

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

**SECOND SUPPLEMENTAL REPORT OF CANON 3 SUBCOMMITTEE**

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**UPDATE**

After the meeting of the entire Advisory Committee on June 11, 2004, the Canon 3 subcommittee reconvened to discuss a few follow-up matters. This supplemental report is intended to update the committee on matters that were discussed but not resolved at the June 2004 meeting<sup>1</sup>, so that the unresolved issues may be addressed at the committee meeting on October 29, 2004.

**Canon 3D Disciplinary Responsibilities**

At the June 2004 meeting, the committee discussed whether it might be better if the “should” in the first sentence in Canon 3(D)(1) were instead a “shall.” As part of this discussion, the committee also considered whether the “appropriate action” language used in Canon 3D(1) and (2) should be defined. Some suggested that perhaps the words “one or more violations” or “repeated violations” should be substituted for the “a [single] violation in Canon 3D(1) and (2). Others emphasized that a single serious or egregious violation should warrant action.

A separate discussion evolved over whether these matters should be addressed in a comment to the Code provision rather than in the provision itself. This led to a discussion about whether it would be advisable to include comments to one provision of the Code when the existing Code does not have comments to any provisions, except for the newly amended Canon 5. (The Canon 5 subcommittee, however, has recommended that the commentary be moved into the body of the provision.) Some committee members were opposed to adding comments and favored putting any additional material directly into the body of the rule. Ultimately, the committee decided that the language in the body of Canon 3D(1) and (2) should remain as it is but that the committee should

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<sup>1</sup> The follow-up matters were identified but not discussed at the September 10, 2004 committee meeting.

consider proposing a comment to this rule that addresses the noted concerns. The committee asked the Canon 3 subcommittee to prepare draft language for discussion at a subsequent meeting.

At the September 2004 meeting, the committee revisited the discussion concerning whether any proposed amendment to the rule should be in the commentary or the body of the rule. After a lengthy discussion, the committee reversed its original decision and decided against commentary. Instead, the committee now favors putting any changes in the body of the rule.

**As indicated at pages 12-13 of the Canon 3 subcommittee's original report, the following suggested change of the term to "other appropriate corrective action" and its definition are taken from similar language in the Codes of California, Maryland, and New York. In addition, the July 2004 preliminary draft of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct has moved the 3D provisions on reporting to Canon 2 at 2.17 and 2.18. The commentary to each defines "appropriate action" as follows:**

**Appropriate action may include direct communication with the judge who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.**

**Appropriate action may include direct communication with the lawyer who has committed the violation, and reporting the violation to the appropriate authority or other agency or body.**

Given the discussion at the June 11th meeting, the committee seemed to want more specific guidance on how "appropriate action" should be defined. This definition could be included in Canon 8 rather than adding it to Canon 3D. In addition, the specific reference to impairment was added because of the June 11th discussion referring the subcommittee to the Disciplinary Rules of Professional Conduct 8.03 commentary; and the "serious or repeated violation(s)" change in the proposed language was made based on committee discussion. Accordingly, the following suggested revisions to Canon 3D are offered for committee discussion: