

Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

On October 31, the American Bar Association's Joint Commission to Evaluate the Model Code of Judicial Conduct issued its final report recommending changes to the current ABA Model Code. The proposed new code will be considered at the ABA mid-year meeting in February 2007. The full report may be viewed by going to: www.abanet.org/judicialethics/commissionreport.html

The current ABA Model Code of Judicial Conduct was adopted in 1990. As noted in the introduction to the Joint Commission's report, the structure of the proposed new code presents two notable differences from the 1990 code. "The first difference is the presentation of Canons, which state overarching principles of judicial conduct, followed by black-letter 'Rules.' In the 1990 Code, each Canon was followed by "sections" that discursively established the parameters of permissible and prohibited conduct." The Joint Commission determined that "a structure similar to that of the ABA Model Rules of Professional Conduct (which address permitted and prohibited conduct for lawyers) would be more straightforward and user-friendly." In the proposed Code, the rules "are usually followed by comments that provide both aspirational statements and guidance in interpreting and applying the rules."

The second difference is that "the material treated under each of the Canons has been reorganized to provide what the [Joint] Commission considers a more logical, functional and helpful arrangement of topics. Canon 1 and its rules combine most of the subject matter of present Canons 1 and 2, addressing the obligations of judges to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and its appearance, and to avoid abusing the prestige of judicial office. Canon 2 and its rules address solely the judge's professional duties as a judge, which constitute most of Canon 3 in the present Code. Canon 3 and its rules address specific types of personal conduct, including involvement in extrajudicial activities and in business or financial activities; most of which is now addressed in Canon 4. Finally, Canon 4 and its rules address, as does present Canon 5, acceptable political conduct of judges and judicial candidates. The current Preamble has been divided into two parts: a new Preamble, which states the objectives of the Model Rules, and a Scope section, which describes the manner in which they are to be interpreted, used for guidance, and enforced."

The adoption of a new ABA Model Code of Judicial Conduct will undoubtedly result in a major study of Arizona's Code of Judicial Conduct. Judges and others interested in the ABA process and the details of the new model code are encouraged to take a look at the ABA's web site.

Changes in Commission Rules

New rules for the Commission on Judicial Conduct went into effect on January 1, 2006. Even before the amended rules were implemented, it became apparent that additional changes were needed to make the rules easier to understand and apply. To this end, the commission submitted a petition to the Arizona Supreme Court to amend the rules on an emergency basis, subject to circulation and comment. The court granted the petition, and the commission operated under the emergency rules throughout most of the year.

On September 18, 2006, the supreme court approved the amended rules in final form. The most significant change was to Rule 23(c), which now reads:

As an alternative to filing a motion for reconsideration, the judge may, within fifteen days of the mailing of an order, file a request for a hearing conducted pursuant to Rule 27, providing, however, that the hearing shall be conducted before the commission rather than a hearing panel or hearing officer, that the duties of the presiding member described in the rule shall be performed by the chairperson of the commission or the chairperson's designee, and that all other subsections of the rule shall be interpreted in accordance with these provisions.

Other changes to the rules include an addition to Rule 23(a) to provide that the commission may issue orders dismissing complaints or imposing informal sanctions, rather than using letters for this purpose. In addition, the rules governing temporary reassignment and discipline by consent have been substantially revised. An up-to-date version of the commission's rules is posted on the commission's website, which can be viewed and downloaded by going to: www.supreme.state.az.us/ethics

Court Denies Petition to Amend Commission Rules

On September 11, 2006, the Arizona Supreme Court denied a petition filed last year by the Maricopa County Attorney's Office to amend the commission's rules. The county attorney proposed a change in Rule 9(e) that would require the commission to disclose the judge's response to the complainant in every case in which the judge is asked to respond, except those portions of a response subject to a protective order. The complainant would then be allowed to file a reply to the judge's response. The county attorney also proposed adding the judge's response to those documents made public following entry of an order of dismissal. Under the current rules, which will remain in effect, disclosure of a judge's response is discretionary with the commission.

Commission Sued in Federal Court

On October 4, Randolph D. Wolfson, a candidate for justice of the peace in Mohave County, filed a lawsuit in the United States District Court (*Wolfson v. Brammer et al.*, Civil Action No. 3:06CV2357) naming the members of the Arizona Commission on Judicial Conduct, the members of the Arizona Supreme Court Disciplinary Commission, and chief counsel for the State Bar of Arizona as defendants. He also filed a motion to enjoin the defendants from enforcing disciplinary standards before the election.

Mr. Wolfson claims, among other things, that Canon 5 of the Code of Judicial Conduct denies his First Amendment rights by prohibiting him from speaking out on Proposition 107 and other political and legal issues. He is also challenging Canon 3E, which governs disqualification, and

various other provisions in Canon 5 that prohibit candidates from making speeches for political organizations or other candidates, publically endorsing candidates for public office, soliciting funds for a political organization, and personally soliciting campaign contributions.

The lawsuit is one of many that have been filed around the country in the wake of *Republican Party of Minnesota v. White*, the 2002 case in which the U.S. Supreme Court held that judicial conduct commissions and codes of judicial conduct cannot prohibit judges from announcing their views on disputed legal and judicial issues during elections. The Court did not overturn restrictions that prohibit judges from making "pledges, promises or commitments" with respect to future cases or how they might rule in cases in the future, and lawsuits are now challenging these provisions.

