independence of the judiciary" and to act "in a manner that promotes public confidence in the integrity and impartiality of the judiciary" were void for vagueness. The lower court concluded that the Code failed to provide adequate guidelines to allow members of the judiciary to determine permissible and impermissible conduct.<sup>11</sup> This district court decision was subsequently vacated by the Second Circuit under *Younger* abstention principles.<sup>12</sup> Thus, it appears this issue will be addressed by the New York appellate courts.

Among the issues the subcommittee considered in reviewing the broad provisions of Canon 2:

Is it desirable to maintain aspirational behavioral norms in the Code or should the Code be redrafted purely in terms of disciplinary prohibitions?

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<sup>10</sup> *In re Barr*, 13 S.W.3d 525, 564-565 (Tex. 1999). See also, *In re Lowery*, 999 S.W.2d 639, 654 (Tex. 1999).

<sup>11</sup> *Spargo v. New York State Commission on Judicial Conduct*, 244 F. Supp.2d 72 (N.D.N.Y. 2003), vacated 351 F.3d 65 (2nd Cir. 2003).

<sup>12</sup> *Spargo v. New York State Commission on Judicial Conduct*, 244 F. Supp.2d 72 (N.D.N.Y. 2003), vacated 351 F.3d 65 (2nd Cir. 2003).

Is inclusion of additional definitions and commentary to Canon 2 desirable to provide increased specificity that might facilitate more predictable interpretations of the Canon? The ABA Model Code provides extensive Commentary to Canon 2.

Are Canons 1 and 2 sufficiently specific to support a violation, or should disciplinary actions be based on the subsequent specific canons? Should Canons 1 and 2 be folded into the preamble?

It is against this background that the subcommittee examined the specific provisions of Canon 2.

### **CANON 2: TITLE**

It should be noted that there is a significant difference between titles and their effect on potential disciplinary enforcement. Texas Canon 2 is entitled: "Avoiding Impropriety & The Appearance of Impropriety In All of the Judge's Activities". Model Canon 2 is entitled: " *A Judge Shall* Avoid Impropriety And the Appearance of Impropriety in All of the Judge's Activities." The distinctions in the wording is significant, as the Model Code is arguably a disciplinary standard.<sup>13</sup> The subcommittee does not recommend any change to the title of Canon 2.

### **CANON 2 (A)**

As noted above, within the Texas Code of Judicial Conduct Canon 2 (A) are two specific variations from the ABA Model Code. Texas Canon 2 omits the requirement that a judge "respect the law" and it provides that a judge "should" (as opposed to ABA Model Code "shall") act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. The subcommittee does not suggest a change to Canon 2

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<sup>13</sup> Indeed, the ABA Commentary focuses upon the requirement that a judge should avoid impropriety and the appearance of impropriety:

" Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired. See also Commentary under Section 2C."

Texas Canon 2(A) does not include the prohibition against a judge avoiding the appearance of impropriety.

(A) as to either of these variations. While the subcommittee did not have the basis supporting the Texas Canon 2 deviation from the ABA model code, it concurred that rational reasons support that decision.

The subcommittee does not indorse including a requirement that a judge "respect" the law, as provided in model Canon 2 (A). To obligate a judge to "respect" the law, while at first blush, appears perfectly reasonable, such a requirement has the potential for mischief. For example, if a judge believes that long-standing case law should no longer be followed and so rules, has the judge shown "disrespect" for the law? Is a dissenting judge, criticizing the law and advocating a distinctive ruling "respecting" the law?

Canon 2 (A) does require that a judge "comply with the law. In interpreting that requirement, the Court has explained:

There can be no greater threat to a free society than judicial anarchy which would certainly be realized through the continued erosion of judicial independence. It is that constant quest for independence that should prohibit the imposition of disciplinary action upon a judge for an incorrect ruling. The potential impact on the independence of the judiciary in the State of Texas cannot be overstated, for the preservation of an independent judiciary requires that judges not be exposed to personal discipline on the basis of case outcomes or particular rulings. Judicial independence is the cornerstone of our system of justice as is recognized in the Preamble to the Texas Code of Judicial Conduct, which states that "[o]ur legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us." TEX.CODE JUD. CONDUCT, PREAMBLE (1993).

In various states, courts and/or judicial commissions have imposed discipline for legal errors made by judges which were egregious, were part of a pattern and practice of legal error, and/or made in bad faith. In those cases, there was no dispute that the legal rulings made by those judges were clearly error under their respective statutes or jurisprudence. For example, it has been held to be not only judicial error but also judicial misconduct when judges have consistently failed to advise defendants of their constitutional right to counsel, denied defendants a full and fair hearing, coerced guilty pleas, directed the jury to find a defendant guilty, failed to order recognizance or bail in nonfelony cases, or sentenced defendants to jail when only a fine is provided for by law. [FN 19]

We are ever mindful of the fact that legal decisions may be made where the law thereunder is arguably unclear or ambiguous, and under those circumstances, judicial disciplinary proceedings are to be discouraged, if not condemned, as a frontal attack on the independence of the judiciary. It is for that reason that we hold that a member of the Texas judiciary may be found to have violated Article V, section 1-a(6)A of the Texas Constitution by a legal ruling or action made contrary to clear and determined law about which there is no confusion or question as to its interpretation and where the complained-of legal error is

egregious, made as part of a pattern or practice of legal error, or made in bad faith. *See Quirk, 705 S. 2d at 177-78*. So long as judicial rulings are made in good faith, and in an effort to follow the law as the judge understands it, the usual safeguard against error or judicial overreaching lies in appropriate appellate review. *See* JEFFREY M. SHAMAN ET AL., JUDICIAL CONDUCT AND ETHICS, § 2.02 (2d ed.1995). We further hold that with respect to judicial disciplinary proceedings, a specific intent to use the powers of the judicial office to accomplish a purpose which the judge knew or should have known was beyond the legitimate exercise of judicial authority constitutes "bad faith" as a matter of law.<sup>14</sup>

The subcommittee also recommends that the requirement remain that a judge "should" (as opposed to ABA Model Code "shall") act in a manner that promotes public confidence in the integrity and impartiality of the judiciary. This Canon requires viewing the judge's obligations from the public perception. The subcommittee felt it inappropriate to discipline a judge for behavior that is adjudged from this perspective, but concurred that it is a proper aspirational goal.

The subcommittee is divided on the issue of whether additional commentary to Canon 2 (A) is desirable. Some members of the Committee, in the hopes of providing additional guidance, recommend the inclusion of the following Comment to Canon 2 (A):

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge should avoid all impropriety and appearance of impropriety. A judge should expect to be the subject of constant public scrutiny. A judge should therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. The test for appearance of impropriety is whether an observer aware of the facts and circumstances might reasonably perceive that the judge's ability to act with integrity, impartiality, and competence is compromised.

Justice Kidd raised the following concerns to the inclusion of commentary to Canon 2 (A):

1) Originally, ABA Model Canon 2 was purely aspirational. Canon 2 behavioral guidelines were cast in terms of "should" and not "shall". As the ABA Model Code changed over time, past Task Forces on Judicial Conduct after significant debate and consideration carefully negotiated those Canon 2 obligations that might lead to judicial discipline ("shall") and those that should remain aspirational. (It appears that the Code of

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<sup>14</sup> *In re Barr*, 13 S.W.3d 525, 544-545 (Tex. 1999).

Judicial Conduct for United States Judges remains aspirational, and speaks only in terms of "should" and "may").

2) Justice Kidd suggested that the 288 Judicial Ethics Advisory Opinions serve as the Commentary to the Texas Code of Judicial Conduct and are relied upon by the Texas judiciary in formulating appropriate conduct. These opinions are readily accessible on line at: <http://www.courts.state.tx.us/Judethics/ethicsop.asp> In addition, the Tribunal Opinions of the Texas State Commission on Judicial Conduct are reported cases and are available on line at <http://www.scjc.state.tx.us/> Further, Texas Judicial Seminars use these opinions and decisions as the basis for educating the judiciary as to their obligations. Thus, it is suggested that additional commentary is unnecessary.

