**PROPOSED REVISIONS TO CODE OF CONDUCT FOR U.S. JUDGES**

**Public Comments**

| **#2** | Frank H. Easterbrook, Illinois | 04/13/2008 |
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This is a nicely thought out set of revisions. I have comments on only three sections.

One is that the addition in the commentary to Canon 2B--the sentence "Nor should a judge use judicial letterhead to gain an advantage in conducting personal business."--should be revised.

The phrase "to gain an advantage in conducting" should be deleted. Use of judicial letterhead is never appropriate when conducting personal business. Gaining an advantage may be the goal of this misuse of office, but the rule should be absolute. Trying to determine, case by case, why a judge used the letterhead is a mistake. (I'm thinking about this from the perspective of one who must administer the Judicial Conduct and Disability Act of 1980 and needs clear rules rather than fuzzy standards.)

The sentence also should be extended to forbid the use of judicial titles ("Judge" or "The Honorable") when conducting personal business. For an example of the problem, see the memorandum I wrote under the 1980 Act concerning use of the judicial title by a judge who was a plaintiff in civil litigation unrelated to the judicial office. <http://www.ca7.uscourts.gov/JM_Memo/06-46.pdf>.

My second comment concerns Canon 3A(4)(c), which as revised says that a judge may obtain written advice of a disinterested expert on the law if and only if the parties are notified and allowed to respond. I understand the genesis of this rule--a desire to bring to light "advice" in the
nature of private amicus briefs. But the addition of the word "written" brings this subsection into conflict with Canon 3A(6) and Canon 4A(1), which together permit the judge to engage in scholarly activities, including the discussion (for the purpose of legal education) of issues in pending litigation.

Scholarly discussion is mostly oral. I teach at the University of Chicago, and if the revised version of Canon 3A(4)(c) were in force today, I would be in violation weekly. There are frequent oral exchanges on subjects that bear on pending cases. I can't discuss antitrust, bankruptcy, or any other topic of interest without getting into some issues that are (or are likely to be) before me. Getting the conversation of a lunch table or a seminar down on paper for distribution under Canon 3A(4)(c) is not feasible, but treating that rule as one requiring the judge to leave the room would be at odds with Canon 3A(6) and Canon 4A(1).

I'm inclined to think that this entire subparagraph should be deleted, and the issue of advice from scholars treated either in an advisory opinion or subsumed under the normal rules about ex parte contact. Otherwise the Code will be at war with itself, for oral interchanges with

scholars about issues in (or about to be in) litigation are a desirable part of the teaching and scholarship that the Code encourages.

Finally, I appreciate the elaboration in the revised Canon 3A(4)(b) of circumstances under which ex parte contacts are allowed on matters of procedure; that will solve an issue on which I have been in communication with the Committee on Codes of Conduct.

PS; I suggest that the draft be sent to [redacted], or another specialist in drafting, before it is submitted to the Judicial Conference. Although most of the language is clear, application of [redacted] Guidelines for Drafting and Editing Court Rules (prepared in conjunction with his work for the Standing Committee on Rules of Practice and Procedure) would improve usability. For example, Canon 3A(4) has an un-numbered hanging paragraph. That never occurs in good drafting; every paragraph should be numbered to facilitate citation.