The plaintiff is represented by the Alliance Defense Fund, based in Scottsdale, and by the Madison Institute for Free Speech located in Terre Haute, Indiana. James Bopp, Jr., lead counsel in the *White* case, is the Institute's lead counsel. The defendants are represented by the Attorney General's Office and the Phoenix law firm of Lewis and Roca.

On November 6, Federal Judge Stephen McNamee denied Mr. Wolfson's motion for a preliminary injunction on seven grounds: (1) plaintiff did not demonstrate that his campaign had been harmed or that his opponent's campaign gained an unfair advantage due to the existing regulations; (2) plaintiff provided nothing beyond conclusory allegations to support his claims of harm; (3) plaintiff had not been threatened with professional discipline; (4) the Judicial Ethics Advisory Committee actively worked with him to address his concerns; (5) plaintiff delayed too long in bringing his action to claim the severity of the harm he allegedly suffered; (6) plaintiff did not offer any controlling law to establish that any of the rights he claims were violated are protected by the First Amendment; and, (7) plaintiff's arguments involved "quantum leaps of constitutional development" that the court was unwilling to make without traditional methods of discovery, i.e., the factual underpinnings need to be developed.

Shortly after the election, counsel for the defendants filed a motion to dismiss the lawsuit on grounds that the plaintiff was not elected and, therefore, was not subject to the commission's jurisdiction. The motion was still pending as of November 27.

Just prior to filing his lawsuit, Mr. Wolfson asked the Judicial Ethics Advisory Committee for a formal opinion as to whether the code permitted him, as a candidate for judicial office, to publicly discuss Proposition 107. In response, the committee issued Advisory Opinion 06-05, which states that a candidate for judicial office may publicly discuss an initiative measure to amend the Arizona Constitution also appearing on the ballot, provided any public comments conform to the requirements of Canon 5B(1)(d)(i). The opinion also permits a judge standing for retention or election to respond to a political interest group questionnaire seeking the candidate's views on disputed political and legal issues or judicial philosophy.

As a result of the new opinion, the committee officially withdrew Advisory Opinion 96-11, which prohibited a candidate for judicial office from responding to a questionnaire seeking the candidate's views on disputed political and legal issues. Advisory Opinion 97-05 has also been superseded by Opinion 06-05 to the extent that a judicial candidate's comments in an educational context cannot be restricted in light of *Republican Party v. White*.

2006 Advisory Opinions

The Judicial Ethics Advisory Committee has, to date, issued six opinions in 2006. The opinions are summarized here. To read the full text of the opinions, go to www.supreme.state.az.us/ethics and click on Judicial Ethics Advisory Opinions.

Opinion 06-01 (April 18, 2006)

A former chief city prosecutor now sitting as a municipal court judge is required to disqualify himself or herself in cases that were issued or charged while the judge was the city prosecutor. Although a judge is not automatically required to disqualify in cases being prosecuted by former subordinates that were filed after the judge left the prosecutor's office, there are additional facts or circumstances that might give rise to the need for disqualification.

Opinion 06-02 (April 25, 2006)

Determining whether a judge has violated Canon 3B(8) concerning timely rulings requires a factual inquiry into the circumstances of each case. Although a violation of the so-called "sixty day rule" (Rule 91(e) and related statutes) may be relevant in such an inquiry, it is not determinative of a violation of the code.

Opinion 06-03 (July 20, 2006)

A judge may not accept an award for "Excellence in Adjudication" from Mothers Against Drunk Driving. Accepting such an award from an organization whose "mission is often adversarial to those charged with DUI offenses" could cast reasonable doubt on the judge's capacity to act impartially in DUI cases and could trigger disqualification considerations.

Opinion 06-04 (July 24, 2006)

A full-time justice of the peace may not regularly absent himself or herself from court in order to serve as an associate municipal court judge in another county.

Opinion 06-05 (October 11, 2006)

A judge standing for retention or election may respond to a political interest group questionnaire seeking the candidate's views on disputed political and legal issues or judicial philosophy, provided the response conforms to the requirements of Canon 5B(1)(d)(i) of the Code of Judicial Conduct. A judge may also publicly discuss an initiative measure to amend the Arizona Constitution appearing on the ballot, subject to the same canon. However, a sitting judge who is not campaigning for election or retention may not publicly express his or her views on disputed political or legal issues, and a newly-elected judge must refrain from making public political comments when he or she becomes constitutionally entitled to hold office.

Opinion 06-06 (November 7, 2006)

A judge may serve as honorary chair of a fund-raising campaign intended to benefit a public institution of legal education.

Membership Changes

Judge **Patrick Irvine** (Court of Appeals, Phoenix) was appointed to the Judicial Ethics Advisory Committee, replacing Judge **Sheldon Weisberg** (Court of Appeals, Phoenix). Tempe Municipal Judge **MaryAnne Majestic** and Phoenix attorney **David Damron** were reappointed to the committee for additional terms.

Constable Ethics Committee

During the last session, the legislature passed Senate Bill 1180 to reorganize the Constable Ethics Committee, which investigates complaints against constables, and to fund the committee and constable training. The bill also relieved the Commission on Judicial Conduct of its responsibility for staffing the committee. Complaints against constables should now be directed to the Constable Ethics Committee, c/o John C. Ronquillo, Arizona Association of Counties, 1910 W. Jefferson, Phoenix 85009.

New Phone Number

Effective October 9, 2006, the Commission on Judicial Conduct and the Judicial Ethics Advisory Committee have a new phone number: 602-452-3200.