3) As we observe in our subcommittee report, Texas did not incorporate the Model Code Canon 2 provision that "A judge *shall* avoid impropriety and the appearance of impropriety in all of the judge's activities." Instead, Texas Canon 2 provides that a judge "*should* act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." An evenly divided subcommittee favors the adoption of a "Texanized" version of ABA Commentary to Canon 2 (A). Justice Kidd reports after discussion with Seana Willing, our suggestion that: "Filings by the Texas State Commission on Judicial Conduct reveal that over the years 2002, 2003, and 2003, at least forty seven specific cases of judicial misconduct found violations of Canon 2A. At least nine of these cases involved questions of impartiality of the judge" is somewhat misleading. Seana Willing advises judges are not disciplined solely on the basis of a lack of impartiality. As our proposed comments are based on the ABA Model Code and address impartiality, Justice Kidd suggests the comments are not appropriate for inclusion in the Texas Code of Judicial Conduct. An evenly divided subcommittee agrees with Justice Kidd and does not favor inclusion of commentary.

4) Both Justice Kidd and Seana Willing request that our subcommittee consider recommending splitting the first sentence of Texas Canon 2 (A) into two sentences. It currently reads:

A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Justice Kidd would ask that our subcommittee support the modification of Canon 2 (A) as follows:

A judge shall comply with the law. A judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

It has been suggested by some that a judge may not be disciplined for failing to comply with the law unless that failure reflects negatively on public confidence or the integrity and impartiality of the judiciary. Separating the two sentences would make clear that this is not the case. Further, separating the two sentences (one a "shall" and the other a "should"), would clarify the distinctive nature of these disparate obligations. A majority of the Canon 2 subcommittee favor amending the first sentence of Canon 2 (A) as suggested by Justice Kidd.

In addition, the full subcommittee recommends defining "impartiality". The proposed amendments to the ABA Model Code include a definition of impartiality that "tracks the analysis of impartiality in the majority opinion of White" that the Working Group believes "is narrowly tailored yet encompasses the general concepts of judicial impartiality that are vital to the maintenance of an independent judiciary."<sup>15</sup>

Without addressing how that definition might impact the interpretation of Canons other than Canon 2, the subcommittee recommends the adoption of the definition of impartiality as part of Canon 8. The subcommittee believes the inclusion of this definition will provide necessary specificity and will facilitate the interpretation of Canon 2. The United States Supreme Court in *Republican Party of Minnesota v. White*, 536 U.S. 765, 122 S. Ct. 2528 (2002) observed that neither the Minnesota Code of Judicial Conduct nor the ABA Model Code of Judicial Conduct specifically defined impartiality and that a clear definition was desirable. Indeed, history appears to show that the Texas Code would be well served by including a definition. Filings by the Texas State Commission on Judicial Conduct reveal that over the years 2002, 2003, and 2003, at least forty seven specific cases of judicial misconduct found violations of Canon 2 (A). At least nine of these cases involved questions of impartiality of the judge.<sup>16</sup>

### **CANON 2 (B)**

Texas Canon 2 (B) provides that: "A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interest of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness."

The subcommittee considered two changes to Canon 2 (B): the inclusion of commentary and the movement of the prohibition of a judge voluntarily serving as a character witness to Canon 4.

The subcommittee is evenly divided as to the proposed inclusion of commentary to Canon 2 (B). Some members favor the adoption of the ABA Commentary to Canon 2 (B) with additional cross-references to other specific canons to provide the reader with more certainty as to acceptable behavior. The ABA Commentary provides:

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and

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<sup>15</sup> August 2003 Proposed Amendments to the ABA Model Code of Judicial Conduct.

