

1 line is going to get more and more blurred in the  
2 future.

3 I was just talking with somebody in the  
4 news business lamenting the nature of news coverage  
5 now, the biased news coverage. I asked where it is  
6 going, and he said it's going to get worse. The  
7 blogs are going to be the future.

8 I submit with the blogs, there aren't  
9 going to be many non-public comments because the way  
10 people get ahold of this information and put it on  
11 the Internet, the line is pretty much disappearing.

12 Whatever you do, be mindful of that in  
13 your commentaries because you're trying to get this  
14 to apply to us in the near future, and I see that in  
15 the near future.

16 JUDGE ROSENBLUM: That's a good point to  
17 make to add something in the commentary about modern  
18 media.

19 JUSTICE SHEPARD: Peter, do you have  
20 anything else you want to cover?

21 JUDGE BOWIE: Just two points. The first  
22 one is in the economic interest area, one of the  
23 things we have proposed is adding "domestic partner"  
24 into both parts of it, both within the third degree

1 and the economic interest.

2           The proposed language also expands  
3 economic interest to read, "The judge's spouse,  
4 domestic partner, child or any other member of the  
5 judge's family residing in the judge's house." That  
6 raises questions about granny flats and that kind of  
7 thing, which may be too broad. We need to hear from  
8 you on that.

9           The other point I wanted to make is that  
10 we have a new 2.19 that we want you to look at where  
11 we talk about a judge's responsibility where a judge  
12 has knowledge that the performance of a lawyer or  
13 another judge is impaired by drugs, alcohol or other  
14 mental, emotional and/or physical condition shall  
15 take appropriate action, which may include a  
16 confidential referral to a lawyer or judicial  
17 assistance program.

18           That's a new provision that we felt, the  
19 commission felt that we had (inaudible) on this, was  
20 an area where judges needed to be encouraged to do  
21 something.

22           QUESTION/COMMENT FROM AUDIENCE: Could I  
23 ask something? Since this is yours, why doesn't  
24 section 2.05 express a broader obligation than

1 section 2.07?

2 2.05 talks about respect. What isn't in  
3 there is respect. What we expect from a judge is  
4 respect for all participants in the process.

5 Instead, in 2.05, you have -- it seems to  
6 me, you have created a statute with protective  
7 characteristics, and I don't know why it's invidious  
8 to deal with these characteristics and not others  
9 that are equally irrelevant to how I, as a judge,  
10 should decide a person's case.

11 Why are you being so particularized in  
12 2.05, and why aren't you looking at the most broad  
13 approach to the kind of obligation a judge has to  
14 the persons who are in the litigation process?

15 JUDGE BOWIE: Well, I suppose there are  
16 two parts to the answer, at least, maybe more.

17 One is that the language in 2.05(a) is  
18 the same as the old 3(d)(5). There was no change  
19 there.

20 Comment 3 was added that the new comment  
21 in which we set out a list of some of the ways in  
22 which bias may be manifested, but it was the same.  
23 2.05(b) is the old 3(b)(6). 2.07(a) is the old  
24 3(b)(3). (Inaudible) so we weren't changing

1 anything.

2                   Your point is still one that ought to be  
3 thought about in terms of what we're doing, but then  
4 it goes back to the point that Barbara was making.

5                   At the end of the day, when somebody  
6 walks out of the courtroom and they have lost, what  
7 is their sentiment of how they were treated in the  
8 context of those proceedings? Were they treated  
9 with respect? Were they treated by the staff  
10 courteously?

11                   It's the responsibility of the judge to  
12 both handle it that way and to require staff people  
13 to do the same.

14                   QUESTION/COMMENT FROM AUDIENCE: Yeah, I  
15 agree. That is what you say in 2.07.

16                   QUESTION/COMMENT FROM AUDIENCE: Well, I  
17 think one of the reasons that was established in the  
18 rule and has been in the rule for quite sometime is  
19 if you don't spell it out, judges don't get it.  
20 They weren't getting it, so it had to be spelled  
21 out.

22                   JUDGE ROSENBLUM: It wasn't an area that  
23 we felt we should go back to the old way.

24                   QUESTION/COMMENT FROM AUDIENCE: 2.19,

1 you indicate this was new; is that correct?

2                   It seems to me, in some ways, since it is  
3 mandatory "shall" is setting us all up for  
4 violations.

5                   A good number of people that I know might  
6 fall into this category, present company excluded,  
7 of course.

8                   Now, it's modified in that it impairs the  
9 performance, but I think when I was a circuit court  
10 judge for ten years, sometimes an attorney would  
11 show up and an attorney would be drunk. That's one  
12 thing, but (inaudible) obsessive compulsive, and yet  
13 this requires me to perhaps report someone like  
14 that.

15                   DEAN ALFINI: No, it doesn't. That's a  
16 big part of the issue.

17                   At our last meeting, there was a  
18 committee from an association from New York arguing  
19 that we should do that, that we should make it that  
20 you should be obliged to report the person to --

21                   QUESTION/COMMENT FROM AUDIENCE: But  
22 shall take appropriate action. Shall take  
23 appropriate action. I think that is what I mean by  
24 setting us up.

1           DEAN ALFINI: Well, it might mean  
2 chatting with your chief judge. It might be  
3 referring the person to what I believe in all states  
4 are confidential bodies, and that's an assistance  
5 program, a judicial or lawyer assistance program.

6           We have been challenged from the other  
7 side is what I'm saying.

8           QUESTION/COMMENT FROM AUDIENCE: My  
9 concern is making the "shall" take action regardless  
10 of what that action is. It is a violation of the  
11 code of ethics if I don't take some action.

12          QUESTION/COMMENT FROM AUDIENCE: We have  
13 this rule in California. It really creates a very  
14 heavy burden on the presiding judge and presiding  
15 justices because the way our rule is set up, it's  
16 that the presiding judge who has the obligation once  
17 the judge learns of an problem.

18          Nobody has ever been disciplined for  
19 failure to act, but it has enabled some people to  
20 get treatment that they needed. It has had a  
21 salutary effect.

22          I want to go back, if I may, to 2.12 on  
23 this issue of economic and personal interest. I  
24 happen to be a parent of the boomerang generation.

1 These kids keep coming back and leaving and then  
2 coming back with boyfriends and friends, and I don't  
3 always know exactly where these boyfriends work or  
4 if. I'm just glad if they do.

5 I don't even know the name of the punk  
6 rock band that my daughter is in now, but I know the  
7 clubs that she appears at.

8 I have a little trouble knowing exactly  
9 to what extent it's going to -- modern day American  
10 parents and children who have their parents and  
11 other relatives living with them at the cost of the  
12 housing market.

13 JUDGE BOWIE: That's a point that we have  
14 discussed on the federal side. The rule is still  
15 just a minor child residing in the judge's house.

16 QUESTION/COMMENT FROM AUDIENCE: That is  
17 so much easier.

18 JUDGE BOWIE: It is easier, but then  
19 domestic partner is another issue that is a very  
20 real concern.

21 The fact that you may have a long-term  
22 relationship with somebody who is your domestic  
23 partner and has financial interests in companies  
24 that may appear in front of you, if you don't know

1 about that, once somebody finds out, then all the  
2 same harm occurs, whether they in fact were involved  
3 in formal nuptials or not.

4           That is why I raised the flag for you.  
5 What we're talking about is expanding the scope of  
6 those who are reached, and whether that is too far,  
7 whether it is unworkable in that sense, and that is  
8 why I threw out the granny flat circumstance as  
9 well.

10           If you have adult children who happen to  
11 be living there, do they have to have been there for  
12 a whole year? Are they just transients?

13           JUSTICE SHEPARD: It does say "minor" for  
14 a reason.

15           QUESTION/COMMENT FROM AUDIENCE: Well, it  
16 doesn't say "minor."

17           JUSTICE SHEPARD: Yes, it does.

18           QUESTION/COMMENT FROM AUDIENCE: I'm  
19 looking at D.

20           JUDGE BOWIE: D1.

21           QUESTION/COMMENT FROM AUDIENCE: D1 just  
22 says "child."

23           JUSTICE SHEPARD: We obviously ought to  
24 clarify that.



1                   JUDGE DRESSEL:  What we're going to do, I  
2   have asked the panel if they would stay on.  This en  
3   banc discussion is going really good.  We don't need  
4   a discussion group of the smaller ones, so what  
5   we're going to do is take a 15-minute break now,  
6   come back in here and continue this discussion.

7                   I think this will really get at your  
8   questions because you have been great in asking  
9   questions, and we want to keep that going.

10                   (Break taken at 2:27 p.m.)

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1 RENO, NEVADA; THURSDAY, FEBRUARY 24TH, 2005; 2:54 P.M.

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5 JUSTICE TOAL: My campaign chaplain, J.  
6 Mark White, by popular request, has asked that I  
7 make available in the back of the room for immediate  
8 release, the Statement of Chief Justice Toal.

9 You're all bound to secrecy of that  
10 disclosure because if this goes back to South  
11 Carolina and it is known in South Carolina that I  
12 handed this out and stayed at a hotel that has slot  
13 machines all over it --

14 JUSTICE SHEPARD: Well, I thought that  
15 during the break, someone broke the code in the  
16 nature of the dialogue we have been having by  
17 saying, what we have in the room is a collection of  
18 people who are accustomed to interrupting the  
19 speaker and not accustomed to being interrupted in  
20 turn.

21 We shall do our best to carry on. We'll  
22 move on to Canon 4, which Eileen Gallagher is going  
23 to walk us through.

24 MS. GALLAGHER: I'll just go through some

1 of the provisions of Canon 4 quickly.

2           Canon 4 is extrajudicial conduct, and the  
3 proposed revisions to Canon 4 remain pretty  
4 consistent with the existing language of the Canon  
5 4.

6           The subsections of Canon 4 cover a  
7 judge's appearance before governmental bodies, their  
8 civic and charitable activities, appointments to  
9 judiciary positions, testifying as a character  
10 witness, the practice of law, financial activities  
11 and business activities and then gifts,  
12 reimbursement, compensation, disclosure of financial  
13 interest.

14           We talked earlier about Rule 4.02 which  
15 covers appearance before governmental bodies and  
16 it's existing Canon 4(c)(1).

17           There's a provision that has been added  
18 to the black letter that allows a judge to appear  
19 before a governmental body to discuss matters that  
20 may reasonably merit the judge's comment because of  
21 the judge's particular expertise or knowledge  
22 required in the performance of judicial duties.

23           It's designed to allow the judge the  
24 opportunity to speak about certain initiatives that

1 are not law-related but may impact the justice  
2 system.

3           The example in the commentary that I  
4 think as we mentioned before is a juvenile court  
5 judge commenting on the potential benefits of  
6 proposed improvements in the community that could  
7 lead to decrease in juvenile delinquency.

8           Rule 4.04 is the rule that addresses  
9 civic and charitable activities. The black letter,  
10 we had agreed to different order of those  
11 provisions.

12           The first part of the rule sets out  
13 certain prohibitions and allowances for  
14 participating in the activities of civic and  
15 charitable organizations. It contemplates that  
16 judge cannot solicit funds for the organization and  
17 cannot participate in membership solicitation if  
18 that solicitation is primarily a fundraising  
19 mechanism.

20           The new draft allows a judge to  
21 personally solicit funds from other judges over whom  
22 the judge does not have supervisory authority.

23           A judge may assist in fundraising and  
24 participate in the management and investment of the

1 organization's funds.

2           You can participate in a fundraising  
3 project, but you can't actually go and solicit the  
4 funds.

5           A judge may appear, and that has to deal  
6 with maybe cooking the food at a fundraiser for your  
7 kid's soccer team, something like that, that you can  
8 actually just participate in the fundraiser, but you  
9 aren't the person that sees the money.

10           The second part of the rule allows a  
11 judge to serve in a leadership capacity of a certain  
12 civic and charitable organizations.

13           Then we have added some commentary to  
14 clarify the rule a little bit more in that  
15 provision.

16           One of the things that we hope to address  
17 with this rule, in particular, is as we talked about  
18 before: Balancing the benefits of judicial outreach  
19 and judge's participating more in the community and  
20 having a role in the community through some of these  
21 civic and charitable organizations, but also trying  
22 to balance the impact that this would have on the  
23 judge's personal time too.

24           I think we would really appreciate some

1 feedback about whether or not this rule provides,  
2 meets both of those goals of trying to strike a  
3 balance between --

4 QUESTION/COMMENT FROM AUDIENCE: Do you  
5 make a distinction or should we make a distinction  
6 between those that are civic and charitable, that  
7 they also be advocacy organizations?

8 For example, the Sierra Club might be  
9 considered a civic or charitable organization, but  
10 it also has a point of view on certain issues that  
11 might come before judges, or the ACLU or the  
12 Federalists Society or something like that.

13 Those are all designated in some legal  
14 sense usually as charitable organizations because  
15 they have tax exempt status or whatever, or at least  
16 some part of them does, and I'm wondering if there  
17 is some -- as opposed to say the Rotary Club or  
18 Kiwanis. I don't know about those and don't belong  
19 to, but those kind of things.

