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## DELIVERED BY EMAIL AND FIRST CLASS MAIL

ABA Joint Commission to Evaluate the Model Code of Judicial Conduct  
321 North Clark Street  
Chicago, IL 60610

Re: Comments of the Illinois Judicial Ethics Committee Concerning  
Proposed Rule 4.04 of the ABA Model Code of Judicial Conduct

Dear Chairman Harrison and Commission Members:

I am writing on behalf of the Illinois Judicial Ethics Committee. The IJEC is a joint committee of the Illinois Judges Association, the Illinois State Bar Association, and the Chicago Bar Association. Formed in 1992, the IJEC responds to ethics inquiries from judges located throughout the State of Illinois. During the past 13 years, the IJEC has issued more than 150 formal advisory opinions. Those opinions are available to the public on Westlaw and online at the Illinois Judges Association website ([www.ija.org](http://www.ija.org)).

The IJEC appreciates the work of the Joint Commission in updating the Model Code of Judicial Conduct. I am pleased to submit comments on behalf of the IJEC with respect to an important and difficult subject: judges' ability to participate in fundraising events conducted by bar associations and other law-related organizations. The IJEC has found ethics inquiries on this subject to be among the most vexing it has been called upon to address. Indeed, because the IJEC believes the current Illinois ethics rule on this subject (Illinois Supreme Court Rule 64) fails to provide judges with sufficient guidance, the IJEC is submitting a proposed revision to that rule to the Illinois Supreme Court.

The analogous provision to Illinois Supreme Court Rule 64 contained in the Joint Commission's proposed revisions to the Model Code of Judicial Conduct is found in Model Rule 4.04. As explained below, the IJEC supports the Joint Commission's rewrite of that Rule and, in particular, the provision in subparagraph (a)(2)(iii) concerning fundraising events conducted by law-related organizations. The IJEC believes that proposed Rule 4.04(a)(2)(iii) would correct shortcomings in the 1972 and 1990 Model Codes and provide needed guidance to judges on this subject. The following discussion explains the basis for the IJEC position and offers some suggestions intended to clarify further the intent of the proposed rule.

### **JUDGES' PARTICIPATION IN BAR ASSOCIATION FUNDRAISING EVENTS**

Comment [1] to proposed Model Rule 4.01 appropriately acknowledges that [c]omplete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives." A delicate balance is required to enable judges to make valuable extra-judicial contributions while maintaining their judicial impartiality. This is one aspect of the challenge that Benjamin Cardozo aptly described as requiring a judge to "live in the crowd, and yet apart from it, man of the world and philosopher by turns" (address at Albany Law School, June 10, 1925).

Based on the frequency with which it has occupied the IJEC, this balance is especially elusive when it concerns judges' permissible fundraising-relating activities. The IJEC has addressed judges' ability to participate in fundraising on behalf of a host of charitable, educational, political, religious, and law-related organizations. *See, e.g.*, IJEC Opinion Nos. 96-3 (judge may not be a speaker or guest of honor at charitable organization fundraising event); 99-5 (judge cannot be guest of honor at high school fundraising event); 96-19 (participation in political fundraiser); 96-4 (judge may serve as president of church, synagogue, or mosque and may explain financial condition of congregation to its members, but may not solicit funds); 95-22 (judge may serve as chair of charitable arm of bar association and may explain organization's activities to public and private fund-granting agencies, but may not sign fundraising letters or solicit funds); 98-11 (judge may publicly assist efforts to convince Supreme Court to fund Lawyers' Assistance Program by increasing attorney registration fees).

A judge's involvement in fundraising on behalf of law-related, charitable, or other kinds of organizations raises two potential concerns. First, as alluded to by Comment [2] to proposed Model Rule 4.04, no matter how pure a judge's motives nor how worthy the cause, a judge's involvement in fundraising activities potentially subjects prospective donors to pressure to contribute. Depending on the circumstances, that pressure may be subtle and attenuated, or blatant and virtually extortionate. A potential contributor may wonder: if I do not contribute, will that be held against me when I appear before the judge? In its most virulent form, that pressure can taint the public perception of the judge's impartiality.

Second, there is the flip-side to the fear of retribution—the hope that contributing would curry favor with the judge. This consideration, which is overlooked in the Comments to Rule 4.04, involves the possibility that a potential contributor may wonder: if I contribute, will that help me when I appear before the judge? A corollary to this is the even greater risk that members of the public aware of the contribution may wonder whether it would have that effect. *See* Jeffrey M. Shaman, *et al.*, *Judicial Conduct and Ethics*, § 9.06 at p. 295 (3<sup>rd</sup> ed. 2000).