<sup>16</sup> SCJC FY 2002 Annual Report, Appendix D, page 69; SCJC FY 2002 Annual Report, Section 9 Summary; SCJC FY 2003 Annual Report, Examples of Improper Judicial Conduct.

improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.

A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.<sup>17</sup>

Those subcommittee members that favor inclusion of the above commentary also favor the adoption of the following additional comment that provides cross-references to other sections of the Code to facilitate a fuller understanding of acceptable judicial conduct:

*See also* Canon 4B(1) (proper to participate in activities concerning the law and the legal system, including speaking, writing, lecturing, and teaching); Canon 4B(2) (proper to serve on organization devoted to improve the law or legal system); Canon 4B(2) (improper to participate in public fund raising activities); Canon 4B(2) (proper to make recommendations on projects and programs concerning law and legal system); Canon 4C (generally proper to serve as officer,

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<sup>17</sup> ABA Model Code Commentary to Canon 2 (b):

director, or advisor of educational, religious, charitable, fraternal, or non-profit civic organization); Canon 4C(2) (improper to solicit funds for educational, religious, charitable, fraternal, or non-profit civic organization); Canon 4C(2) (proper to be a speaker or guest of honor at fund-raising event for educational, religious, charitable, fraternal, or non-profit civic organization); Canon 4C(3) (improper to give investment advice to educational, religious, charitable, fraternal, or non-profit civic organization); Canon 4D(1) (improper to use judicial position to advance financial interest of judge or others); Canon 4D(2) (proper to hold and manage investments).

Justice Kidd, and an evenly divided subcommittee, disfavor the use of the proposed Canon 2 (B) commentary. Justice Kidd shared the following observations with the subcommittee:

The first paragraph of the suggested Canon 2 (B) commentary is largely redundant of the Preamble and Canon 1. Further, it speaks to the obligation of a judge to "respect" the law, an obligation not contained in Texas Canon 2 (B). The last sentence of the first paragraph: "Similarly, judicial letterhead must not be used for conducting a judge's personal business" is contrary to Texas Ethics Opinions, including Opinion No. 137 (1990).

The second paragraph of the suggested Canon 2 (B) commentary addresses obligations under Canon 4, a Canon our full committee has not yet considered.

The third and fourth paragraph of our suggested Canon 2 (B) commentary discusses limitations on judicial recommendations, but is redundant of and contrary to, in some instances, to Texas Ethics Opinion 222.

The fifth paragraph of our suggested Canon 2 (B) commentary address limitations on judges testifying a witness, a matter already covered by Texas Ethics Opinion 139.

The Comment is not sufficiently informative to warrant inclusion (essentially stating "Read Canon 4").

2) The full subcommittee recommends that the prohibition that a judge shall not testify voluntarily as a character witness be moved to Canon 4.

## **CANON 2 (C)**

Texas Canon 2 (C) provides: "A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law." Model Canon 2 (C) provides: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin." The Model Code

includes additional commentary.<sup>18</sup> A brief review of these provisions reveals that Texas Canon 2 (C) differs from Model Canon 2 (C) in two important respects.

First, Model Canon 2 (C) imposes a strict liability standard.<sup>19</sup> Under this standard, “a judge may be in violation even in the absence of knowledge about the membership or the fact that the organization practices invidious discrimination.”<sup>20</sup> In addition to Texas, a few other states impose a “knowing” standard.<sup>21</sup>

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<sup>18</sup> ABA Model Code Commentary to Canon 2 (c):

"Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Section 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. Absent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, religion, sex or national origin persons who would otherwise be admitted to membership. See *New York State Club Ass'n. Inc. v. City of New York*, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. 1940 (1987), 95 L.Ed.2d 474; *Roberts v. United States Jaycees*, 468 U.S. 609, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984).

Although Section 2C relates only to membership in organizations that invidiously discriminate on the basis of race, sex, religion or national origin, a judge's membership in an organization that engages in any discriminatory membership practices prohibited by the law of the jurisdiction also violates Canon 2 and Section 2A and gives the appearance of impropriety. In addition, it would be a violation of Canon 2 and Section 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion or national origin in its membership or other policies, or for the judge to regularly use such a club. Moreover, public manifestation by a judge of the judge's knowing approval of invidious discrimination on any basis gives the appearance of impropriety under Canon 2 and diminishes public confidence in the integrity and impartiality of the judiciary, in violation of Section 2A.