20 MS. GALLAGHER: Rule 4.04 says, "A judge  
21 may participate in civic or charitable activities  
22 that do not reflect adversely upon a judge's  
23 impartiality, integrity and independence or  
24 interfere with the performance of judicial duties

1 subject to the following limitations," and then we  
2 get into some of those specifics that I talked  
3 about.

4           Then (B) gets into when you're serving in  
5 a leadership capacity of the organization, it needs  
6 to be an organization or governmental entity devoted  
7 to the improvement of the law, the legal system or  
8 the administration of justice or of an educational,  
9 fraternal or civic organization not conducted for  
10 profit, unless it is likely, and then it goes on  
11 to --

12           JUDGE BOWIE: B2 is the specific answer.

13           MS. GALLAGHER: Right.

14           JUDGE BOWIE: If it's an organization  
15 that is engaged frequently in adversary proceedings  
16 in any court, then you can't be involved in it.  
17 That's the old rule.

18           QUESTION/COMMENT FROM AUDIENCE: But I  
19 think it's helpful to be specific about that because  
20 if it's just a generalized statement, then I could  
21 interpret it one way or the other.

22           Another thing is I'm looking at it from  
23 the standpoint of enforcement. How do we draw the  
24 distinction for the purposes of enforcement?

1 MS. GALLAGHER: Well, I would also add in  
2 looking at this rule too, the way it has been  
3 rearranged, when you look at 4.04(b), that is  
4 talking about your participation as an officer,  
5 director, trustee or non-legal advisor of an  
6 organization.

7 You can do that unless the organization  
8 will be engaged frequently, so that is addressing  
9 your ability to serve in a leadership role in that  
10 organization, but it doesn't necessarily address  
11 whether you can be a member.

12 QUESTION/COMMENT FROM AUDIENCE: That's  
13 my question. Where does a member fit in?

14 MS. GALLAGHER: That may be more of a  
15 question that comes out of reorganization of the  
16 rule because --

17 QUESTION/COMMENT FROM AUDIENCE: Just  
18 being a member?

19 MS. GALLAGHER: We don't prohibit being a  
20 member, but --

21 QUESTION/COMMENT FROM AUDIENCE: Of a  
22 group that comes before you, you can be a member?  
23 That seems odd.

24 JUDGE ROSENBLUM: Well, keep in mind, the



1 disqualification rule, which is always out there, no  
2 matter what.

3           If you are a member of the Sierra Club  
4 and the Sierra Club came before you, you would, more  
5 than likely, have to disqualify yourself.

6           QUESTION/COMMENT FROM AUDIENCE: What if  
7 you're member of the state bar and the state bar  
8 petitions you for things?

9           JUDGE ROSENBLUM: Well, then a rule of  
10 necessity or some other thing.

11           QUESTION/COMMENT FROM AUDIENCE: Well,  
12 you don't have to be a member of the state bar.

13           QUESTION/COMMENT FROM AUDIENCE: Can I  
14 make a comment? I recently have been involved on  
15 behalf of Judge Kaye doing focus groups all over the  
16 state of New York to find out more why people don't  
17 participate in judicial elections and those kind of  
18 activities.

19           The resounding feedback from citizens was  
20 that it's important to them to have those who are  
21 judges and those who might aspire to be judges  
22 involved in the community, talking about the legal  
23 system, talking about the process.

24           The extent to which we're focusing on

1 judicial elections, citizens out there are saying  
2 it's very important that judges be engaged in  
3 appropriate citizen activity.

4 I think I would suggest believing that it  
5 should be a little more robust than the language  
6 that is there. I haven't really fine-tuned the  
7 language, but that would be my reaction just based  
8 on one state's involvement with the citizens of the  
9 state.

10 JUDGE ROSENBLUM: Dean, I would urge you  
11 to look at the commentary, both number 1 and number  
12 5.

13 We really tried to beef that up because  
14 many of us -- I think we all agree that judges  
15 should be encouraged to participate in the  
16 community.

17 If you think that needs to be beefed up  
18 even more or put in the black letter?

19 QUESTION/COMMENT FROM AUDIENCE: I'll  
20 come back with anything that occurs for your  
21 consideration.

22 JUSTICE SHEPARD: It seems to me that the  
23 question that has just been asked here is one that a  
24 lot of people would ask. There are special

1 provisions with respect to organizations, legal  
2 organizations, if you will, and officers' roles and  
3 so on and then we have to ask the question.

4 (Inaudible) lack of parallelism there. That seems  
5 to be an interesting issue to resolve.

6 MS. GALLAGHER: Rules 4.05 through 4.12  
7 really remain substantially the same as the existing  
8 canons, and primarily, we have added some  
9 explanatory commentary.

10 I think you'll see -- mainly, one of the  
11 changes is about a judge testifying as a character  
12 witness in the black letter has been changed to say,  
13 "The judge shall not testify as a character witness  
14 except when properly summoned," and that has just  
15 been changed from, "A judge shall not testify  
16 voluntarily as a character witness."

17 The majority of the rest of the black  
18 letter remains the same, and then we move into the  
19 gift provisions.

20 What we have done with the gift  
21 provisions is first, we have added a comprehensive  
22 definition of "gifts," and that will go into the  
23 terminology section.

24 Right now, you see it as a lead-in to

1 Rule 4.13. A gift is now defined as any gratuity,  
2 favor, discount, entertainment, hospitality, loan,  
3 forbearance, request or anything of monetary value.

4 Then in the definition, we list a set of  
5 exceptions of things that would not fall within the  
6 definition of a gift.

7 Those include ordinary social  
8 hospitality, items with a little intrinsic value  
9 intended for presentation, and then a variety of  
10 things that are rewarded on factors other than the  
11 judge's status, such as loans, rewards or prices,  
12 fellowships.

13 The definition of gifts also makes note  
14 that reimbursement or waiver of charges for  
15 travel-related expenses not considered a gift  
16 because that is governed by a different rule, so  
17 that all falls within the definition of "gift."

18 Then Rule 4.13 establishes solicitation  
19 acceptance of gift. The rule states, "A judge may  
20 not accept or solicit any gift," but then it gives  
21 seven exceptions of a gift that a judge would be  
22 allowed to accept.

23 Those are a gift incident to a public  
24 testimonial, books, magazines, journals.

1           The third one is an invitation to the  
2 judge or judge's spouse or guest to attend without  
3 charge a widely-attended event or law-related  
4 function or any activity devoted to the improvement  
5 of the law, legal system or the administration of  
6 justice.

7           "Widely-attended event" has been defined  
8 to mean a convention, conference, symposium, forum,  
9 panel discussion, dinner, viewing, reception or  
10 similar event at which more than 25 persons are  
11 expected to attend.

12           Then you'll see there are a few other  
13 exceptions for a gift that a judge may accept, and  
14 the fourth one is a gift awarded for the business or  
15 profession or other separate activity of a spouse or  
16 other family member.

17           A gift from a relative or friend for a  
18 special occasion such as a wedding, anniversary or  
19 birthday, a gift from a relative or close personal  
20 friend whose appearance or interest in a case would,  
21 in any event, require disqualification.

22           Then the seventh one is sort of a  
23 catchall that a judge can accept any other  
24 individual gift valued at, and we have inserted a

1 dollar amount, \$50 or less or a series of gifts from  
2 the same source if the value in the aggregate does  
3 not exceed \$150.

4           We have two exceptions. The donor of  
5 that gift of that \$50 or less gift, cannot be a  
6 lawyer, party or third person who has come before  
7 the judge or person or entity whose interests have  
8 come before the judge within the preceding five  
9 years, or a lawyer, party or third person who is  
10 likely to come before the judge or person or entity  
11 whose interests are likely to come before the judge  
12 in the foreseeable future.

13           Then the final part of the rule of 4.13  
14 requires disclosure of any gift other than a gift  
15 from a family member that is valued over \$250.

16           If it falls within one of the exceptions  
17 and it's a gift that you can accept and it's over  
18 \$250, then you need to disclose it.

19           There's a series of questions you have to  
20 answer with this. First, does the item fall within  
21 the definition of a gift, or is it one of the  
22 exempted categories within the definition.

23           Second, if it is a gift, does it fall in  
24 one of the exceptions that allows the judge to

1 accept the gift, and if it does, and the judge can  
2 accept the gift, then does the value require  
3 disclosure?

4           When the final test is added, you'll see  
5 in comment 7 to this rule, you'll see there is  
6 another step that says that a judge needs to ask  
7 whether accepting the gift would violate Rule 4.01  
8 by casting reasonable doubt on the judge's  
9 impartiality, integrity or independence.

10           So those are the levels of test with  
11 accepting a gift. Any questions?

12           QUESTION/COMMENT FROM AUDIENCE: I have  
13 a question. I'm just making sure I'm reading this  
14 correctly.

15           Under Exception A3, widely-attended  
16 event. The way I read that, any widely-attended  
17 event. It's not a widely-attended event that is  
18 likened to improvement of law or the legal system  
19 because the way the words are used?

20           JUDGE BOWIE: That is correct. It could  
21 be a football game.

22           MS. GALLAGHER: Rule 4.14 addresses the  
23 reimbursement or waiver of charges for  
24 travel-related charges of the judge or the judge's

1 spouse or guest, and this really gets to attendance  
2 at privately funded seminars to an extent.

3           The rule says, "A judge may receive  
4 reimbursement or accept a waiver of charges from  
5 sources other than the judge's employing entity for  
6 the expenses of necessary travel, food and lodging  
7 associated with the judge's participation in the  
8 extrajudicial activities permitted by his code, if  
9 such receipt or acceptance does not cast reasonable  
10 doubt on the judge's capacity to act with  
11 impartiality, integrity or independence."

12           Then the second part of the rule requires  
13 that the expense reimbursement and waiver of charges  
14 shall be limited to the actual cost of travel, food  
15 and lodging reasonably incurred by the judge and  
16 where appropriate by the judge and judge's spouse or  
17 guest.

18           Then it also requires that if the  
19 reimbursement or waiver of charges and other costs  
20 are reimbursed from the same source in the same  
21 calendar year exceeds \$100, then that will be  
22 publicly disclosed and the information relating to  
23 such reimbursement and waiver of charges shall be  
24 reported as required in the reporting section and



1 made accessible to the general public at least  
2 quarterly.

3           Then there's also a commentary that has  
4 been added. It tries to explain how to make a  
5 decision about what extrajudicial activities you can  
6 attend that are being -- that you would be  
7 reimbursed for, while also emphasizing that judicial  
8 education and law-related and academic discipline is  
9 an important part of what a judge does. It's  
10 important to help a judge maintain a competence in  
11 the law.

12           QUESTION/COMMENT FROM AUDIENCE: What's  
13 the thinking behind accepting reimbursement or  
14 waiver of charges from the definition of gift and  
15 then having a requirement, which for all practical  
16 purposes, I have never seen a reimbursement of less  
17 than \$100.

18           Maybe there are such reimbursements. I  
19 have never seen them.

20           JUDGE BOWIE: As to the dollar amount, I  
21 share your experience. On the federal side, it has  
22 been broken out between gift and reimbursement.

23           For instance, on the federal financial  
24 disclosure forms, where you put it is in the

1 reimbursement section, you don't put it in the gift  
2 section, but you do disclose.

3           This particular distinction, the  
4 commission was wrestling with, How do we deal with  
5 this in this general context of ordinary social  
6 activity and all these other kinds of things and the  
7 kinds of gifts you want to prohibit and still  
8 provide all this other stuff that we say in 4.14  
9 with respect to what is essentially privately funded  
10 seminars --

11           QUESTION/COMMENT FROM AUDIENCE: Well  
12 now, isn't the employing entity the only exception  
13 here?

14           JUDGE BOWIE: Right.

15           MS. GALLAGHER: Right.

16           QUESTION/COMMENT FROM AUDIENCE: There  
17 are plenty of courts that don't have budgets for  
18 this.

19           JUDGE BOWIE: I have to.

20           QUESTION/COMMENT FROM AUDIENCE: You  
21 don't have to report if it is paid for by the  
22 government.

23           JUDGE BOWIE: Well, actually I have to  
24 report it two ways, yes. If it is paid for by my

1     employing agency, the US government, if they were  
2     paying my travel here and my hotel and that kind of  
3     stuff, then I would not have to disclose that on my  
4     financial disclosure statement on an annual basis,  
5     but if the National Judicial College did --

6                    QUESTION/COMMENT FROM AUDIENCE:  What  
7     about state judges serving on a committee of US  
8     judicial conference?

9                    JUDGE BOWIE:  And it's reimbursed by the  
10    feds?  It's going to depend on how you write this  
11    rule for your state.

12                   As we intended the rule, that would be  
13    something that you would be required to disclose  
14    even though it's not obviously going to be  
15    controversial.

16                   When Texaco is writing the check or  
17    funding the activity and you have got Texaco cases  
18    in front of you or the millions of other examples --

19                   QUESTION/COMMENT FROM AUDIENCE:  Isn't  
20    that \$100 there pretty foolishly low?  Sometime in  
21    April, I'm going over to Virginia to be on a panel,  
22    Virginia Trial Lawyers Homestead meeting.

23                   I am assuming they're going to pay my  
24    tab.  They won't pay me a stipend or anything.  I

1 will guarantee it will be more than \$100, and I am  
2 going to have to remember to disclose that?

