

## MEMORANDUM

To: Joint Commission to Evaluate the ABA Model Code of Judicial Conduct

From: Debbie Segal, Chair  
ABA Standing Committee on Pro Bono and Public Service

Date: December 3, 2003

Re: Issues to Consider in the Evaluation of the ABA Model Code of Judicial Conduct

We appreciate the opportunity to submit issues for consideration in revising the ABA Model Code of Judicial Conduct. The Standing Committee on Pro Bono and Public Service is dedicated to increasing pro bono legal work on the part of attorneys and expanding the pool of volunteer legal services available to the poor and underserved. As such, the Committee has followed closely the role of judges in increasing pro bono service and the special challenges that judges face in participating in pro bono activities. The Pro Bono Committee has tracked developments around the country in this arena and suggests that you take into consideration several issues.

While the Model Judicial Code of Conduct does not specifically mention the term “pro bono,” it can be interpreted that involvement in civil pro bono activities is not prohibited if they do not affect a judge’s impartiality, demean the judicial office or interfere with the judge’s duties. Canon 4, in particular, states that “A judge shall so conduct the judge’s extra-judicial activities as to minimize the risk of conflict with judicial obligations.” This Canon allows a judge to be involved in activities and organizations “devoted to the improvement of the law, the legal system or the administration of justice” and allows a judge to “assist such an organization in planning fund-raising” but prohibits a judge from “personally participating in the solicitation of funds or other fund-raising activities.”

The Pro Bono Committee believes that while there are some pro bono activities clearly prohibited for judges, there is a broad area of pro bono participation that could be *specifically noted, defined and encouraged* in Canon 4, especially in the accompanying Commentary.

By way of example:

1. In 2000, the Colorado Supreme Court adopted revisions to its Code of Judicial Conduct that stated that judges may engage in activities to support pro bono services. The Colorado Supreme Court changed the title of its Canon 4 to say that a judge is “encouraged to engage in” activities to improve the administration of justice, replacing the old language that a judge “may engage in” such activities. A revision to the Commentary in Canon 4 states:

”Support of pro bono legal services by members of the bench is also an activity that relates to the improvement of the administration of justice. Accordingly, a judge may engage in activities intended to encourage attorneys to perform pro bono services, including, but not limited to: participating in events to recognize attorneys who do pro bono work, establishing general procedural or scheduling accommodations for pro bono attorneys as feasible and acting in an advisory capacity to pro bono programs.”

2. On October 28, 2003, the Nevada Supreme Court amended the commentary to Canon 4C(3) of its Code of Judicial Conduct to eliminate language that may discourage members of the judiciary from assisting legal services organizations in the recruitment of attorneys or law firms to provide pro bono legal services. The Court affirmed that the provision of pro bono legal services furthers the administration of justice by improving access to the courts. The commentary to Canon 4C(3) now states explicitly that:

A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism.

...

A copy of the Order Amending Commentary to Canon 4C(3)(b) is attached to this memo.

3. The Conference of Chief Judges adopted a resolution in February 1997 that states:

NOW, THEREFORE, BE IT RESOLVED, that the members of the Conference of Chief Justices should promote broader access for people unable to afford legal services and should encourage the legal profession to increase pro bono efforts. In furtherance of these goals, the individual members of the conference in their respective states should consider . . . Encouraging judges to:

- recruit lawyers to do pro bono work
- participate in events to recognize lawyers who do pro bono work
- consider special procedural or scheduling accommodations for lawyers who are volunteering their services
- act in an advisory capacity for pro bono programs.

4. With the goal of improving the system of justice, judges are able to participate in the recruitment of pro bono volunteers in a variety of ways. A Maryland judicial advisory opinion issued in 1996 specifically that judges may solicit attorneys to provide pro bono assistance to indigent parties in child custody cases by placing ads in the local bar newspaper, appearing at group meetings and sending letters. *Maryland Judicial Ethics Handbook Opinion 124, 10/22/96*. A State Bar of Michigan Advisory Ethics Opinion issued in January 1998 stated that a sitting judge may engage in activities designed to promote and encourage attorneys to provide pro bono legal services, but should not directly solicit individual attorneys to provide pro bono services to specific persons.

5. An expanding trend in judicial participation in pro bono is in judges making accommodations for pro bono attorneys. The Hon. Judith Billings described this phenomena in an article she co-authored titled: "Expanding Pro Bono: The Judiciary's Power to Open Doors" in the September 1998 issue of the ABA's *Dialogue* publication. In this article, she described a variety of activities in which judges can have an impact on encouraging pro bono service. She noted that:

More and more, judges have designed innovative procedural and scheduling accommodations to facilitate volunteer service by pro bono attorneys. These efforts conserve volunteers' time, minimize inconvenience to them and provide recognition for their efforts. The methods employed must be designed to allow judges to:

- \* maintain their integrity and impartiality (*Canon 2A*)

- \* insure that every person who has a legal interest in a proceeding or that person's lawyer has the right to be heard according to law (*Canon 3B(7)*)
- \* dispose of all matters promptly, efficiently and fairly (*Canon 3B(8)*)

6. The California Judicial Council adopted a resolution in 1996 asking judges to encourage pro bono service through signing recruitment letters, considering special accommodations for pro bono counsel, participating in training and pro bono recognition events, and working with pro bono programs to make law clinics available at or near courthouses.

7. There is a split amongst states on the issue of a judge's role in participating at fund-raisers sponsored by charitable organizations. An excerpt from *A Judge's Attendance at Social Events, Bar Association Functions, Civic and Charitable Functions, and Political Gatherings*, written by Cynthia Gray and published by the American Judicature Society and the State Justice Institute, is attached for your review.

The Standing Committee on Pro Bono and Public Service urges the Joint Commission to examine and consider including specific language in Canon 4 and its Commentary about a judge's role in encouraging pro bono service.