When a person who is a judge on the date this Code becomes effective [in the jurisdiction in which the person is a judge] [FN1] learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Section 2C or under Canon 2 and Section 2A, the judge is permitted, in lieu of resigning, to make immediate efforts to have the organization discontinue its invidiously discriminatory practices, but is required to suspend participation in any other activities of the organization. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within a year of the judge's first learning of the practices), the judge is required to resign immediately from the organization."

<sup>19</sup>See Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 981 (1996).

<sup>20</sup>*Id.*

<sup>21</sup>See, e.g., Alaska Court Rules: Code of Judicial Conduct Canon 2 (C) (prohibits judges from holding membership in any organization “that the judge knows practices invidious discrimination”); Colorado Court Rules: Code of Judicial Discipline Canon 2 (C) (same); Iowa Court Rules: Iowa Code of Judicial Conduct Canon 2 (C) (same); Oregon Rules of Court: Oregon Code of Judicial Conduct JR1-101(H) (prohibits judge from holding membership in any organization “that the judge knows is a discriminatory organization”).

Second, the governing criterion in Model Canon 2 (C) is “invidious” rather than “illegal” discrimination. “‘Invidious’ discrimination arguably is broader than discrimination that is unlawful under federal or state law.”<sup>22</sup> “An invidious discrimination is an arbitrary one made on an illegitimate or offensive basis.”<sup>23</sup> “Membership discrimination is invidious if the reasons for the restrictions fail to reflect legitimate, generally accepted values.”<sup>24</sup>

One commentator has noted three difficulties with regard to Canon 2 (C), stating that “[f]or courts and judicial ethics committees, the scope of Canon 2 (C) awaits further development, for three reasons.”<sup>25</sup>

The first difficulty advanced is that “the criteria for determining whether an organization invidiously discriminates are still indefinite.”<sup>26</sup> “Until there is a consensus about the appropriate technique for Canon 2 (C) analysis, judges cannot predict an ethics committee or appellate decision for any group to which they belong.”<sup>27</sup> Texas and several other states avoid this problem by using the phrase “illegal discrimination” or “discrimination prohibited by law.”<sup>28</sup>

The second difficulty identified is that Canon 2 (C) only applies to a judge and not to members of the judge’s household.<sup>29</sup> The commentator notes that a judicial nominee may resign from an organization that invidiously discriminates; however, after being confirmed or elected, the judge’s spouse may rejoin the organization in the spouse’s name.<sup>30</sup>

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<sup>22</sup>Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 981 (1996).

<sup>23</sup>*Id.* at 988.

<sup>24</sup>*Id.*

<sup>25</sup>*Id.* at 990.

<sup>26</sup>*Id.*

<sup>27</sup>*Id.*

<sup>28</sup> See TEX. CODE JUD. CONDUCT, Canon 2 (C); see also Maine Rules of Conduct: Maine Code of Judicial Conduct Canon 2 (C) (unlawful discrimination); Minnesota Statutes Annotated: Code of Judicial Conduct Canon 2 (C) (same); North Carolina Rules of Court: Code of Judicial Conduct Canon 2 (C) (same); Oregon Rules of Court: Oregon Code of Judicial Conduct JR 1-101(H) (discriminatory organization defined as “organization that, as a policy or practice and contrary to applicable federal or state law, treats persons less favorably in granting membership privileges, allowing participation or providing services on the basis of sex, race, national origin, religion, sexual orientation, marital status, disability or age”); Washington Court Rules: Code of Judicial Conduct Canon 2 (C) (discrimination prohibited by law).

<sup>29</sup>Leslie W. Abramson, *Canon 2 of the Code of Judicial Conduct*, 79 MARQ. L. REV. 949, 990 (1996).