3 JUDGE BOWIE: It's probably a number that  
4 ought to be bracketed. There is no meaning to that  
5 number because as Chuck was saying, that's an  
6 allusion that there's going to be reimbursement.

7 It might be a dinner. There might be a  
8 dinner or something like that comes in less than  
9 that that you wouldn't have to disclose.

10 If the panel met somewhere and somebody  
11 was picking up the tab, the National Judicial  
12 College was picking up the tab, should I have to  
13 disclose allocate share of that dinner, no. I think  
14 that is at least part of the purpose of the  
15 threshold.

16 JUSTICE SHEPARD: Two points. I would  
17 like to restate what Peter said. There are a few  
18 places in the document where there are brackets with  
19 numbers in them.

20 The idea is simply to say whoever is  
21 adopting, pick your number. There is not a  
22 recommendation what the number ought to be.

23 The other point is that although  
24 reimbursements of travel are almost always going to

1 be above anything other than a nominal number, one  
2 of the structures of the moment is that you don't  
3 have to remember different numbers.

4           You don't have to remember whether the  
5 travel reimbursement number is a different number  
6 than the Christmas gift number, or the dinner number  
7 or something else. You can do that a number of  
8 ways, but it has at least that benefit.

9           JUDGE ROSENBLUM: Well, also, while it  
10 may not seem all that significant to you, it might  
11 be very significant to the lawyers who appear before  
12 you to know that you're going to dinner with a  
13 special interest group of lawyers.

14           Now, nothing wrong with that, clearly,  
15 but the trial lawyers are an advocacy group, and I'm  
16 sure the lawyers who represent the defense side  
17 would be interested in knowing how much they paid  
18 for your way, even if it is --

19           QUESTION/COMMENT FROM AUDIENCE: It also  
20 begs for me to have to report the amount that was  
21 paid out for me at this conference in Reno, Nevada.  
22 Then you have to run for reelection, and I stayed at  
23 Harrah's.

24           QUESTION/COMMENT FROM AUDIENCE: So where

1 will next year's meeting be?

2 JUDGE ROSENBLUM: Just make sure you put  
3 "National Judicial College" on it?

4 QUESTION/COMMENT FROM AUDIENCE: It seems  
5 to me that the commentary 4 is inconsistent with the  
6 black letter rule.

7 The commentary says that you can't accept  
8 anything from a lawyer or their firms if they are  
9 likely to come before you or have come before you,  
10 but the actual phrasing of Rule No. 7 says, "Any  
11 other individual gift," and since these are the  
12 permissible gifts 1 through 7, wouldn't -- it isn't  
13 unusual that you get an invitation to a \$250 plate  
14 fundraiser.

15 Maybe it's a fundraiser for the pro bono  
16 project of a particular group or whatever, and the  
17 lawyers say, Hey, we have an extra seat at our  
18 table, come sit.

19 That seems to be permissible under number  
20 3. It isn't prohibited by number 7, as I read it,  
21 but the commentary would make it seem as though you  
22 couldn't do that, so there is some inconsistency  
23 there that I think you need to address.

24 QUESTION/COMMENT FROM AUDIENCE: This

1 disclosure doesn't require amounts, does it? It  
2 just says "disclosure."

3 JUSTICE TOAL: It says "amounts." This  
4 is something that we talked about at the Conference  
5 of Chiefs when Randy and a group presented this  
6 thing.

7 It does seem to ask for amounts, and of  
8 course, some of us are used to disclosing, but not  
9 having to ask the organization to break it down, how  
10 much did my dinner cost, and how much did my room  
11 cost and this kind of thing.

12 You would have to decide how is the state  
13 going to do that.

14 Ours is a disclosure without having to  
15 report the amounts. We have done both ways the 18  
16 years I have been on the court, but at the moment,  
17 it is disclosure without amount.

18 The way this reads, you would have to put  
19 the amounts?

20 JUSTICE SHEPARD: I think that's right.  
21 I think in our forms we use, in our state, for some  
22 purposes, you have to list the amount and some you  
23 don't.

24 The only reason it's that way is because

1 the form is so old, no one can remember why it's  
2 that way in the first place.

3 JUSTICE TOAL: Exactly.

4 JUDGE BOWIE: On the federal side, we do  
5 not disclose the amount of the reimbursement on the  
6 financial disclosure form.

7 QUESTION/COMMENT FROM AUDIENCE: It's not  
8 in the black letter, but in the commentary 4.14 is  
9 focused on the sponsors of the seminars.

10 The black letter of the rule talks about  
11 the expenses.

12 Are you implying that you should disclose  
13 the sponsors in your disclosure under B, so you have  
14 to go behind the name of the organization and say,  
15 Texaco provided the funding for this.

16 It's not in the black letter, but it is  
17 -- the gist of the commentary would seem to leave  
18 one there.

19 JUDGE BOWIE: Well, the notion is in the  
20 black letter in the sense of sources of funding  
21 without using the word "sponsors."

22 We have not anywhere in your discussions  
23 arrived at any agreement that you have a duty to  
24 investigate, but if you get an invitation that says,



1 Westinghouse, GECC, Ford Motor Credit, and three  
2 other organizations are hosting this event for a  
3 weekend or Price Waterhouse Cooper, or any of a  
4 number of organizations who may be in front of you  
5 for one reason or another, then that is something  
6 that you need to look at in terms of identifying  
7 that in terms of the propriety of your attending.

8 QUESTION/COMMENT FROM AUDIENCE: Right.  
9 Once you attend, what do you have to disclose?

10 JUDGE BOWIE: I don't think we say. I  
11 think what we contemplate just simply is that the  
12 event -- who is the hosting organization.

13 The sources of funding is something that  
14 you need to look at to decide the propriety of  
15 whether you attend. In terms of the actual  
16 disclosure, we're not trying to tell you chapter and  
17 verse, we don't provide a draft disclosure form,  
18 that kind of thing, but I don't think we contemplate  
19 that you have got to go back and say who are all the  
20 entities that have contributed to this sponsoring  
21 organization. Who are all the entities who have set  
22 up exhibitors booths at the state bar convention and  
23 are handing out some things and have paid some fee  
24 to the state bar in order to have space in the hall

1 to do that. We don't contemplate that.

2 Q. Well, comment 3 talks about the judge  
3 taking reasonable steps to ensure that information  
4 relating to the participation is made available, and  
5 I didn't know if you intended that to mean that you  
6 had to go behind the name of the responsible  
7 organization and find out where the money came from.

8 JUDGE BOWIE: My understanding is it's  
9 not our intent that be part of your disclosure.

10 It is our intent that that be part of  
11 your inquiry in deciding the propriety of your  
12 attendance.

13 MS. GALLAGHER: I think the disclosure  
14 anticipates you saying more you attended a program  
15 on X subject and reimbursed this amount.

16 I think the disclosure anticipates  
17 disclosing who reimbursed it, but without getting  
18 into the level of detail that you discussed in the  
19 threshold question, which is should I go in the  
20 first place.

21 QUESTION/COMMENT FROM AUDIENCE: I  
22 understand what it is that you're saying in that  
23 there's a real disconnect between the black letter  
24 here which deals explicitly with what you are

1 required to disclose, amounts so forth and so on,  
2 but when you get into the commentary, the commentary  
3 really seems to relate back to, and I'm not finding  
4 the number of that particular rule, but the one that  
5 deals with extrajudicial activity that may or may  
6 not be law-related or have to do with the  
7 administration of justice when you are participating  
8 in a program or something or choosing whether or not  
9 to participate.

10 I understand the reason for putting it  
11 here in the commentary as well, but it might be  
12 helpful in the black letter either to relate it back  
13 to that earlier rule or to focus the commentary of  
14 this just on those elements that must be disclosed  
15 and relate that comment back to the other one  
16 because it really -- I agree.

17 I think it's -- you read what it is  
18 you're required to disclose and then when you jump  
19 into the commentary, it immediately gets into, Well,  
20 when you're deciding whether or not you should  
21 attend, these are the sorts of things that you  
22 should take into considerations. The two just don't  
23 seem to flow logically.

24 QUESTION/COMMENT FROM AUDIENCE: It just

1 seems to me that this being here fairly suggests  
2 that if one of us is asked to come and be the  
3 speaker at the Rotary International national  
4 regional meeting, or to go speak with the Trial  
5 Lawyers Association, one is judicial in nature and  
6 one is not, either one of those, we're going to have  
7 to have an accountant to break this down to comply  
8 with B.

9 I'll tell you, I don't believe that has  
10 been the practice of most of us in this room today,  
11 or any one of us it has been. I don't think that  
12 makes much sense.

13 JUSTICE SHEPARD: What sort of breakdown  
14 do you mean? Are you going to fill out a form?

15 QUESTION/COMMENT FROM AUDIENCE: Well, it  
16 says whatever amounts you decide. Here it says  
17 \$100, but I realize you can say \$500.

18 You're going to have to show, and I  
19 assume it's implied, I went and spoke to the Rotary  
20 Club. They picked up my tab. How much did you pay?  
21 Don't count the bar bill. I can pay that myself,  
22 whatever. It's \$685.

23 It's the same thing with whether you go  
24 to the Trial Lawyers or whether you came out here.

1 JUDGE BOWIE: So just report it.

2 QUESTION/COMMENT FROM AUDIENCE: So you  
3 have 60 things on your report at the end of the  
4 year?

5 JUDGE BOWIE: Well, that would be the  
6 question for each of your courts to decide, whether  
7 you're going to require disclosure of the amount or  
8 just the disclosure of the event, the dates, the  
9 place and the host organizations.

10 QUESTION/COMMENT FROM AUDIENCE: Could I  
11 go back to the gift provisions for just a second?

12 The prior page, there is no mention of  
13 domestic partner in here, and it was mentioned in  
14 other aspects of the code. Was that intentional?

15 JUDGE BOWIE: That was in the recusal  
16 area.

17 QUESTION/COMMENT FROM AUDIENCE: Right.  
18 Could you make the same argument with gifts as to  
19 domestic partners?

20 The second question relates the  
21 definition of "family." I thought the old code  
22 defined "immediate family."

23 Is there a definition of "family" in  
24 here?

1 MS. GALLAGHER: There's a definition of  
2 family members residing in --

3 JUDGE BOWIE: A member of the candidate's  
4 family. It denotes a spouse, child, grandchild,  
5 parent, grandparent or other relative that the judge  
6 maintains a close familial relationship.

7 QUESTION/COMMENT FROM AUDIENCE: Where is  
8 that?

9 JUDGE BOWIE: That's in the terminology  
10 section of the old code. You don't have that.

11 MS. GALLAGHER: Then in this rule, we use  
12 the phrase judge's family residing in the judge's  
13 household, which is also a defined term, and that  
14 denotes any relative of a judge by blood or marriage  
15 or person treated by a judge as a member of the  
16 judge's family who resides in the judge's household.

17 QUESTION/COMMENT FROM AUDIENCE: So that  
18 would be a domestic partner.

19 MS. GALLAGHER: Some people have  
20 interpreted, yes, that means a domestic partner.  
21 Somebody who is treated as a family member.

22 QUESTION/COMMENT FROM AUDIENCE: That  
23 definition of family that generally in the past has  
24 been a little bit more expansive.

1           I could do a will for my mother-in-law.  
2    We don't live in the same house. Where you practice  
3    law outside of your profession. It simply says the  
4    judge's family.

5           JUDGE BOWIE: Right.

6           QUESTION/COMMENT FROM AUDIENCE: So now,  
7    we're going to restrict it back just to those living  
8    in our household?

9           JUDGE BOWIE: No. That was part of the  
10   definition. The definitional phrase was the judge's  
11   family residing in the household, that particular  
12   phrase.

13           The other is just to define a member of  
14   judge's family, and that was more expansive and not  
15   limited to household. There were several different  
16   definitions.

17           QUESTION/COMMENT FROM AUDIENCE: The  
18   other question relates to A7 and B in gifts.

19           Under A7, it appears to say that you  
20   can't accept an individual gift valued in the  
21   aggregate over \$150. B seems to say that if you  
22   accept a gift over \$250, you report it.

23           I guess I don't understand how those two  
24   relate.

1 MS. GALLAGHER: Right. If your gift  
2 comes up in exceptions 1 through 6, that have a  
3 value over \$250, then you report it.

4 QUESTION/COMMENT FROM AUDIENCE: In other  
5 words, a relative's wedding present over \$250 gets  
6 reported?

7 MS. GALLAGHER: Well, it's not a gift  
8 from a family member.

9 Say you received a gift incident to a  
10 public testimonial that was over \$250 in value, then  
11 you would report it.

12 QUESTION/COMMENT FROM AUDIENCE: I see.

13 JUDGE BOWIE: But we debated that and we  
14 wrestled with that because in these days and times,  
15 at least in certain areas of the country, a wedding  
16 gift from somebody, you get married, the judge gets  
17 married, may well exceed in value, and of course,  
18 how do you know?

19 QUESTION/COMMENT FROM AUDIENCE: So a  
20 friend's gift over \$250 is reported for a wedding.

21 MS. GALLAGHER: Uh-huh.

22 QUESTION/COMMENT FROM AUDIENCE: And 7  
23 and B are unrelated. Sub B relates to gifts under  
24 the first 6 that are over \$250 and seven stands



1 alone.

