

# EQUAL JUSTICE SOCIETY

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

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Re: Comments on *December 2005 Final Draft Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct*

Dear Members of the Commission:

The Equal Justice Society appreciates this opportunity to file comments regarding proposed changes to the Model Code of Judicial Conduct. We have been apprised of the comments filed by National Association of Women Judges (NAWJ) and the testimony of NAWJ's Executive Director, Drucilla Ramey, before the Commission on February 11, 2006, and we are pleased to endorse and support their Final Comments on the Commission's *December 2005 Final Draft Report*.

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The Equal Justice Society is a nonprofit organization that frequently convenes legal scholars, social scientists, academics from other fields, attorneys and law students to analyze legal policies and practices with a view to promote social and racial justice. The changes proposed initially would substantially curtail the opportunity for judges to address such gatherings or to be honored by organizations such as ours. The need for our greater community to identify judges as potential role models both in the legal field and in the community as a whole should be readily apparent to the ABA. In the tradition of the nonprofit world, awards and honors are frequently scheduled for events that are also fundraising events. Recently, we were able to honor both California Senators at our annual fundraiser. Excluding judges from these types of events would serve only to further distance the judicial system from the larger social context in which it operates.

Major events held by organizations which focus on the legal rights of minorities, women, immigrants, victims of domestic violence and other vulnerable groups are almost always, by necessity, fundraising events. Organizations like ours simply cannot afford to hold a major event that is *not*, at least in part, a fundraiser. (Parenthetically, it is important for the Commission to recognize that CLE events, almost without exception, are fundraising events for the organizations sponsoring them.) Therefore, limitation on judicial participation in such events effectively precludes judges from one of the primary vehicles for meaningful contact with such groups.

Accordingly, we join the NAWJ in urging the following modifications to the proposed rules:

1. Retain the new language in Rule 4.04(B)(3) allowing a judge to “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.**” (emphasis added) (Parenthetically, the Rule’s language should be amended to clarify that its provisions in this regard are in the disjunctive, rather than the conjunctive, thus reading as follows: “...appear at, speak at, receive and award or other recognition at, be featured on the program of, **and/or** permit his or her title to be used in connection with an event...”.)
2. Delete from Draft Rule 4.04(B)(3) the final clause, which currently reads, “unless the organization’s membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client” and add “subject to other provisions of this Code.”
3. Delete the last sentence of Comment [8] to Rule 4.04(B)(3), which currently reads, “For example, it would be inappropriate for a judge to speak at a fundraising event for a specialty bar association whose members are closely identified with certain clients or particular positions on legal issues.”
4. Should the Committee deem it necessary or desirable upon deletion of the above-described language, additional language could be added at the end of Comment [8] along the lines of the language in Rule 4.11, Comment [2], stating in relevant part, “A judge’s decision should be based on an assessment of all of the circumstances, and the judge must undertake a reasonable inquiry to obtain the information necessary to make an informed judgment. The judge should, for example, consider whether the sponsor of the activity is currently appearing or likely to appear before the judge in a matter, thus possibly requiring disqualification of the judge. See Rule 2.12.”
5. Alternatively, the Committee could choose to add language to Comment 8 incorporating the spirit of the salient provisions of Formal Ethics Opinion No. 50 of the California Judges Association Committee on Judicial Ethics (October 12, 2000), and extending their application beyond acceptance of awards to embrace all the forms of participation set forth in 4.04(B)(3). The relevant language of Opinion No. 50 reads, “Judges are free to accept awards from trial lawyers associations, ethnic bar associations... and even, in the proper circumstance, prosecutorial agencies or police departments. When asked to accept such an award, the judge must consider carefully whether acceptance would cast doubt on the judge’s impartiality, demean the judicial office or interfere with the judge’s proper performance of duty... The judge must assess the impact of accepting such an award on a case-by-case basis... [A] judge who accepts an award from an agency that regularly appears in the judge’s courtroom should make it clear that he/she is open to receiving awards from agencies or groups with opposing interests.”

6. Should the Commission reject the above approaches, we recommend that, at a minimum, Rule 4.04 (b)(3) and Comment 8 be amended to include language removing from proscribed activities a judge's attendance at, speaking at, and/or receiving awards at events, including fundraisers, of "...public service organizations that seek improvement in the administration of justice, benefit indigent representation, or assist access to justice..." (cf., Alaska Canon 4(C)(3)(b)(i)) "... Access to justice includes increasing minority representation on the bench, preserving judicial independence, and assisting the advancement of the legal profession." (Commentary to Alaska Canon 4(C)(3)(b))

7. We also recommend that Rule 4.01(D) be amended to read:

**RULE 4.01: EXTRA-JUDICIAL ACTIVITIES IN GENERAL:**

"A judge may engage in extra-judicial activities to the extent that the activities do not:

(D) involve the use of court premises, staff, stationery, equipment, or other resources, unless such use is permitted by law **or is in furtherance of the judge's participation in an organization composed entirely or predominantly of judges that exists to further the educational and professional interests of judges and is authorized by the judge's chief court administrator.**" (emphasis added)

The Rules themselves stress the great importance of extra-judicial community involvement, tempered by the appropriate caveats. For example, as already set forth in Comments [1] and [3] to Rule 4.01, respectively, "To the extent that time permits, and independence and impartiality are not compromised, judges are encouraged to engage in appropriate extra-judicial activities. Such participation will help prevent judges from becoming isolated from their communities, and will further public understanding of and respect for courts and the judicial system." (Comment [1]), and "As a judicial officer learned in the law, a judge is in a unique position to engage in extra-judicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects." (Comment [3]). Similarly, Comment [1] and the first part of Comment [8] to Rule 4.04(b)(3), respectively, state that, "A judge is permitted to participate in civic or charitable activities for the benefit of the community of which the judge is a part, provided that such participation does not take inappropriate advantage of the judge's position, or otherwise interfere with the performance of the judge's judicial duties," and, "Even with respect to law-related civic and charitable organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge's participation in or association with the organization, would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's independence, integrity, and impartiality."

If the second clause of 4.04(B)(3) is intended to apply solely to membership organizations of attorneys, it would clearly sweep within its ambit judicial attendance and/or participation in the events, including educational programs, of groups such as the Association of Business Trial Lawyers, the Defense Research Institute, ATLA, the International Association of Defense Counsel, the American Immigration Lawyers Association, the Federation of Defense and Corporate Counsel, the Federalist Society, the American Constitution Society, state and local trial and consumer lawyers' associations, the National District Attorneys Association, the National Legal Aid and Public Defenders Association, lawyers' groups that represent the victims of domestic violence, and even certain ABA sections, committees and commissions, and might well have a chilling effect on judicial participation in the events of women's and minority bar associations. If Rule 4.04(B)(3)'s prohibition is intended to apply to all of the civic and charitable organizations referred to in the first part of the Comment (as at least one ABA counsel to the Committee believes to be the case), then judges would be precluded from attending the events, presumably including educational programs, of groups such as the NAACP Legal Defense and Educational Fund, Inc., the Mexican American Legal Defense and Educational Fund, and, possibly, the local legal aid society.

This result would ultimately increase the isolation of the courts, damage the reputation of the judicial system and alienate a large segment of legal and non-legal organizations that are working diligently for social justice. We need judges to be role models who are active within our respective communities, not removed from them.

Sincerely



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President

Cc: David Salniker  
Dru Ramey