



March 14, 2006

Mark I. Harrison, Chair
Joint Commission to Evaluate the Model Code of Judicial Conduct
American Bar Association
321 N. Clark Street
Chicago, IL 60610

Dear Mr. Harrison:

As president of the Association of Trial Lawyers of America (ATLA), I submit these comments on a recently introduced portion of your Joint Commission's Final Draft Report. I would appreciate it if you would share these comments with other members of the Commission.

Specifically, my comments and concerns are directed at the Draft's addition of Rule 4.04(b)(3) ("the Rule") to Canon 4 of the ABA Model Code of Judicial Conduct ("the Code"). The Rule provides that judges "may appear at, speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with an event of a civic or charitable organization concerned with the law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose, *unless the organization's membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client.*" (emphasis added). As Comment 8 to the Rule explains, the Rule means that "[i]t would be inappropriate for a judge to speak at a fund-raising event for a specialty bar association whose members are closely identified with certain clients or particular positions on certain legal issues."

ATLA is apparently one of the "specialty bar associations" that would be affected by this proposal, as its members primarily represent plaintiffs in civil litigation. From the proposed Rule's context, we believe it would prevent a judge from speaking at or being recognized at an ATLA membership convention or at an ATLA continuing legal education program for which attendees pay a registration fee.¹ We believe that the Rule is shortsighted and otherwise problematic for three fundamental reasons.

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¹ Presumably, the prohibition could be avoided by making any event featuring a judge a fee-free event, open to the non-members generally and not subject to prior registration.

One, the Rule prevents judges from contributing to the improvement of the law by preventing judges from reaching out to a legal constituency that may not otherwise be accessible by similar participation in events sponsored by the general bar. Two, the Rule impairs the free exchange of ideas between the bench and the bar. Three, the Rule improperly focuses on a generalized viewpoint discrimination that ignores some of the realities of the modern legal marketplace of ideas.

I. The Rule Would Undermine the Judicial Role in Improving the Legal System

From its earliest days, the Judicial Canons have recognized that judges should not occupy an isolated role separate from members of the legal profession. As one commentator described the 1972 version of the Code: “On the whole [the Code] does not assume or try to prescribe a cloistered judicial role; indeed, to the extent that it encourages a judge to engage in a variety of activities and not recede into monastic contemplation, it recognizes that the business of judging is more than the mere application of precedents and requires more than merely being ‘learned’ in the law. . . .” Joel B. Grossman, *A Political View of Judicial Ethics*, 9 SAN DIEGO L. REV. 803, 808-09 (1972). *See also* MODEL CODE OF JUDICIAL CONDUCT Canon 5D(ii) (recognizing the propriety of judicial speeches “on behalf of measures to improve the law, the legal system, or the administration of justice.”).

Interpreting the Code to encourage judges to improve the legal system, the California Judges Association found that judges may speak at specialty bar programs dedicated to improving the legal system. Cal. Judges Ass’n, Comm. on Judicial Ethics, Op. 46 (July 1997) (“To the extent that [specialty bars] are devoted to the improvement of the law, the legal system or the administration of justice, judicial participation is permitted,” and therefore “it would be appropriate . . . for judges to participate as speakers or to participate in other capacities in educational programs sponsored by such groups”). In fact, in its next opinion, the California Judges Association explained that judges are encouraged to participate in events sponsored by specialty bar associations. Cal. Judges Ass’n, Comm. on Judicial Ethics, Op. 47 (Sept. 11, 1997). A trial lawyer association was one example that the California Judges Association provided of an appropriate sponsor. *Id.*

The California Judge Association is by no means alone in interpreting the Code to allow judges to participate in specialty bar events. To the contrary, many states have read their state models of the Code to mean that judges may attend specialty bar events even when the specialty bar pays for the judge’s attendance. *See* Advisory Comm. on Judicial Conduct of the District of Columbia Courts, Op. 4 (Feb. 22, 1994) (finding that judges may attend specialty bar events at no expense); [Ore.] Judicial Conference, Judicial Conduct Comm., Op. 81-1 (1982) (concluding that judges may attend, at reduced or no tuition, educational seminars and conferences sponsored by bar associations, including those that represent particular interest groups within the bar); Washington Ethics Advisory Op. 91-27 (in deciding whether to attend a specialty bar event at no expense to the judge, judges should “keep in mind the isolation which might result if they declined outright all invitations extended by such groups”); Ill. State Bar Ass’n, Op. 86-19 (Jun. 17, 1987) (judges improve the legal system by participating in specialty bar events).