2 MS. GALLAGHER: Seven only allows you to  
3 take a gift up to that amount.

4 JUDGE BOWIE: Up to that amount, which  
5 means you won't ever fall into the B part.

6 QUESTION/COMMENT FROM AUDIENCE: Wouldn't  
7 that fall under the excluded definition under the  
8 very beginning as being a matter of ordinary social  
9 hospitality?

10 JUDGE BOWIE: Why wouldn't what?

11 QUESTION/COMMENT FROM AUDIENCE: The  
12 wedding gift as a way of example.

13 JUDGE BOWIE: We kicked this around at  
14 some length, and I'm not a defender of it as such,  
15 but there's a concern particularly those of us who  
16 come to the bench out of the legal community, which  
17 is almost everybody, a lot of our closest friends  
18 are lawyers and with law firms and so on, so you  
19 have some concern because they're -- at some point  
20 in time, there gets to be an appearance.

21 Your former partners in your firm give  
22 you the honeymoon cruise to the Caribbean and that  
23 kind of thing that has a value substantially in  
24 excess of the \$250.

1                   What that is saying is you just have to  
2 disclose.

3                   QUESTION/COMMENT FROM AUDIENCE: What  
4 about the situation where your former law partner,  
5 who also happens to be a close friend of  
6 longstanding invites you to come and stay a weekend  
7 at his condo in Florida; is that a covered gift or  
8 is that ordinary social hospitality?

9                   JUDGE BOWIE: That is not ordinary social  
10 hospital depending upon what the reasonable value of  
11 that is and what the travel involved is and that  
12 kind of stuff.

13                   Another thing is in 4.13(a)(c), where a  
14 gift from a relative or close personal friend whose  
15 appearance or interest in a case would, in any  
16 event, require your disqualification.

17                   You're not going to have that person  
18 appearing in front of you if you have that kind of  
19 relationship with them.

20                   QUESTION/COMMENT FROM AUDIENCE: In other  
21 words, if you have the kind of relationship that  
22 would trigger that type of social contact, then you  
23 would be disqualified anyway?

24                   JUDGE BOWIE: That would be a recusal

1 situation, but we're still concerned about finding  
2 some threshold for saying that you need to disclose  
3 a gift.

4 QUESTION/COMMENT FROM AUDIENCE: This is  
5 going back to 4.02, which had to do with testifying  
6 before legislature.

7 If I understand the restrictions  
8 correctly, public appearance would not be allowed.  
9 One, for example, would be a judge before they  
10 became a judge, (inaudible) domestic affairs. They  
11 used to run a domestic violence or something like  
12 that, and the legislature wanted them to talk about  
13 the problems with domestic violence because they  
14 were an expert on this before they became a judge.

15 Someone who is a dean of law school  
16 before they went to the bench, the legislature  
17 wanted them to speak about educational issues, not  
18 matter of law, per se.

19 Is it true that in both those situations,  
20 the judge would not be allowed to confer with, talk  
21 to the legislature?

22 JUDGE ROSENBLUM: No. Well, first of  
23 all, domestic violence certainly, arguably, is an  
24 issue that involves matters concerning the law, so

1 it would probably be within that exception.

2 QUESTION/COMMENT FROM AUDIENCE: So  
3 matters concerning the law is defined broadly?

4 JUDGE ROSENBLUM: Depending, of course,  
5 on what is actually said and what the request is for  
6 the speaking engagement. You always want to  
7 evaluate that.

8 It could fit into B, because certainly,  
9 if you have acquired information before you became a  
10 judge, you have probably continued to be involved in  
11 that area to some extent.

12 QUESTION/COMMENT FROM AUDIENCE: I guess  
13 I would wonder just a little bit around that.

14 What matter that a legislative body would  
15 ask me to testify on is not a matter concerning law?

16 JUDGE ROSENBLUM: It's not that bad.

17 QUESTION/COMMENT FROM AUDIENCE: I'm just  
18 curious.

19 MS. GALLAGHER: Specifically about B, if  
20 you look at one of the examples we have given in the  
21 commentary, it's about a juvenile court judge being  
22 able to go and talk about proposed improvements such  
23 as the creation of new athletic or other  
24 recreational opportunities, and you're going to talk

1 -- the creation of the new athletic facility isn't  
2 necessarily related to the law, but the juvenile  
3 court judge is going to say, This is good because I  
4 think it's important for this community. It will  
5 help with decreasing the rate of juvenile  
6 delinquency in this community. It will give  
7 after-school programs or that type of commentary  
8 that the judge would provide.

9           JUDGE BOWIE: But your question is one we  
10 did discuss, in part because there are circumstances  
11 where judges come to the bench with some area of  
12 expertise or accelerated level of knowledge, but one  
13 of the concerns has been the circumstance where  
14 because it's now the judge appearing before this  
15 body, it's not anything to do with the judge's  
16 official capacity or anything that the judge learned  
17 in that capacity, is whether you end up lending the  
18 prestige of the judicial office in support of  
19 something that doesn't (inaudible) the law or legal  
20 system, the administration of justice such as  
21 positioning airports or whatever if you were a  
22 civilian pilot or that kind of thing.

23           You can imagine all kind of hypothetical  
24 circumstances, and that was a concern in the context

1 of our discussions.

2 QUESTION/COMMENT FROM AUDIENCE: I guess  
3 maybe I deal with too many legislators who don't  
4 give judges too much deference, but it occurs to me  
5 that that is true for a lot of professions that come  
6 before legislative bodies who have things to say.

7 In any event, if a legislator or staff or  
8 even as a citizen that wants the legislature to get  
9 all the best possible information and their job is  
10 not to sort of (inaudible).

11 That's their job. I'm not sure that's  
12 the judge's job. I think the provision should be as  
13 broad as possible to allow the legislature to make a  
14 determination.

15 JUDGE BOWIE: Except it's not just the  
16 legislators who are likely to be influenced.

17 We didn't really debate this, but I would  
18 suspect we'd be less concerned about the individual  
19 legislators on the committee than we will the people  
20 who are there, and the press that were reporting  
21 that judge so and so came and testified that the  
22 airport ought to be sited here or the culverts in  
23 the community ought to be moved to here or there,  
24 and that that is where the influence may come up.

1 It's not so much with the individual legislators.

2 JUDGE ROSENBLUM: Once again, it's sort  
3 of setting the judge up for potential recusal on  
4 issues that the judge doesn't have any particular  
5 expertise about. It only relates to the law. I  
6 don't think that's the breadth of what we meant  
7 here.

8 Funding issues that don't really have  
9 anything to do with the administrations of justice,  
10 the airport examples, there are a thousand examples  
11 you can come up with. Judges really ought stay out  
12 of that.

13 QUESTION/COMMENT FROM AUDIENCE: With  
14 regard to sponsorship of events of this kind, I  
15 assume you're referring to direct sponsorship.

16 For instance, law schools solicit money  
17 from all kinds of people, the Judicial College  
18 solicits money, the National Center for State Courts  
19 solicits money.

20 Are you referring to direct sponsorship  
21 of the seminar or event, and if so, should you use  
22 the word "direct"?

23 DEAN ALFINI: We talked about that.

24 QUESTION/COMMENT FROM AUDIENCE: I'm

1 looking at the commentary on page 5.

2 JUDGE BOWIE: That's the onion issue, and  
3 it's always been the onion issue and how many layers  
4 of the onion before you get back to whoever it was  
5 that donated the funds. Everyone has been grappling  
6 with that.

7 One of the handouts that Heidi put back  
8 there for you is the federal side's latest answer,  
9 assessment of this, the renowned advisory opinion  
10 that had been out there for quite a while and had  
11 been vilified.

12 The Code of Conduct committee issued a  
13 revised (inaudible) as of October 1 of 2004. Then  
14 they got a letter from Doug Kendall asking some more  
15 questions about it.

16 They have responded and made that  
17 response public, and the handout includes the old  
18 67, the new 67, Kendall's letter and the response to  
19 it, trying to explain all the different things that  
20 are concerns that go to your question.

21 They're really looking at the whole  
22 (inaudible), but then if you have someone who is  
23 giving a restrictive grant for a specific program  
24 hosted by NYU Law School, for instance, but it's



1 going to be on religion in society or something, and  
2 it's some particular organization that is hosting  
3 this and funding this, then the question starts to  
4 arise about what influence they have on selecting  
5 who the speakers are. They have already chosen  
6 content because the organization isn't necessarily  
7 free to set the content.

8           There is a whole list of factors,  
9 non-exhaustive list, that we're trying to get the  
10 people to look at.

11           One of the factors may well be, and we  
12 have had this at the Federal Judicial Center where  
13 there has been an invited speaker in a program who  
14 has been designated as an expert on side in a case.

15           In 1983, Title 42 case, that just  
16 happened to be one of those areas where that happens  
17 from time to time. You know that if you have a 1983  
18 case and this person has been designated as an  
19 expert, and you're going to a seminar, even though  
20 it's sponsored by the FJC, that may be one you  
21 shouldn't go to because you're hearing something  
22 outside the record, or you're going to have to  
23 recuse.

24           JUSTICE SHEPARD: As you might know, it's

1 been, I think maybe more for federal judges than the  
2 state judges, but it is the privately sponsored  
3 seminars as a continuing source of agitation about  
4 whether or not these are constituting some sorts of  
5 purchases of attention, if you will.

6           Justice Edmunds and I are on a committee  
7 that advise a standing committee on ethics for  
8 probably 18 months, in which they were undertaken to  
9 draft advisories on this topic, and the judges  
10 finally said, We move that you do nothing.

11           It's a topic in which I think we're going  
12 to continue to get a lot of questions in which the  
13 underlying concerns are (inaudible), but I think so  
14 far, I stand with where we ended up, which is to  
15 resist that some sort of bright line that judges  
16 have to know who the (inaudible) are and you have to  
17 know that when you get the invitation, and then you  
18 have to split it out in declarations, for example.

19           I also think we have to acknowledge where  
20 there are circumstances where reasonable people  
21 would say (inaudible), operation that is designed to  
22 curry favor, and that's an uncertainty as to the  
23 law.

24           This is an effort at least to say to

1 judges, this is something you ought to stop and  
2 think about before you say yes, and stop there.

3 This is very unpopular, by the way, as is  
4 revised 167.

5 QUESTION/COMMENT FROM AUDIENCE: Is 414,  
6 is it totally new? Is it in the old ABA 414,  
7 reimbursement for travel-related expenses, et  
8 cetera?

9 MS. GALLAGHER: Parts of it are based on  
10 Canon 4(h). It is all tied into the compensation,  
11 reimbursement and reporting, so 4(h)(1) says, "A  
12 judge may receive compensation and reimbursement of  
13 expenses for the extrajudicial activities permitted  
14 by the code if the source of such payments does not  
15 give the appearance of influencing the judge's  
16 performance of judicial duties or otherwise give the  
17 appearance of impropriety."

18 DEAN ALFINI: It's the line out there.  
19 You can see that.

20 QUESTION/COMMENT FROM AUDIENCE: I have a  
21 question procedurally for the commission.

22 The language you have, have you taken  
23 some templates or some things out, some functions  
24 like the Roscoe Pound form for judges, the Center

1 for National Legal Economics, maybe 15 or 20 of  
2 these, and then put this language up against it and  
3 then see what it does with respect to each of those  
4 functions?

5           If I had that assurance that you did  
6 that, I might be more confident with the  
7 recommendations.

8           What I'm hearing is that the number of  
9 the judges or participants are coming up with some  
10 examples that are very real life examples, but I'm  
11 not getting any feedback that you have taken this--  
12 some very real templates that you can do and say, we  
13 put the language up against it and it works.

14           I guess I would be more confident if you  
15 could assure me that in the future.

16           JUDGE ROSENBLUM: I think we have done it  
17 anecdotally only.

18           QUESTION/COMMENT FROM AUDIENCE:

19 Anecdotes sometimes fail you.

20           DEAN ALFINI: We have been lobbied pretty  
21 heavily by at least one organization that wanted us  
22 to have a much brighter line rule, and they  
23 presented some templates to us.

24           It's a good idea. We should think more

1 about it.

2 JUSTICE SHEPARD: Maybe one of the  
3 problems is the complainers see the problems only in  
4 the third person. It's their seminar that is a bad  
5 thing. My seminars are okay, and some of the data  
6 -- not data, but some of the underlined rationale  
7 are quite explicit by saying, Well, surely the Aspen  
8 Institute is different than the Pound Institute, and  
9 then proceeds to walk through or explain why it is  
10 that way.

11 QUESTION/COMMENT FROM AUDIENCE: My point  
12 is I will be more confident in your recommendation,  
13 you sitting as a learned body, if you can assure me  
14 that you have done this and taken the language and  
15 applied it against some known templates, and you  
16 have come to the conclusion that it works the way  
17 you broadly say it should.

18 QUESTION/COMMENT FROM AUDIENCE: Building  
19 on what you're saying also, Justice Shepard, and  
20 what you're saying, Justice Anderson, the reporting  
21 part may be some bookkeeping or something like that,  
22 but everybody can do that. You may need an  
23 accountant, but everybody can do that.

24 The "cast a reasonable doubt" part,

1     though, without these sort of guidelines, I would  
2     urge my Supreme Court not to adopt this at all or  
3     consider it.

