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Sent: Thursday, September 15, 2005 3:28 AM  
To: Taylor, Debra  
Subject: Comments on MCJC

MODEL CODE OF JUDICIAL CONDUCT, JUNE '05 DRAFT PROF. MONROE H. FREEDMAN

I. Rules 1.03 and 2.12

I strongly approve of the appearances standard of Rules 1.03 and 2.12, in part for the reasons given in §9.07 of Freedman & Smith, *Understanding Lawyers' Ethics* (3rd ed., 2004). See also §9.04, which explains that the Due Process Clause of the Constitution imposes an appearances standard for judicial impartiality and disqualification. It would be anomalous if the American Bar Association were to adopt a lesser standard in its Model Code than that which is required by constitutional due process.

II. Rule 4.13 and Introductory Report

The factors enumerated in Comment [2] to Rule 4.13 should include a reference to the need to avoid the potential for ex parte communications with the judge by sponsors and participants at educational conferences. Similarly, there should be a reference to the potential for ex parte communications in the second paragraph of page 7 of the Introductory Report.

III. Rule 4.04

Canon 4, Rule 4.01, and Rules 4.04(A) and (B)(1) are extremely important. I am concerned, however, that the drafting of 4.04(B)(2) and (C) could lead to unintended results.

Rule 4.04(B)(2) begins with the words, "Notwithstanding paragraph (1)...." It then goes on to permit a judge to "appear at, participate in, and permit the judge's title to be used" in connection with an event "even though the event may serve a fundraising purpose." Thus, (B)(2) seems expressly to override the prohibition of (B)(1)(a) that a judge shall not "use or permit the use of the prestige of judicial office for fundraising or membership solicitation."

In addition, the important limitations of Rule 4.04(C)(1) and (2) appear in context to apply only to the subject of 4.04(C) itself, which relates only to service as an officer, director, trustee, or non-legal advisor of an organization. Yet the limitations of 4.04(C)(1) and (2) should apply to any kind of involvement or participation by a judge with an organization, not just to service as an officer, etc. That is, a judge should avoid all personal involvement with any organization that (1) will be engaged in proceedings that would ordinarily come before the judge, or that (2) will be engaged frequently in adversary proceedings in the court of which the judge is a member or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

Assume, for example, that a judge appeared at, participated in, and permitted the judge's title to be used in connection with the fundraising and membership-soliciting event of an organization that engages in cause litigation. That conduct by the judge would reflect adversely on the judge's impartiality with respect to that organization, requiring the judge's disqualification in those cases in which the organization is a litigant. The requirement of disqualification means, in turn, that the judge's association with the

organization would have interfered with the performance of the judge's duties. I don't think, therefore, that the Joint Commission intended to permit the judge to engage in fundraising and membership soliciting activity for an organization that engages in litigation; however, that appears to be the effect of Rule 4.04(B)(2) and (C).

Moreover, the last paragraph of the Commentary to Canon 4C(3)(b) of the present Code has been deleted in the current draft. This deletion, along with the other problems in Rule 4.04 of the current draft, reinforces the notion that a judge could ethically participate in a litigating organization's fundraising event, even as a speaker or a guest of honor.