As the Advisory Committee on Judicial Conduct of the District of Columbia Courts has noted, there are many specialty bar associations and the missions of these many associations are diverse. Advisory Comm. on Judicial Conduct of the District of Columbia Courts, Op. 4 (Feb. 22, 1994). Since prohibiting judges from attending some functions might further the Code's goal of creating an impartial judiciary, but prohibiting judges from attending other functions might not further this goal, the Committee declared "that *it would be futile* to develop a blanket rule with regard to judicial attendance at all specialty bar-related functions." *Id.* (emphasis added).

The proposed Rule reverses these well-founded assumptions at considerable cost. ATLA has had the privilege of having the last three chairs of the Judicial Conference of the United States Advisory Committee on Civil Rules (Hon. Paul V. Niemeyer (U.S. Court of Appeals for the Fourth Circuit), Hon. David F. Levi (Chief Judge, U.S. District Court for the Eastern District of California) and Hon. Lee H. Rosenthal (U.S. District Court for District of Texas) speak at ATLA Conventions to describe the existing initiatives of their committees, charged with improving the federal rules of civil procedure, and invite ATLA members to submit comments on the proposals. I understand they have engaged in similar outreach to other specialty bars, including the Defense Research Institute. The proposed Rule would prohibit that type of outreach, which is critical to the improvement of the law.

These judicial presentations have had an important impact on ATLA members. Rather than feel left out and isolated because of a perceived defense-oriented bias in the general bars, these lawyers exchanged concerns and ideas with these judges in an environment where lawyers with similar experiences could speak openly about common issues, while providing a perspective for the judges that they do not often otherwise hear. Along with the ABA, ATLA shares concerns unwarranted attacks on the judiciary, as well as the underfunding of our courts. We share concerns about the nature of modern judicial election campaigning and access to justice. A Rule that isolates ATLA and other specialty bars from the judiciary undermines the ability of each of us to discharge our responsibilities as members of a learned profession and our ability to improve the administration of justice.

II. The Rule Would Undermine the Free Exchange of Ideas between the Bench and the Bar

ATLA is proud of the role it played in responding to the terrorist attacks of September 11, 2001. At a time when Congress was merely considering an airline industry bailout in the immediate aftermath of the attacks, ATLA insisted that compensation be provided the victims and then undertook the largest ever *pro bono* legal project to represent victims before the federal fund. See Kenneth R. Feinberg, *WHAT IS LIFE WORTH?: THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11* (2005); Robert S. Peck, *The Victim Compensation Fund: Born From a Unique Confluence of Events Not Likely to be Duplicated*, 53 DEPAUL L. REV. 209 (2003). Two years ago, at ATLA's Annual Convention, ATLA honored Kenneth Feinberg, who had completed his work as special master for the fund, for his unflinching work on this very difficult task. Justice Stephen G. Breyer, a longtime friend and former colleague of Mr. Feinberg, made the presentation. Beyond his remarks about Mr. Feinberg, Justice Breyer also spoke about the U.S. Supreme Court and areas in which he disagreed with stances he believed had been taken by the plaintiffs' bar. That dialogue between members and the justice continued

during a question-and-answer period. The result was enlightening both to the ATLA membership and to the justice. Rather than be perceived as ethically questionable, it should be viewed as a positive development yet Justice Breyer's participation in this program would have been rendered ethically problematic by the proposed Rule.