4                   If you go to Roscoe Pound, and you go to  
5     something that is sponsored 100 percent by ATLA or  
6     100 percent by DRI, or something like that, isn't  
7     there going to be quite a division of opinion as to  
8     whether that casts reasonable doubt?

9                   I will give you an even more milk toast  
10    type of example. I go to speak sometimes at the  
11    National Association of Administrative Law Judges.  
12    Well, there's a particular perspective on  
13    administrative law and on the Doctrine of  
14    Administrative Primacy and all that sort of thing,  
15    which is certainly not what you all are alluding in  
16    this, but I think it might cover that.

17                   JUSTICE SHEPARD: I want to take one more  
18    then to give us all some energy for Canon 5, we'll  
19    take another brief break, so this will be our last.

20                   QUESTION/COMMENT FROM AUDIENCE: It's  
21    just a comment. In Washington, we have very  
22    demanding public disclosure laws, and so we have to  
23    keep track of all the events we attend, and anything  
24    over \$50, we actually have to report on a list.

1                   For example, being here at this  
2 conference, it would be listed I would be here.  
3 Now, I didn't know until it was mentioned that  
4 dinner tonight will be paid for by three attorneys.  
5 That would be something that I would have to break  
6 out.

7                   I would just indicate my airfare and my  
8 hotel and other things, and it hasn't caused any  
9 problem at all, and it's there for anybody to see.  
10 No one ever looks at it, and nobody cares.

11                   It forces me to engage in assuring that,  
12 in fact, I am thinking about whether I attend some  
13 conferences. Some of our justices do attend the  
14 Roscoe Pound conference, other justices do not.  
15 It's their own personal comfort level and what their  
16 concern is.

17                   It's not quite as onerous as perhaps, at  
18 least in my experience, that the discussion has  
19 lent, and I think it provides that assurance of  
20 impartiality and independence and integrity, which  
21 is the overriding goal.

22                   MS. GALLAGHER: Before we break, can I  
23 just add that 416 is the rule that relates to  
24 reporting of compensation reimbursement and waiver

1 of charges.

2                   This rule spells out that the reporting  
3 should be made at least quarterly and it should be  
4 filed as a possible document in the office of the  
5 clerk of the court in which the judge serves or  
6 other office designated by law, and when technically  
7 feasible, post it on the web site of that court or  
8 office.

9                   That is a change in the current code of  
10 annual disclosure requirements.

11                   QUESTION/COMMENT FROM AUDIENCE: That  
12 really is force-feeding and that really invites, The  
13 chief wasn't in his office four times this time.  
14 What is the idea behind that?

15                   QUESTION/COMMENT FROM AUDIENCE: Why  
16 quarterly?

17                   JUDGE BOWIE: The rationale for those who  
18 supported the quarterly provision, I not being one  
19 of them because our reporting is federal, but the  
20 notion is theoretically, in the federal scheme, you  
21 have to report by May 15th or the presiding year, so  
22 you could, theoretically, have as much as 17 months  
23 between the event and the report getting filed  
24 disclosing the event.



1           A lot of litigation goes on in that  
2 period of time, and the argument was, if we're going  
3 to say this is okay, then making it available in a  
4 manner and in a time frame that would allow somebody  
5 to use it for something was viewed as the sunlight  
6 on the process, rather than having it buried in the  
7 archives.

8           DEAN ALFINI: I'm not sure I was a  
9 proponent of this either, but also the rationale was  
10 why not do it as it's occurring.

11           QUESTION/COMMENT FROM AUDIENCE: Well, I  
12 don't object to the quarterly, but as the Justice  
13 from Washington said, Nobody cares.

14           Well, it's on the web site now, so now we  
15 can start tracking stuff that we didn't really even  
16 care about.

17           JUDGE BOWIE: As Judge Hug can tell you,  
18 we have Aspen and several other publishing companies  
19 that get ours every year, and it's interesting  
20 because you're not supposed to be able to get them  
21 for commercial purposes, but they get them, and the  
22 only way you can see them is if you subscribe.

23           MS. GALLAGHER: Can I also add too since  
24 we're talking about financial disclosure, I wanted

1 to say that this project would never have been  
2 possible if it hadn't been for the support of the  
3 Joyce Foundation. We have been very appreciative  
4 to them for their support. They have been great  
5 advocates.

6 (Break taken at 3:52 p.m.)

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1 RENO, NEVADA; THURSDAY, FEBRUARY 24TH, 2005; 4:12 P.M.

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5 JUSTICE SHEPARD: We think we just want  
6 to spend the rest of the day on this topic, then  
7 let's get on to dinner.

8 We have assigned Judge Rosenblum to walk  
9 us through the easy part here.

10 JUDGE ROSENBLUM: I'm what sits between  
11 you and dinner.

12 Well, my first disclaimer is that I'm an  
13 elected nonpartisan state court trial judge from  
14 Oregon. I have had one contested race, my very  
15 first one. My opponent filed 15 minutes before the  
16 deadline. In fact, I didn't even know until the  
17 next morning when my husband read it in the paper.

18 True story. My campaign chair and I went  
19 out to celebrate because we checked it at 4:30.

20 The happy result was that I won but I  
21 only got 70 percent of the vote. I have been  
22 fortunate to have some uncontested races after that.

23 We have to run every six years in Oregon,  
24 and my colleague who is here, Justice Kistler, is a

1 fairly recently elected Justice on our Supreme  
2 Court, and he had a very interesting race. I'm not  
3 going to steal his thunder, but I'm sure he would  
4 love to share stories with you about it. He ran a  
5 very admirable race, and it's great to have you  
6 here.

7           As you know, I was assigned to Canon 5 in  
8 my absence. The truth is that this group has been  
9 living and breathing Canon 5 over the last six  
10 months, it seems.

11           I don't know when we posted 4, but it  
12 seems like it was about a year ago, and then we  
13 really focused on 5.

14           I have to say that while you might think  
15 we may have felt under attack by this group, that is  
16 not the case at all because we have been punching  
17 each other, very good naturedly, but at the same  
18 time, this has been a very hotly contested  
19 commission in the sense of really debating these  
20 issues and not always agreeing.

21           The only hesitation I had when I heard  
22 that I was assigned to Canon 5 is that, frankly,  
23 there are some concerns that I have, and my  
24 colleagues are very well aware of what they are, so

1 I'll try not to editorialize too much because what I  
2 think is important is to get your feedback and not  
3 my opinion.

4           The commentary, as I think you are aware,  
5 has not yet been posted, so we don't have it in  
6 front of you. We do apologize for that; however, we  
7 are working hard on it.

8           It will actually turn out to be helpful  
9 to get your input today so we can consider it and  
10 incorporate some of your ideas in the commentary.  
11 Please feel free to help us out there.

12           The preliminary draft takes a somewhat  
13 new approach to outlining the rules relating to  
14 political activity.

15           You don't have the current code in front  
16 of you unless you brought it with you, so I'm going  
17 to discuss with you some of the major or most  
18 significant changes from the current code to the  
19 proposed code, but perhaps, somewhat surprisingly,  
20 they really aren't substantively all that great, and  
21 even style-wise, there are changes but it's not a  
22 huge change from what the current code looks like.

23           What we have tried to do, and we really  
24 want your thoughts on whether this is effective or

1 not and makes sense to you, is we have started out  
2 with the first rule governing the political activity  
3 of sitting judges only, and that is Rule 5.01.

4 We then move into Rule 5.02, which is the  
5 prohibited political activity for judicial  
6 candidates, whether they be judges who are running  
7 or non-judges.

8 QUESTION/COMMENT FROM AUDIENCE: Could I  
9 ask a question about that? You differentiate  
10 between judges who are currently candidates and  
11 judges who are not currently candidates.

12 How do you define when a judge is a  
13 candidate?

14 JUDGE ROSENBLUM: I'm so glad you asked  
15 that question because I want to give you three  
16 definitions to work with.

17 One of them is the definition of  
18 "candidate." You reminded me of that, and again, I  
19 apologize you don't have the terminology in front of  
20 you.

21 I actually wrote one of the definitions  
22 up on the board. To me, it's a very important one,  
23 and one that perhaps is misunderstood. I want to be  
24 sure that you have the definition of "political

1 organization," the definition of "candidate," and  
2 just to remind you of the definition of  
3 "impartiality," because we use that term a lot and  
4 we did modify that definition, or actually, I think  
5 we defined it for the first time in 1992 at the ABA  
6 House of Delegates.

7           A candidate is defined as a person  
8 seeking selection for or retention in judicial  
9 office by election or appointment, and a person  
10 becomes a candidate for judicial office as soon as  
11 he or she makes a public announcement of candidacy,  
12 declares or files (inaudible) with the election or  
13 appointment authorities or authorizes solicitation  
14 or acceptance of contributions or support.

15           That is the working definition of  
16 "candidate."

17           QUESTION/COMMENT FROM AUDIENCE: So that  
18 means that if I'm going to run four years from now,  
19 I cannot attend the J&J dinner, Democratic dinner --  
20 as a sitting judge, I cannot attend those, unless I  
21 first say I'm going to run in 2008. Is that right?.

22           JUDGE ROSENBLUM: No. If you're saying,  
23 I'm going to run, but you haven't --

24           QUESTION/COMMENT FROM AUDIENCE: I

1 haven't decided if I'm going to run truthfully, and  
2 I haven't.

3 JUDGE ROSENBLUM: You're not a candidate  
4 then under this definition.

5 QUESTION/COMMENT FROM AUDIENCE: So a  
6 sitting judge cannot go to a political dinner?

7 JUDGE ROSENBLUM: That's what this --

8 QUESTION/COMMENT FROM AUDIENCE: And the  
9 reason for that?

10 JUDGE ROSENBLUM: By the way, that has  
11 always been the way. It's not really a change,  
12 although there are some changes that are significant  
13 that go to that issue, but I'll try to get to that.

14 DEAN ALFINI: We should try to mention  
15 that you're going see a lot of variations here.

16 There are more variations, and Cindy will  
17 second this, there is more variation from the old  
18 Canon 7 from 1972 than Canon 5 in 1990 than any  
19 other canon by far, so even among the elected states  
20 among the nonpartisan elected states and appointed  
21 states, a lot of variations.

22 JUDGE ROSENBLUM: However, Canon 5, as it  
23 currently reads, does have a provision that pretty  
24 much, I think, wipes out some of the restrictions



1 for elected judges, for those who are subject to  
2 public election, not who are necessarily candidates  
3 currently.

4           That is, again, I don't think you have it  
5 in front of you, but 5(c) of the current code says  
6 that a judge or candidate subject to public election  
7 may, except as prohibited by law, at any time  
8 purchase tickets for and attend political  
9 gatherings.

10           This would be a change from that any time  
11 provision, and that is one of the things that is one  
12 of the more significant changes. It is definitely a  
13 step back, a more restrictive rule for those who are  
14 not currently candidates.

15           You were right to focus on that word,  
16 "currently," to recognize that as a significant  
17 change.

18           DEAN ALFINI: We should mention  
19 historically the '72 rule was essentially what we  
20 have now.

21           In '90, they made it more permissive, and  
22 now, as Ellen has suggested, we have stepped back.

23           JUDGE ROSENBLUM: Other than that, Rule  
24 5.01 that you have in front of you is virtually

1 identical to the current Canon 5(A) with just some  
2 slight language modifications.

3           It happens to apply to judges and  
4 candidates for elections or appointments, but it has  
5 the same laundry list of what you shall not be  
6 permitted to do, as I said, with some minor  
7 modifications.

8           Instead of leaving the term, "attending  
9 political gatherings," we say, "attend meetings or  
10 other events sponsored by a political organization."

11           QUESTION/COMMENT FROM AUDIENCE: What was  
12 the reason for that change?

13           JUDGE ROSENBLUM: There was a feeling  
14 that "political gatherings" were a little vague, and  
15 we wanted to be clearer about what we meant.

16           However, that is where the definition of  
17 "political organization" comes in, and I wrote it up  
18 on the board up there for you, and I will also read  
19 it to you.

20           I think it is important to keep in mind  
21 that it is not limited to political party  
22 organizations. It is a broader definition than  
23 that.

24           A political organization denotes a

1 political party or other group, the principal  
2 purpose of which is to further the election or  
3 appointment of candidates to political office."

4 Our working definition of a "political  
5 organization" includes political parties, PACs that  
6 are dedicated to the election as well as campaign  
7 committees for individual candidates.

8 "Political organization," keep in mind,  
9 is broader than simply a political party affiliated  
10 organization.

11 QUESTION/COMMENT FROM AUDIENCE: I have a  
12 jurisdictional question that troubles me about this.

13 If this code is designed to be adopted by  
14 courts to regulate conduct, how does a court get the  
15 ability to regulate, in a judicial conduct code, the  
16 conduct of somebody running for office? I would  
17 understand --

18 DEAN ALFINI: You mean a non-judge.

19 QUESTION/COMMENT FROM AUDIENCE: A  
20 non-judge. Is this something that has to be adopted  
21 by the state bar?

22 JUDGE ROSENBLUM: They can only  
23 discipline under the code if they are elected, once  
24 they're elected.

1           QUESTION/COMMENT FROM AUDIENCE: So that  
2 is precisely my question. So if the conduct occurs  
3 before the time they are elected, you only get hit  
4 for it if you win?

