



The ABA Model Code of Judicial Conduct Receives an Update

By Tanya Noreen Lewis

In 2003, American Bar Association President Dennis W. Archer announced the appointment of a Joint Commission to Evaluate the Model Code of Judicial Conduct (the Commission.) In announcing the creation of the Commission, Archer commented that judicial ethics were not static, and that political, legal, and social changes necessitated revisions to the Model Code of Judicial Conduct, which had last been overhauled in 1990.

The Commission, chaired by Phoenix attorney Mark I. Harrison of the law firm of Osborn Maledon, P.A., held public hearings across the country in 2004 and 2005. The purpose of the hearings was to elicit commentary from members of the bar and judiciary about the existing Code and to formulate ideas on changes, both procedural and substantive, to the Model Code. The Commission, comprised of

prominent members of bar and judiciary from around the country, worked to create a code that would improve upon the 1990 code and be applicable to the issues and concerns of today's judiciary, bar, and public. In fact, the Commission held nine public hearings, met in person 20 times, and held more than 30 teleconferences to accomplish its goals.

One of the goals of the Joint Commission was to clarify the Code and break it down into sections, much like the Model Code of Professional Responsibility. Additionally, new language was added to highlight that, at all times, judges should avoid both impropriety and the appearance of impropriety in their professional and personal lives and that they should aspire to conduct that ensures the greatest possible public confidence in their independence, integrity, impartiality, and competence.



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Key points of the revisions

New terms were added to the Model Code to reflect society's changing views on personal relationships. For example, the Model Code now includes the term "domestic partner," instead of "spouse." The theory is that now commonplace "non-traditional" relationships that exist outside marriage are deserving of treatment equal to that afforded marital relationships in evaluating their potential conflict-of-interest implications under the Rules.

Furthermore, the Joint Commission's changes to the comments clarified that undertaking activities that encourage public understanding of and confidence in the justice system is not a duty of judicial office per se, but such activities promote public confidence in the courts and to that extent facilitate the courts' mission.

The Joint Commission also focused its efforts on defining bias and harassment, both terms that have taken on new significance since the last revision of the Model Code in 1990. Prior to 2007, the Model Code required judges to avoid bias and prejudice, but included nothing in the black letter about harassment, which it relegated to a discussion in the Commentary, limited to sexual harassment. The Commission agreed that harassment was a form of bias or prejudice that the Rules prohibited, but wanted to expand it beyond sexual harassment to reach other forms of harassment as well. Witnesses, however, argued that the proposed change could be construed to have an unintended consequence. By deleting the reference to "sexual" harassment per se, the change could be construed as deleting sexual harassment from the range of behaviors barred by the Rules, or at least diminishing its significance. The Commission remained of the view that harassment—including but not limited to sexual harassment—should be proscribed by the Rules. It was, however, persuaded that sexual harassment deserved special mention, given the significance of the problem.

Four new items were added to the list of factors upon which bias is prohibited: gender ("sex" is a term of art employed in sex discrimination statutes, but may not capture bias, prejudice, or harassment against trans-gendered individuals); ethnicity (which the Commission regarded as distinct from national origin; for example, in the case of an Arab-Canadian, discrimination on the basis of Arab ancestry would relate to ethnicity, while discrimination based on Canadian derivation would relate to national origin); marital status (the Commission was made aware of instances in which judges had berated a party for cohabiting or having a child outside of wedlock); and political affiliation (as, for example, when a judge displays animus toward plaintiffs affiliated with a particular political party).

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Other revisions

Advances in technology since 1990 also were considered by the Joint Commission. The Joint Commission emphasized the prohibition on a judge conducting an independent investigation about the facts of a case, and given the ease with which factual investigation can now be accomplished via electronic databases and the Internet, the risk that a judge or the judge's staff could inadvertently violate Rules 2.9(B) and (C) has heightened considerably. The need for vigilance on the part of judges has increased accordingly.

The Joint Commission also added Rule 2.14, requiring that judges report situations involving the impairment or potential impairment of fellow members of the judiciary. This new rule governs a difficult and extremely important issue. Impairment can undermine judicial competence, diligence, and demeanor specifically, and public confidence in the courts generally. The Rule imposes a mandatory obligation to take appropriate action when a judge learns of a colleague's impairment. The objective of this provision is to guide and encourage judges to address impairment problems when they arise.

The revised Model Code of Judicial Conduct was unanimously approved by the ABA House of Delegates on February 12, 2008.

Moving forward

Harrison states that it was a goal of the committee to prepare a Model Code that would be appropriate for adoption by each state to improve and clarify the standards for its judiciary. This fall, Harrison plans to meet with members of the Nevada Supreme Court to explain key provisions of the new code, and to assist them with their plans to evaluate the new Model Code and discuss its adoption in Nevada.

In his comment on the enactment of the new Model Code, Harrison wrote, "An independent, impartial judiciary is indispensable to our system of justice. Equally important is the confidence of the public in the independence, integrity and impartiality of our judiciary as an institution. In its work over the last three years, the Joint Commission took great care to adhere to those principles while at the same time providing sound, clear, and reasonable guidance to judges faced with uncertainty. The end result is a Code that should serve both judges and the public well for many years to come."

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