Contrary to that proposal, the federal Advisory Committee on Codes of Conduct has recognized the vitality of this type of exchange to the legal system. In Advisory Opinion 67, the Advisory Committee found that this exchange serves the public interest and that judges may attend lectures and seminars, even those that "may emphasize a particular viewpoint or school of thought." U.S. Judicial Conference, Advisory Comm. on Codes of Conduct, Advisory Op. 67 (rev. 1998). Certainly, when speaking as a participant on a program rather merely an attendee, judges are even less likely to be compromised by an appearance of bias. *See also* Ill. State Bar Ass'n, Op. 86-19 (June 17, 1987) ("While we are aware that some of these associations are plaintiff oriented while others are defense oriented . . . we believe that full and open exchange of ideas, philosophies and the like between lawyers and the judges should be fostered and we further believe that the bar association's functions are a proper and healthy forum for these exchanges.").

Lawyers today often must choose between a wide variety of opportunities to participate in bar activities. Seldom does one's practice permit the time to be truly active in more than one. If one's practice is more consonant with active membership in a specialty bar, that should not create limits on opportunities to exchange of ideas with members of the bench, as the proposed Rule contemplates.

III. The Rule's Concern about Bias Appears Misplaced

Whatever risk might exist that the public would perceive a judge who speaks at specialty bar events as biased seems infinitesimally small compared the variety of events that the rules would not prevent judges from speaking at that carry a far greater risk of bias. Many communities, for example, are dominated by a single or small number of major employers. As a necessary consequence, those employers may be the most frequent defendants in courts of that jurisdiction. However, when that employer invites judges to participate on panel discussions of issues facing business as part of a business forum it sponsors, the proposed Rule is silent. Yet, that type of special access to judges, and the cumulative effect of hearing a slanted version of the litigation crisis tale that has been repeatedly debunked or the legal woes of that influential employer, can have an impact on judges that no appearance before a specialty bar association could ever entail.

The late Chief Justice was one who recognized that greater dangers that party bias brings, as opposed to viewpoint bias. Hon. William H. Rehnquist, *Stuff and Nonsense About Judicial Ethics*, 28 Rec. Ass'n Bar City N.Y. 694 (1973). In his view, party bias should disqualify a judge from hearing a case, but viewpoint bias should not. *Id.* at 709. The Supreme Court agreed with this assessment in *Republican Party of Minnesota v. White*, 536 U.S. 765, 775-76 (2002) ("One meaning of 'impartiality' in the judicial context-and of course its root meaning-is the lack of bias for or against either *party* to the proceeding. Impartiality in this sense assures equal application of the law.") (emphasis in original). While party bias is to be avoided, the Court

believes that viewpoint bias should be tolerated, and may even be desirable. *Id.* at 778 (2002) (“Indeed, even if it were possible to select judges who did not have preconceived views on legal issues, it would hardly be desirable to do so.”).

Further evidence that the proposed Rule’s distinction between lawyers and parties is found in the fact that no specialty bar I am familiar with rates judges according to whether they rule in favor of plaintiffs or defendants. Business groups, however, regularly issue such ratings, labeling judges as pro-business or anti-business based on which party the judge ruled in favor, regardless of the issue or the evidence. Thus, the U.S. Chamber of Commerce ranks legal systems in the states and calls those states where business loses a significant number of cases centers of “liability abuse.” Business supported groups, such as the American Tort Reform Association, similarly identifies specific jurisdictions as legally dangerous for business. And statewide business groups rank individual judges on the frequency with which they “side” with business. ATLA submits that the pernicious effect of these campaigns and the participation of judges in forums on these subjects pose more significant ethical dilemmas than judges speaking at a specialty bar events.

IV. Conclusion

Considering that the Rule discourages judges from furthering one of the Code’s central goals, that the Rule impairs the free exchange of ideas between the bench and the bar, that the Rule improperly focuses on an attenuated variety of supposed viewpoint bias rather than party bias, and that the Rule unfairly burdens organizations like ATLA which represents a significant and otherwise disproportionately unrepresented portion of the bar, we respectfully request that the Commission withdraw the proposed Rule.

Sincerely,



Kenneth M. Suggs
President