5           JUDGE ROSENBLUM: You could get hit for  
6 it under the lawyer code, but that's it.

7           QUESTION/COMMENT FROM AUDIENCE: There is  
8 certainly nothing in the lawyer code that deals with  
9 these issues.

10          DEAN ALFINI: Our Rules of Professional  
11 Conduct refer to this.

12          QUESTION/COMMENT FROM AUDIENCE: Perhaps,  
13 but given the thing we were just talking about, for  
14 example, certainly a lawyer may attend a political  
15 event any time he or she wants.

16                 I guess my question is, is there a  
17 corresponding effort to modify the rules of  
18 professional conduct so that it will be bilateral,  
19 because otherwise it seems to me -- it's worth the  
20 risk if all that happens is once you win, something  
21 may happen to you.

22          JUSTICE SHEPARD: You're absolutely  
23 right. What we have done -- actually, we didn't do  
24 it in our lawyer code, we did it in the judge code

1 -- to simply say that licensed lawyers who are  
2 candidates are obliged, and then give a directive  
3 about whether the judicial discipline people or the  
4 lawyer discipline people are going to take that  
5 case.

6 I think the judicial discipline people  
7 end up disciplining the loser lawyer.

8 QUESTION/COMMENT FROM AUDIENCE: Without  
9 the substantive content here, it seems to me you  
10 need something to make it bilateral.

11 JUSTICE SHEPARD: Yes.

12 QUESTION/COMMENT FROM AUDIENCE: What do  
13 you do for the races where there are non-lawyer  
14 judges as there are in many states where you have  
15 non-lawyers who are running at the local level, the  
16 justices of the peace or the municipal judges, et  
17 cetera.

18 Is there anyone who knows anything that  
19 works towards that, other than if they win?

20 DEAN ALFINI: Cindy, I'm thinking of some  
21 of the New York state opinions where they have a  
22 large number of justices, non-lawyer justices of the  
23 peace.

24 Sometimes, the sanction will be you can't

1 run again. Was there anything like that?

2 MS. GRAY: Well, if the non-lawyer wins,  
3 then the judicial conduct commission has  
4 jurisdiction.

5 If the non-lawyer candidate loses, then  
6 no one has jurisdiction, but they have lost, which  
7 is a worse sanction.

8 That is really the only response to that,  
9 and it's true that if a non-lawyer runs a really  
10 nasty campaign, there is really no resource if they  
11 lose at the bar because at least the bar --  
12 (inaudible)

13 JUDGE ROSENBLUM: That is why these  
14 committees are so important.

15 QUESTION/COMMENT FROM AUDIENCE: How does  
16 that help the judge that is actually trying to  
17 follow the rules, the ethical rules here, and the  
18 other side is kind of a win-win situation.

19 I can violate the rules. If I lose, so  
20 what? If I win, maybe I'll get disciplined.

21 JUDGE ROSENBLUM: We assume they want to  
22 win, and we have concluded that they should be  
23 subjected -- if you look at 5.02, that is the  
24 provision that applies to all candidates for

1 judicial office.

2 Also, it is the prohibitions of all  
3 candidates, whether they are incumbents, sitting  
4 judges or non-judges.

5 QUESTION/COMMENT FROM AUDIENCE: I think  
6 there are two absolute truths that come out of this  
7 discussion. One is the novel one that states vary.

8 Maybe California is different in the way  
9 it used to be, but at least it used to be in  
10 California, there wasn't an agreement of who would  
11 discipline the lawyers, and since you can't go on  
12 the wrong side of the other truth which is what  
13 Justice Nelson was just saying, you have to have a  
14 level playing field, whether it's a non-lawyer or  
15 whoever they are.

16 You can't say well they lost because that  
17 exposes the other side, the incumbent, to an unfair  
18 campaign risk, so it seems to me it has to be  
19 addressed, but the ultimate answer has got to be the  
20 particular state.

21 Most states don't have the problem of the  
22 lawyer isn't touched, but it's state-by-state.

23 Could I go to a slightly different thing,  
24 which was brought up, I don't know if it was Alabama

1 or West Virginia.

2                   It was sort of the first question about,  
3 Well, I don't know whether I'm going to run in 2008,  
4 are you saying I can't go to -- now if either of  
5 those two states are partisan states, the  
6 proposition that somebody is not a candidate, either  
7 a sitting judge or (inaudible) candidate can't go to  
8 a party event seems to fly totally in the face of  
9 what we mean of having a partisan jurisdiction.

10                   QUESTION/COMMENT FROM AUDIENCE: I said  
11 it a little differently, I agree with you, but you  
12 said it much better.

13                   QUESTION/COMMENT FROM AUDIENCE: I get  
14 lost reading this, and I think what West Virginia  
15 Justice Starcher brings up is that you kind of get  
16 lost.

17                   You say you can't do anything. It  
18 doesn't make any sense for a partisan jurisdiction,  
19 so you go to the partisan provision to find out  
20 whether it's there. No, it's not there either.

21                   Why not have a code that reflects the  
22 reality, which is four different systems? We have  
23 got the weirdest state in the nation, Randy  
24 Shepard's, where they have three and a half systems



1 in one state.

2                   We have plenty of states who have two  
3 systems and some that have only one, but whichever  
4 judge in whichever jurisdiction is in this system or  
5 that system, partisan, nonpartisan, appointed,  
6 whatever, would be under provision so and so.

7                   Maybe you would have a generic, general  
8 opening and then you would have your partisan,  
9 nonpartisan and so forth.

10                   Why wouldn't that be easier to use?

11                   DEAN ALFINI: Well, that is sort of what  
12 we use. Let me make a suggestion. Why don't we let  
13 Ellen run through Canon 5 so you can get a sense of  
14 the structure.

15                   QUESTION/COMMENT FROM AUDIENCE: That's  
16 where I'm lost.

17                   DEAN ALFINI: Then maybe -- because we  
18 really would like to -- this is good commentary. I  
19 just want you to sort of walk through it with her  
20 and then see if you still feel the same way.

21                   JUDGE ROSENBLUM: You may still feel that  
22 way because, frankly, it's a bit of a maze. It's  
23 not any more of a maze than the current, but we're  
24 trying to make things better, not worse and not

1 necessarily even stay the same.

2           If you will, just bear with me for a few  
3 minutes here. We were looking at the -- 5.01 is for  
4 those who are not currently candidates, so you don't  
5 have to worry about those if you're a candidate  
6 because you can worry about 5.02, at least to begin  
7 with.

8           Canon 5.02 is for all candidates, and  
9 5.02, the reason it has more provisions than 5.01 is  
10 that we wanted to make sure that non-judge  
11 candidates would be subject to some of the rules  
12 that judge candidates or judges are subject to that  
13 we felt were pertinent to campaigns.

14           We have added, for example, Section C  
15 which a judge is already subject to under Section  
16 2.11, the public comment provision, which we talked  
17 about earlier.

18           A judge is also already subject to 2D  
19 under Section 2.11, which is the now famous White  
20 compromise, pledges and promises clause.

21           Judges are also subject under Section  
22 2.05 to letter E, manifesting bias or prejudice,  
23 which we discussed earlier.

24           We have added that language in the course

1 of advancing his or her candidacy to C and E, so  
2 that non-judge candidates would be subject to those  
3 same provisions, which we think are important during  
4 a campaign.

5           Other than those, they're pretty  
6 obviously related to judicial campaigns. We have  
7 added a few that weren't in 5.01 just to be clear  
8 that when you're a candidate, you can't personally  
9 solicit or accept campaign contributions, even  
10 though arguably, that is covered by Section G and  
11 Section E of 5.01 as well.

12           That is the initial laundry list, and  
13 then it starts getting a little complicated by the  
14 fact that depending upon the type of state judicial  
15 selection system you have, you go to either 5.03  
16 which is permitted political activity of candidates  
17 for judicial office in partisan public elections.

18           This is true when that person is a  
19 candidate, once they're a candidate, and that  
20 doesn't address your concern. That was very  
21 controversial.

22           QUESTION/COMMENT FROM AUDIENCE: A guy  
23 who thinks he's going to run against me, he can go,  
24 but I can't go?

1                   JUDGE ROSENBLUM: I'm just going to go  
2 through what it says as opposed to whether I think  
3 you're right or not, Justice.

4                   In 5.03, a candidate for partisan public  
5 election may do these various things: May establish  
6 a campaign committee, may speak to gatherings on his  
7 or her behalf, may attend meetings or other events  
8 sponsored by a political organization, may publicly  
9 identify himself or herself as a member or candidate  
10 of a political organization, may purchase tickets  
11 for events, may appear in media advertisements and  
12 distribute campaign literature supporting his or her  
13 candidacy, may publicly endorse or publicly oppose  
14 other candidates for the same judicial office.

15                   Now, somebody mentioned this morning,  
16 they had a friend who was running for judge, why on  
17 earth can't I support another judge? Why can't I  
18 make a public statement in support of another judge.

19                   Well, you can, but only on a very limited  
20 context under this code. This is the way the ABA  
21 code has been for a long time, if not forever.

22                   However, in some states, such as Oregon,  
23 we do permit judges to campaign for other judges.  
24 We do have exceptions in various jurisdictions.

1           Canon 5.04 are the provisions that  
2     pertain to -- we lumped together nonpartisan and  
3     retention elections, so if you're not in a partisan  
4     state, then you don't have to worry about 5.03. You  
5     still have to be concerned with 5.02, but you can  
6     skip over 5.03 to 5.04.

7           These are the provisions which, at one  
8     time, we were going to separate out the nonpartisan  
9     and retention and we concluded that there wasn't  
10    really a basis upon which to do that.

11           We would like your input on that. There  
12    may be things that are missing here in retention  
13    states. If you're from a retention state, take  
14    particular care to let us know if you think there is  
15    something that either shouldn't be here or should be  
16    added.

17           Now, these restrictions are greater on  
18    nonpartisan and retention candidates than on  
19    retention candidates. For example, in A, it states,  
20    that such a candidate shall not directly or  
21    indirectly, even while a candidate, publicly speak  
22    in support of or against a political organization,  
23    and even while a candidate, number two, may not  
24    attend meetings or other events sponsored by a

1 political organization or a candidate for public  
2 office.

3           Now, this is the one place where I will  
4 tell you I had an agreement because I cannot  
5 otherwise fully explain this. This is the  
6 definition part.

7           "Political organization" is defined more  
8 broadly than "political party." If this had said  
9 "political party" or if it said "political party  
10 organization," then it would probably, to me anyway,  
11 make sense. Without that, it seems like it is a  
12 very broad prohibition, and I'll just leave it at  
13 that.

14           QUESTION/COMMENT FROM AUDIENCE: What  
15 sense does it make in view of B2?

16           JUDGE ROSENBLUM: B2 seems to pretty much  
17 follow-up the rule. I guess you couldn't go to an  
18 event unless you were a speaker at it, which doesn't  
19 seem to make a whole lot of sense. You can't attend  
20 the political organization event --

21           QUESTION/COMMENT FROM AUDIENCE: But  
22 fundamentally, the thing that you're excluding is if  
23 I'm a nonpartisan candidate, I would like to go to  
24 both the Democrat and the Republican rallies, so I

1 can go to a Klu Klux Klan rally, but I can't go to  
2 the Republican rally?

3 JUDGE ROSENBLUM: I will tell you, there  
4 were strong feelings from the members of the  
5 commission from nonpartisan states that they wanted  
6 to keep that type of partisan-related activity to a  
7 minimum even for partisan candidates and essentially  
8 zero for nonpartisan candidates?

9 QUESTION/COMMENT FROM AUDIENCE: But the  
10 candidate -- maybe I'm misunderstanding it then.

11 Let's suppose I were in a retention  
12 election state. I'm up for retention election. A  
13 group that fits under that definition attacks me. I  
14 can't respond because I can't oppose them?

15 JUDGE ROSENBLUM: No. Well, first of  
16 all, that's not true. You can respond to attacks.

17 QUESTION/COMMENT FROM AUDIENCE: Well,  
18 that's a different thing, isn't it?

19 JUDGE ROSENBLUM: We're going to have  
20 that in the commentary.

21 QUESTION/COMMENT FROM AUDIENCE: How  
22 about I should go to that organization so they won't  
23 get down on me?

24 JUDGE ROSENBLUM: You can speak to

1 gatherings on your own behalf, any gatherings.

2 QUESTION/COMMENT FROM AUDIENCE: But that  
3 means you have to be on the program. You just can't  
4 go and talk to people at the gathering.

5 JUDGE ROSENBLUM: Right. You're not just  
6 attending a political rally. If you have been  
7 invited, or you have invited yourself to be a  
8 speaker on your own behalf while you're a candidate,  
9 then under B2, you can go to any event, any meeting  
10 or other event whether it is sponsored by a  
11 political organization or.

12 It says in B, notwithstanding the  
13 restrictions which are set forth in 5.02 and  
14 5.04(a), a candidate may do those things.

15 To a degree, that provision swallows up  
16 the (inaudible) to a degree, but it still gets at  
17 showing up at rallies, just sort of being there  
18 hanging out being a nonpartisan candidate.