<sup>30</sup>*Id.*

The final difficulty identified is that “it is unclear when and who will be able to obtain relief for violations of Canon 2 (C).”<sup>31</sup> The commentator notes:

Judicial ethics committees will attempt to respond to inquiries about the correctness of judicial membership in various groups, only to leave it to the individual judge to assess the circumstances of a particular case. Litigants before the judge will have an interest in the judge’s associations as well. As with other parts of Canon 2, litigants may seek the disqualification of a judge under Canon 3E due to the judge’s memberships. The losing party on a motion for recusal would seek an appellate reversal of either a criminal conviction or a verdict in a civil case. There also may be a standing problem in Canon 2C litigation. Who can raise a Canon 2C problem in court? Anyone may be able to challenge the judge’s group affiliations. Perhaps the courts will decide instead that the challenging litigant must be a member of the group that has been excluded from the judge’s organization in order to raise a Canon 2C issue.<sup>32</sup>

The subcommittee recommends that Texas not adopt the Canon 2 (C) strict liability standard set forth in the Model Canon. Judges may be placed on membership lists without their knowledge, and strict liability is too harsh of a standard. Further, given the absence of a clear definition of “invidious discrimination,” the subcommittee does not recommend amending Texas’s Canon 2 (C) to incorporate that term. The subcommittee, with one member dissenting, does not recommend that Texas Canon 2 (C) be extended to apply to a judge’s spouse. Finally, the subcommittee believes it is best to leave the issue on when and who may enforce Texas Canon 2 (C) to judicial development.

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<sup>31</sup>*Id.*

<sup>32</sup>*Id.* at 990-91.

## Canon 2 Subcommittee Proposal

### **Avoiding Impropriety and the Appearance of Impropriety in All of the Judge's Activities**

A. A judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

#### **Proposed Commentary Supported By Evenly Divided Subcommittee:**

**Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge should avoid all impropriety and appearance of impropriety. A judge should expect to be the subject of constant public scrutiny. A judge should therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.**

**The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. The test for appearance of impropriety is whether an observer aware of the facts and circumstances might reasonably perceive that the judge's ability to act with integrity, impartiality, and competence is compromised.**

B. A judge shall not allow any relationship to influence judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. ~~A judge shall not testify voluntarily as a character witness.~~ [Move last sentence to Canon 4]

#### **Proposed Commentary Supported By Evenly Divided Subcommittee:**

**Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as deferential treatment when stopped by a police officer for a traffic offense. Similarly, judicial letterhead must not be used for conducting a judge's personal business.**

**A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid**

exploitation of the judge's office. As to the acceptance of awards, see Section 4D(5)(a) and Commentary.

Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record in response to a formal request.

Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

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A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

See also Canon 4B(1) (proper to participate in activities concerning the law and the legal system, including speaking, writing, lecturing, and teaching); Canon 4B(2) (proper to serve on organization devoted to improve the law or legal system); Canon 4B(2) (improper to participate in public fund raising activities); Canon 4B(2) (proper to make recommendations on projects and programs concerning law and legal system); Canon 4C (generally proper to serve as officer, director, or advisor of educational, religious, charitable, fraternal, or non-profit civic organization); Canon 4C(2) (improper to solicit funds for educational, religious, charitable, fraternal, or non-profit civic organization); Canon 4C(2) (proper to be a speaker or guest of honor at fund-raising event for educational, religious, charitable, fraternal, or non-profit civic organization); Canon 4C(3) (improper to give investment advice to educational, religious, charitable, fraternal, or non-profit civic organization); Canon 4D(1) (improper to use judicial position to advance financial interest of judge or others); Canon 4D(2) (proper to hold and manage investments).

C. A judge shall not knowingly hold membership in any organization that practices discrimination prohibited by law.

## Canon 8 Subcommittee Proposal

The full subcommittee recommends adding the following definition of impartiality:

**"Impartiality" denotes absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintain an open mind in considering issues that may come before the judge.**