The IJEC believes that the rules proposed by the Joint Commission strike the right balance between facilitating judges' ability to participate in law-related, civic, and charitable organizations and preventing judges' involvement in inappropriate kinds of fundraising activities. In particular, the IJEC commends the Joint Commission for proposing a new

provision, found in Model Rule 4.04(a)(2)(iii), that would expressly permit a judge to “appear at, participate in, and permit the judge’s title to be used in connection with an event of an organization devoted to the improvement of the law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose.” This provision would remedy a glaring omission in the text of the 1990 Model Code of Judicial Conduct, which permits judges to help law-related, civic, and charitable organizations *plan* fundraising, but does not directly address the extent to which they can *participate* in fundraising events. *But see* Commentary to Section 4C(3)(b) of the 1990 Model Code of Judicial Conduct (a judge may not be a speaker or guest of honor at a fundraising event sponsored by any civic, charitable, or law-related organization).

Like the 1972 Model Code of Judicial Conduct, proposed Model Rule 4.04(a) makes a distinction between judges’ participation in fundraising events sponsored by civic, charitable, and other nonprofit organizations, on the one hand, and law-related organizations, on the other hand. Canon 5 of the 1972 Code allowed judges to attend, but forbade them from being a speaker or guest of honor at, fundraising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Canon 4 of the 1972 Code covered the same subject, although more obliquely, with respect to judges’ involvement in fundraising activities of organizations devoted to the improvement of the law, the legal system, or the administration of justice. Similarly, the Joint Commission’s proposal draws a distinction based on the type of organization conducting the fundraising. Proposed Model Rule 4.04(a)(1) contains general proscriptions against fundraising activities by judges on behalf of any civic or charitable organizations, while Model Rule 4.04(a)(2)(iii) carves out a specific exception for participation in fundraising events by law-related organizations.<sup>1</sup> The implication of proposed Rule 4.04—which the Joint Commission might wish to consider making express in the body of the Rule or a Comment—is that judges are forbidden to participate in fundraising events by civic or charitable organizations that are not devoted to the improvement of law, the legal system, or the administration of justice.<sup>2</sup>

Although proposed Model Rule 4.04 would revive the distinction between law-related and other civic or charitable organizations that was present in the 1972 Model Code, the proposed Rule would add much-needed clarity to judges’ ability to participate in fundraising events sponsored by law-related organizations. The IJEC has firsthand experience with this issue, in that the

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<sup>1</sup> The non-redlined version of proposed Model Rule 4.04 dated July 19, 2004, which version is available on the Joint Commission’s website, contains a typographical error by mislabeling as “(1),” rather than “(2),” the provision contained in Model Rule 4.04(a)(2). The redlined version does not contain this error.

<sup>2</sup> The IJEC does not have a formal position concerning whether judges should be permitted to be a speaker or guest of honor at fundraising events sponsored by non-law-related civic or charitable organizations. However, the IJEC believes this subject should be expressly addressed by a Model Rule or Comment.

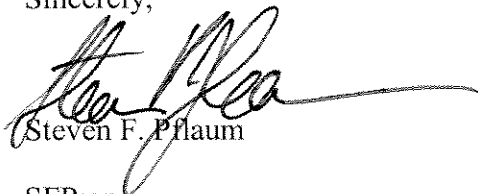
analogous Illinois' ethics rule is based on the 1972 Model Code. Canon 4 of that Code permitted judges to "assist" law-related organizations in raising funds, but forbade them from "personally participat[ing] in public fund-raising activities." The IJEC's uncertainty whether that provision permits judges to be guests of honor or speakers at bar association fundraising events, and the IJEC's belief that such participation should be permitted, led the IJEC to develop a proposed revision to Illinois Supreme Court Rule 64. (Redlined and clean copies of the IJEC proposal are enclosed.) The IJEC proposal is consistent with proposed Model Rule 4.04(a)(2)(iii) and, indeed, borrows language from the Joint Commission's proposal.