19 QUESTION/COMMENT FROM AUDIENCE: Just a  
20 quick comment. One of the realities is that  
21 candidates for nonpartisan judicial office or  
22 retention office have a hard time ever drawing a  
23 crowd.

24 They literally have to borrow the crowd



1 from somebody else. It might be at the county fair,  
2 which is not a particularly good venue for  
3 campaigning.

4           The best place to complain is at the  
5 Republican meeting and at the Democratic meeting,  
6 because when you go there, you know you're going to  
7 be seeing 100 or more people who are all voters and  
8 are politically active.

9           To prohibit going there, it seems to just  
10 undermine the process.

11           JUDGE ROSENBLUM: Well, you wouldn't be  
12 prohibited if you were speaking.

13           QUESTION/COMMENT FROM AUDIENCE: Then you  
14 have to contrive a way to get on the program.

15           JUDGE ROSENBLUM: Again, I don't have to  
16 tell you how I feel about that provision.

17           QUESTION/COMMENT FROM AUDIENCE: It's a  
18 Model Code. If you don't want to adopt it, don't  
19 adopt it.

20           JUDGE ROSENBLUM: You don't have to adopt  
21 it.

22           DEAN ALFINI: It's interesting because  
23 there is another trial judge from another  
24 nonpartisan state on the judiciary. She and Ellen

1 disagree and butt heads on that.

2 QUESTION/COMMENT FROM AUDIENCE: Well, I  
3 disagree with much of this because I don't think it  
4 is realistic even in a nonpartisan setting.

5 In our state, the Republican Party, if  
6 you're a Democrat, isn't going to let you speak to  
7 them, and the same thing for the Democrats. They're  
8 not going to get a Republican judge to speak.

9 JUDGE ROSENBLUM: Justice Toal?

10 JUSTICE TOAL: I was just wondering if  
11 you all would consider when you further evaluate  
12 Canon 5, the situation of those of us in appointed  
13 states or in elected states where the election is  
14 done by the legislature.

15 South Carolina and Virginia are only two  
16 pure election states and there are few others that  
17 have some levels of the judiciary selected in that  
18 way.

19 For us, I wonder if you mean political  
20 organizations to impact our ability to a member of  
21 or attend or interact with such groups as women  
22 lawyers groups, black lawyers groups, and others, in  
23 my state whose primary mission is to increase  
24 diversity on the bench by supporting black

1 candidates or female candidates or the like.

2           There are several statewide organizations  
3 as well as local organizations, community  
4 improvement organizations whose primary focus is  
5 judicial elections in South Carolina and the  
6 promotion of more diverse candidates.

7           They often ask candidates to come, and  
8 some of us are members of those organizations, some  
9 of us were life members of the NAACP before we ever  
10 got to be judges. We can't undo that.

11           I just wonder what is intended by this  
12 political organization definition.

13           JUDGE ROSENBLUM: Well, of course, that  
14 is the current definition; however, from what I have  
15 been able to figure out, because I have been sort of  
16 obsessing on this for a few months, is that it's  
17 kind of been interpreted to apply to party  
18 organizations. It's almost been interchangeable  
19 with the political party, and it hasn't been  
20 considered to apply, even though technically, I  
21 think it does.

22           JUSTICE TOAL: I wonder what would be the  
23 wisdom of focusing it on political organizations,  
24 meaning party organizations if that is what is

1 intended because there certainly are a lot of other  
2 organizations which will fit up under this  
3 definition who have, as either one of their tenets  
4 or primary tenets, judicial elections.

5 JUDGE ROSENBLUM: That is something we  
6 have been talking about, a possible change in the  
7 definition, but I haven't been able to, at this  
8 point, persuade my colleagues that that change --  
9 that they're ready for that change.

10 JUSTICE TOAL: Would the League of Women  
11 Voters be included here?

12 DEAN ALFINI: No. I don't think their  
13 primary purpose is to support candidates. It's  
14 almost the opposite.

15 JUSTICE TOAL: Well I just attended one  
16 of their seminars, and one of their big tenets is  
17 improving the public election of judges, and they  
18 advocate for a certain profile of candidate to be  
19 appointed in South Carolina.

20 DEAN ALFINI: I don't think they would  
21 ever advocate you or any other judge.

22 JUSTICE TOAL: No. I'm just saying if  
23 you look at the definition, it doesn't say advocate  
24 for a particular candidate. It says, "Further the

1 election and appointment of candidates to political  
2 office."

3 DEAN ALFINI: But again, "candidates"  
4 that means specific candidates.

5 JUSTICE TOAL: Well, maybe it would be  
6 helpful to say that.

7 DEAN ALFINI: Okay. Add the word  
8 "specific" before "candidates."

9 JUSTICE TOAL: Exactly. An individual  
10 candidate or specific candidate.

11 DEAN ALFINI: It's a general process if  
12 you cover things like candidate committees, not  
13 groups that have this --

14 JUSTICE TOAL: Endorsement groups that  
15 have this.

16 JUDGE ROSENBLUM: That would not concern  
17 your group.

18 JUSTICE TOAL: They endorse specific  
19 candidates.

20 QUESTION/COMMENT FROM AUDIENCE: Going  
21 back a little bit to what Justice Lambert talked  
22 about and what Roy talked about is intention here.

23 The legislatures in a lot of states  
24 require judges run and be elected in partisan

1 elections, and yet, we're here trying to remove  
2 judges as much as possible from party politics, so  
3 that's the tension.

4           Going back to 5.01, you said if you're an  
5 incumbent judge or sitting judge, you cannot attend  
6 any political party function, so let me give you my  
7 experience.

8           When I first became a judge, I was a  
9 trial judge in Tennessee and we ran in partisan  
10 elections. Thank goodness, I'm now on retention  
11 elections.

12           I was elected for an eight-year term by a  
13 lot of people who helped me in the Republican Party.  
14 They spent a lot of money and time and expense on  
15 me, and I worked hard for a lot of other candidates  
16 in my earlier years.

17           If I were running and having to abide by  
18 this, the moment I got elected and took office, I  
19 would say adios. They wouldn't see me.

20           The people in that party don't understand  
21 judicial ethics. They think I got what I wanted and  
22 I don't want any part of them anymore.

23           Eight years later I'm back. Here I am  
24 again. They say, Now, where have you been? Well, I

1 couldn't come. Yeah, right, you couldn't come.

2 JUDGE ROSENBLUM: You have to tell them  
3 your code prohibited you from coming.

4 This is very valuable input. It is.

5 QUESTION/COMMENT FROM AUDIENCE: I have a  
6 solution. Declare yourself a candidate the next day  
7 and then you're a candidate for eight years.

8 Two areas that we feel we have to deal  
9 with in New York regarding partisan elections is put  
10 a limit on the number of tickets a judicial  
11 candidate can purchase to a political party  
12 function, and also speak to the price in a certain  
13 way.

14 If the amount in the proposed rule that  
15 is before the Court of Appeals right now, no  
16 questions if it's \$250 or under, but if it's \$250 or  
17 over, you have to show that that cost bears relation  
18 to the cost of the dinner or function, so as to  
19 avoid a political contribution.

20 Secondly, purchasing services in a  
21 judicial election. All kinds of people do services.  
22 Judicial candidates have to have some kind of  
23 documentation from the vendor as to the market value  
24 of the services they received, so it's not just

1 having somebody that is not doing anything but  
2 getting money from your campaign committee.

3           We have specific provisions already in  
4 our code and we're going to have, I think when the  
5 court acts on this, more, because as you know, we  
6 have had problems from time to time in New York, and  
7 this is an effort to try to deal with some of the  
8 areas that have been very sensitive in our state.

9           QUESTION/COMMENT FROM AUDIENCE: One of  
10 the problems with the definition is that these  
11 groups such as -- at least in our state and I know  
12 in other states, the Bar Association advocates for  
13 lawyer legislators, so they have a separate PAC that  
14 does it.

15           The trial lawyers have their groups and  
16 the defense counsel have their groups.

17           Under that definition, I don't know if it  
18 makes the distinction between the PAC arm of the  
19 group or the charitable arm of the group, and it  
20 just seems so broad that if someone reads it the  
21 wrong way, you can't even go to a Bar Association  
22 meeting because they're advocating certain people to  
23 become legislators, lawyers in our state and lots of  
24 states because there aren't lawyer legislators.



1           JUDGE ROSENBLUM: You couldn't go to a  
2 meeting of the PAC part of it. That's true.

3           QUESTION/COMMENT FROM AUDIENCE: Well, no  
4 one separates the PAC from the bar.

5           The bar comes out and their magazine  
6 talks about all these great lawyer legislators and  
7 how we have to get more, although the PAC does the  
8 funding of it.

9           Where do you go with this definition?

10          JUDGE ROSENBLUM: When that happens,  
11 judges have to go to the bar and explain that you  
12 have this issue, and could you please separate the  
13 PAC from the rest of the work you do so I can  
14 continue to be involved in the rest of the work you  
15 do, if you were to adopt this. That is what you  
16 would probably have to do.

17          DEAN ALFINI: I don't think the  
18 definition intends to cover the State Bar  
19 Association.

20          QUESTION/COMMENT FROM AUDIENCE: I was  
21 thinking along the same line, but there are a few  
22 entities which are stand alone PACs, and that is all  
23 they are.

24          The proposition that you can go to the

1 NRA because the PAC is separate from the rest of the  
2 NRA, but you can't go to Emily's List because all  
3 Emily's List is a PAC. You can't go to Move On.  
4 You can't go to ACT, whatever that acronym stands  
5 for.

6 I don't know what concrete examples  
7 you're thinking of when you broaden beyond parties  
8 to political organization.

9 JUDGE ROSENBLUM: This isn't in the  
10 current definition. We haven't done that. I'm  
11 suggesting we consider narrowing because it hasn't  
12 been considered.

13 It hasn't really been defined the way  
14 we're discussing it. It has always been fairly  
15 limited in the way it's been applied.

16 DEAN ALFINI: We should mention that we  
17 haven't really gotten to the definitions yet, and so  
18 we would be pleased to hear alternative language  
19 from you or an alternative definition.

20 JUDGE ROSENBLUM: But the problem is you  
21 can't separate out the definition here. The  
22 definition is integral to what we're talking about.

23 To say that we're going to put off  
24 discussing the definition really doesn't make sense.

1 We have to know what it means in substance because  
2 if you think the definition isn't apt, then we ought  
3 to consider changing it before we really think of  
4 the substance.

5 QUESTION/COMMENT FROM AUDIENCE: I would  
6 think if White meant anything, it meant you don't  
7 broaden beyond the old proscription on what to do  
8 with parties and make that apply to what you cannot  
9 do with even more organizations. If anything, it  
10 would be moving toward narrowing it.

11 This seems to be flying in the face of  
12 more realities than I can count.

13 JUDGE ROSENBLUM: It may be my fault for  
14 having raised the issue with the commission that the  
15 definition seems to go beyond what people were  
16 applying to it.

17 QUESTION/COMMENT FROM AUDIENCE: No.  
18 It's that other judge that thinks that the world  
19 should be just like Minnesota.

20 QUESTION/COMMENT FROM AUDIENCE: I  
21 recognize this is language from the prior code, but  
22 5.03(g) 5.04(b)(3).

23 The code provides that a candidate for  
24 judicial office can publicly endorse somebody

1 running for the same office. Implicitly, therefore,  
2 cannot endorse somebody running for a different  
3 judicial office.

4           You have a situation where there is one  
5 seat open on the Supreme Court and two on an  
6 intermediate appellate court and three on the trial  
7 court in a large county. The primary, though very  
8 weak, know who is running in a partisan race on the  
9 Democrat ticket and Republican ticket.

10           It would say you can't spread your  
11 ticket, if you will, of five judges among the 25  
12 events that night and speak to one another, and that  
13 is obviously nonsensical, and I was wondering if you  
14 have any idea why that is there. If you have looked  
15 at all whether you should take it out.

16           In all candor, we just ignore it.

17           DEAN ALFINI: It seems to me if you are  
18 the Democratic candidate, you simply have to be able  
19 to go to the meetings, not just with the other  
20 judges who are candidates on that other ticket, but  
21 with the people who are running for county  
22 commissioner and say, We're all hard working  
23 Democrats, vote the team. That is just the way  
24 people behave.

1           I, frankly, can't remember what the  
2 argument was. I do think it's a different thing if  
3 you aren't part of the ticket, and now, it's off  
4 year, that there is really no reason why the judge  
5 ought -- the incumbent judge in midterm ought to be  
6 endorsing somebody for treasurer.

7           QUESTION/COMMENT FROM AUDIENCE: That's  
8 in a different section of the code, and that is  
9 true.

10          DEAN ALFINI: At the risk of incurring  
11 your collective venom here, let me suggest, I think  
12 historically, the concern here has been over judges  
13 teaming up with candidates from the political  
14 branches during the campaign and that can lead to  
15 some mischief here and there.

16          You're identified with issues that that  
17 gubernatorial candidate or that legislative  
18 candidate is identified with. It puts the judge  
19 more into the political fray.

20          Now, this currently exists in the code.  
21 We're just carrying it over to that extent. If  
22 there is sort of a collective feeling here that that  
23 is nonsense and it seems to me moving in that  
24 direction, we'll certainly consider that.

1                   QUESTION/COMMENT FROM AUDIENCE: I'm in a  
2 non-partisan state. We do not have this limitation  
3 in our code.

4                   I guess I'm wondering why it wouldn't be  
5 considered an improvement or an effort to improve  
6 the judiciary to have one judge be able to say about  
7 another judge who is running for office, This is a  
8 very decent judge who knows exactly what she is  
9 doing, and your community will be improved if you  
10 vote her into office.

11                   I can't imagine. Judges are probably the  
12 only people other than lawyers who can speak to the  
13 public and explain why Judge A versus Judge B.

14                   Why would we not want that to happen?

15                   JUDGE ROSENBLUM: Can I ask you how many  
16 of you agree, if you're willing to raise your hand,  
17 with what Justice Young just said?

18                   I totally agree with you.

19                   DEAN ALFINI: He's arguing for a judge  
20 being able to speak on behalf of another judge.  
21 How many are in favor of that?

22                   How many opposed? There's a few.

23                   JUDGE ROSENBLUM: Mixed levels or the  
24 same level? That would make a difference to you?

1                   QUESTION/COMMENT FROM AUDIENCE: I have a  
2 different perspective, and one of the reasons why  
3 you might not do this is because you can have a  
4 state as Nevada was for 20 years, where you had a  
5 real division in the Supreme Court and you had those  
6 Supreme Court justices recruiting other people to  
7 run against other justices, and that entire negative  
8 campaigning and the infighting in the court created  
9 a great deal of problems with regard to the  
10 integrity of the court, reputation of the court, how  
11 the court was viewed nationally.

12                   There are reasons why that could be a  
13 negative.

14                   QUESTION/COMMENT FROM AUDIENCE: You just  
15 want to drive it underground so nobody knows.

16                   QUESTION/COMMENT FROM AUDIENCE: I'm not  
17 going to be taking a position. I'm simply pointing  
18 out that I think that was one of the concerns for  
19 why they didn't want judges to be endorsing other  
20 candidates including other judges.

21                   I'm not taking the position one way or  
22 another.

23                   JUDGE ROSENBLUM: Wisconsin had a similar  
24 situation and other states as well.

1 QUESTION/COMMENT FROM AUDIENCE:

2 Respectfully, you're not driving it underground.  
3 You are truly really are chilling it or curtailing  
4 it.

5 If the incumbent Supreme Court justice  
6 has a close friend running, it's unseemly, despite  
7 the problems with that Supreme Court justice making  
8 commercials on behalf of that friend running for the  
9 judiciary.

10 Plus, in the real world of partisan  
11 election, the Republican party and Democratic party  
12 will each pull and see who among sitting judges is  
13 extraordinarily popular and begin to make that  
14 person their spokesperson.

15 Now, you really have -- not the  
16 candidate, because I'm in favor of candidates  
17 speaking on behalf of other candidates, the team  
18 that is running, but you have the judiciary by  
19 accident increment drawn into full blown politics.

20 JUDGE ROSENBLUM: That was the reasoning  
21 behind the reason not to change that.

22 QUESTION/COMMENT FROM AUDIENCE: I was  
23 reading on the plane your 20-step Call to Action  
24 from 2000, and there is an entire section on voter



1 awareness. One of them is conduct evaluations of  
2 judges and disseminate to the public, so we're going  
3 to have everything except judges having opinions  
4 about other judges.

5                   If it's a salutary concern that we tell  
6 the public what people who should know think about a  
7 judge, why wouldn't judges be allowed?

8                   JUDGE ROSENBLUM: It's going to be one of  
9 these state-by-state ones, folks.

10                   QUESTION/COMMENT FROM AUDIENCE: I have a  
11 question. Before this passes and gets sent to the  
12 states, does somebody assess the constitutionality  
13 of all this?

14                   Point two, canons, which to me, appears  
15 to be clearly unconstitutional, and that's Canon  
16 5.01(D).

17                   I can't imagine that that can withstand  
18 any kind of scrutiny that is meaningful, and it's  
19 also unfair to judges because lawyers can run around  
20 for the full six years where judges can't, so it's  
21 fundamentally unfair, and given White, it's probably  
22 unconstitutional.

23                   5.02(B), I think there's at least two  
24 Supreme Court decision and a federal court that say

1 you cannot prohibit misleading statements. Chmura  
2 is one of them, I think.

3           Somebody has got to make some kind of --  
4 well, just to say, the ABA passed it, you can  
5 disregard it.

6           DEAN ALFINI: Well, who are we going to  
7 ask? Erwin Chemerinsky? He would strike down half  
8 these provisions. He's an expert. He's a renown  
9 constitutional law expert.

10           That's a tough one. We certainly have  
11 White in mind and we certainly are continually  
12 considering it, but opinions vary here, and it's  
13 tough.

14           If you don't think that's obvious to  
15 everyone, I'm not sure.

16           QUESTION/COMMENT FROM AUDIENCE: To  
17 merely attend a political organization, go to a  
18 barbecue with the Democratic Party six years before  
19 your election is just -- I just can't imagine what  
20 evil it is that you're trying to curb as opposed to  
21 this core political right that you have as a judge.

22           JUDGE ROSENBLUM: In answer to your  
23 question, we have two reporters for this commission,  
24 both I believe are constitutional lawyers, scholars,

1 professors.

2                   There is quite a bit of disagreement on  
3 that particular provision, and I think it's actually  
4 being looked at, maybe even revisit that.

5                   DEAN ALFINI: We will pass on that  
6 concern.

7                   QUESTION/COMMENT FROM AUDIENCE: It seems  
8 to me that these are not really so much legal  
9 constitutional questions as they are policy  
10 decisions, and the difficulty is that unless you're  
11 appointed for life, you live in the real world.

12                   Whether you're merit retention or popular  
13 election, you're going to face the voters at some  
14 point and you are going to need a constituency to  
15 support you.

16                   These rules will be bent and tortured by  
17 judges or ignored as promulgated model rules by all  
18 the states unless they are realistic and reflect in  
19 some measure a balance between what is good, proper  
20 judicial behavior with decorum and reality.

21                   Some of these that are weighted on the  
22 side of proper judicial decorum would work if we  
23 were appointed for life but cannot work if you want  
24 to also do more than pay lip service to the

1 proposition that you want decent people to run for  
2 judges.

3           You are going to make it impossible for  
4 anyone except someone independently wealthy who can  
5 support their own campaign to run for judge, or  
6 someone who has been in the political environment  
7 forever and has built-in support and only intends to  
8 run once. I have spoken.

9           QUESTION/COMMENT FROM AUDIENCE: I agree  
10 with those comments, and in Montana, my jurisdiction  
11 is kind of unique amongst all of you in that we're  
12 the only state that is still functioning under the  
13 1924 canons.

14           I'm on a commission that is trying to  
15 sell to our judiciary that we should adopt a version  
16 of the ABA canons, and we're kind of held up right  
17 now waiting the pending approval of these new  
18 canons.

19           One of the selling points that we have  
20 got to use with our judiciary is I realize this is  
21 not a uniform code, but it is a model code and one  
22 of the selling points that we need to use is that we  
23 can rely on interpretations of those various canons  
24 on the interpretations that our sister states have

1 given to these.

2 I can tell you that if we have got 50  
3 different versions of this, which is what I'm  
4 hearing in here and I heard the comments from the  
5 dais that it's a state-by-state deal, I think that  
6 we have really limited the effectiveness of a model  
7 act.

8 If we have 50 different versions of it,  
9 hell, we might as well function under what we have  
10 got now.

11 DEAN ALFINI: The problem is we have 50  
12 or with DC, 51 or more political cultures, and  
13 they're all very different.

14 What seems to be acceptable in one is not  
15 so acceptable in another. I think the 50 different  
16 versions really just reflect the political realities  
17 in those states.

18 They're not entirely different. There  
19 are a lot of commonalities.

20 QUESTION/COMMENT FROM AUDIENCE: Well, to  
21 make this work in Montana, you would have to  
22 significantly rewrite Canon 5 so it wouldn't bear  
23 any resemblance to what is in the model code?

24 DEAN ALFINI: That's okay.

1           QUESTION/COMMENT FROM AUDIENCE: Well, I  
2 don't believe that is okay, with all due respect.

3           That is why we want to adopt a model code  
4 because it is modeled after the codes adopted in the  
5 sister states. It is like uniform law. We want it  
6 to be as uniform as possible throughout the states.

7           DEAN ALFINI: Maybe you can sell them on  
8 1 through 4.

9           JUDGE ROSENBLUM: Well, I take it that  
10 many of you seem to prefer the idea that was, I  
11 think, addressed by Professor Schotland at the  
12 beginning, which is, okay, if we're a partisan state  
13 here is our list, here are our rules of a partisan  
14 state, and we don't have to check in with three or  
15 four or five rules and put them together.

16           If we were to come up with one set for  
17 partisan and one set for non-partisan and retention  
18 and one set for appointed, that would at least be a  
19 step in the right direction.

20           MS. GALLAGHER: If it were four separate  
21 models of Canon 5. This is Canon 5 for an  
22 appointive system. This is Canon 5 for a partisan  
23 system. This is Canon 5 for non-partisan system.

24           QUESTION/COMMENT FROM AUDIENCE: There is

1 one thing you need to add to that, whether you  
2 separate them out that way ultimately or not, I want  
3 to go back to something you were discussing early  
4 on, and this is probably the most impassioned plea  
5 that I can make for this.

6           Everywhere I go, every state where I do  
7 one of these programs or I do a judicial education  
8 session or something, this is the single biggest and  
9 single most consistent complaint I get. It doesn't  
10 apply to non-judges.

11           You brought up New York. Dean Feerick  
12 can correct me if I'm wrong or if this has changed,  
13 but last I knew, New York was actively taking steps  
14 to bring the non-judges and non-lawyers into the  
15 disciplinary process in some way.

16           New York has 2,500 to 2,600 judges  
17 statewide. Two thousand of them are non-lawyer town  
18 and village justices who account for 67 percent of  
19 all disciplinary violations in the state.

20           This is a huge problem and they are  
21 disproportionately violations that appear during  
22 their candidacies.

23           I do not see how you can possibly get  
24 buy-in from sitting judges until you find a way to

1 coordinate with the Lawyers Code of Professional  
2 Responsibility or what-have-you and also find a way  
3 and in some states I think you can do it by Supreme  
4 Court Rule or some other mechanism beyond a  
5 statutory mechanism to bring non-judicial candidates  
6 and non-lawyer candidates within this process.

7 JUDGE BOWIE: I just want to pick up on  
8 Jim Nelson's point and that is what is happening  
9 here is extremely important to us, and this is  
10 exactly what we want to have happen, and what we  
11 need to have happen because, as I told several of  
12 you, this thing, whatever it looks like doesn't go  
13 anywhere.

14 It's a meaningless effort until it is  
15 something that you can buy into.

16 You have got to be able to tell us, take  
17 a look at what the next iteration is and come back  
18 to us and say, Okay, with these changes, here is  
19 what could work. Here is how we could live with  
20 this. Here is recognizing the political reality in  
21 our jurisdiction, and here is how we could make it  
22 work.

23 We're insular. We have been holding  
24 public hearings for the last year and a half, but if



1 we don't get the input, then we're drawing on our  
2 own internal experience and that is quite limited,  
3 and you can help us by following up on this, not let  
4 this be the only occasion that we have this  
5 exchange.

6 JUDGE ROSENBLUM: If we're going to do  
7 that, I need to tell you three more things in the  
8 code that are different that I wanted you to know  
9 about. It's easy to overlook stuff.

10 One of those is in the current code. It  
11 does not permit a candidate to personally solicit  
12 obviously campaign contributions, but also publicly  
13 stated support. That would be changed.

14 We do permit the personal solicitation by  
15 omission. By omission, it is no longer prohibited.

16 QUESTION/COMMENT FROM AUDIENCE: If you  
17 read a reported opinion where I got slapped upside  
18 the head for soliciting an endorsement from a  
19 union --

20 JUDGE ROSENBLUM: Well, that has changed.  
21 Currently, it is in the code, but it would not be in  
22 the code any longer.

23 Currently, a candidate cannot personally  
24 solicit it or accept campaign contributions or

1 personally solicit publicly stated support.

2                   Then down below, the campaign committee  
3 can attain public statements of support for his or  
4 her candidate, which, of course, they can still do  
5 that.

6                   JUSTICE SHEPARD: We have to go over the  
7 next two quickly.

8                   JUDGE ROSENBLUM: The only other ones  
9 were, there's a very important provision on the code  
10 that says, "A judge shall not engage in any  
11 political activity except as authorized." That's  
12 gone.

13                   Finally, the word "dignity" is not going  
14 to be found any longer in the black letter but it  
15 will be in the commentary.

16                   I know some people are concerned about  
17 that. That is it.

18                   MS. GALLAGHER: Just one quick request.  
19 One thing that could be very helpful for us is if  
20 you provided us with some fact scenarios, for us  
21 then to take the rules as they exist and try to  
22 interpret the rules for that fact situation and see  
23 how do these rules work. Do they address that  
24 situation?

1                   Instead of coming up with specific  
2 language, give us a fact situation, and we'll see  
3 how we can interpret the rules for those facts.

4           (Whereupon the conference was suspended for the day)

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