### CONCLUSION

The IJEC urges the Joint Commission to retain, substantially as written, proposed Model Rule 4.04(a)(2)(iii). The IJEC suggests that the Joint Commission also consider (1) mentioning in a Comment to Rule 4.04 the potential concern that contributions in honor of a judge could be intended or perceived to attempt to curry favor with the judge, (2) adding a provision in a Rule or Comment stating expressly whether judges can be a speaker or guest of honor at fundraising events sponsored by civic or charitable organizations other than law-related organizations, and (3) using language from proposed Illinois Supreme Court Rule 64 in Model Rule 4.04 or its Comments.

Thank you for your consideration of these comments. I will be testifying on behalf of the IJEC at the public hearing in Chicago on June 3, 2005, and would be pleased at that time to answer any questions Commission members may have.

Sincerely,



Steven F. Pflaum

SFP:gr  
Enclosures

cc: Illinois Judicial Ethics Committee

**REDLINED VERSION OF DRAFT AMENDMENTS**  
**TO ILLINOIS SUPREME COURT RULE 64**  
**(CODE OF JUDICIAL CONDUCT CANON 4)**

**Rule 64. Canon 4. A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice.**

A judge, subject to the proper performance of his or her judicial duties, may engage in the following law-related activities, if in doing so the judge does not cast doubt on his or her capacity to decide impartially any issue that may come before him or her.

A. A judge may speak, write, lecture, teach (with the approval of the judge's supervising, presiding, or chief judge), and participate in other activities concerning the law, the legal system, and the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he or she may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. A judge may serve as a member, officer, or director of ~~an organization or a bar association, governmental agency, or other organization~~ devoted to the improvement of the law, the legal system, or the administration of justice. He or she may assist such an organization in raising funds and may participate in their management and investment, ~~but should not personally participate in public fund-raising activities. He or she. A judge may not permit his or her name to be used to solicit funds for any such organization, except that a judge may (1) appear at, participate in, and permit the judge's title to be used in connection with an organization event that serves a fundraising purpose, and (2) permit his or her name to be present on materials used by the organization for fundraising purposes so long as all other persons holding a similar position (e.g., guest of honor for an event, officer or director of the organization, committee member, etc.) are also named, the fundraising communication does not purport to be from the judge, and the judge's judicial title is not used unless comparable designations are provided for persons holding a similar position. However, under no circumstances may a judge personally solicit funds for any such organization.~~

D. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

COMMITTEE COMMENTS

(Revised October 15, 1993[INSERT EFFECTIVE DATE OF LATEST REVISIONS])

This canon regulates the permissible scope of a judicial officer's law-related activities. As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile

justice. To the extent that the judge's time permits, he or she is encouraged to do so through appropriate channels.

~~Extrajudicial activities are governed by Canon 5.~~

Subparagraph (c) addresses a judge's ability to participate in the activities of law-related organizations. Such participation is often desirable, provided that care is taken to comply with restrictions on a judge's ability to help such organizations raise funds. The general rule is that a judge can help plan fundraising activities, but cannot solicit funds or permit his or her name to be used in any manner to solicit funds. Two exceptions to that general rule are specified. Neither of those exceptions is present in Supreme Court Rule 65, the rule addressing a judge's participation in non-law-related civic or charitable organizations. For the distinction between those organizations devoted to the improvement of the law, the legal system, and the administration of justice referred to in paragraph C and other civic or charitable organizations, see Thode at page 76.

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**NON-REDLINED VERSION OF DRAFT AMENDMENTS  
TO ILLINOIS SUPREME COURT RULE 64  
(CODE OF JUDICIAL CONDUCT CANON 4)**

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A. A judge may speak, write, lecture, teach (with the approval of the judge's supervising, presiding, or chief judge), and participate in other activities concerning the law, the legal system, and the administration of justice.

B. A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he or she may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. A judge may serve as a member, officer, or director of a bar association, governmental agency, or other organization devoted to the improvement of the law, the legal system, or the administration of justice. He or she may assist such an organization in raising funds and may participate in their management and investment. A judge may not permit his or her name to be used to solicit funds for any such organization, except that a judge may (1) appear at, participate in, and permit the judge's title to be used in connection with an organization event that serves a fundraising purpose, and (2) permit his or her name to be present on materials used by the organization for fundraising purposes so long as all other persons holding a similar position (*e.g.*, guest of honor for an event, officer or director of the organization, committee member, etc.) are also named, the fundraising communication does not purport to be from the judge, and the judge's judicial title is not used unless comparable designations are provided for persons holding a similar position. However, under no circumstances may a judge personally solicit funds for any such organization.

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