Community
Rights
Counsel

March 15, 2006

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

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

Dear members of the Commission:

On behalf of Community Rights Counsel (CRC), I would like to applaud the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct for its Herculean effort in producing its *Final Draft Report of December 2005* (*Final Draft Report*). In general, I believe the revised Model Code of Judicial Conduct proposed in the *Final Draft Report* is a step forward, which will serve the judiciary and the public well.

CRC has commented on earlier versions of the Model Code of Judicial Conduct through the joint comments submitted by CRC and HALT on October 15, 2003, through letters to the Commission dated July 14, 2004 and November 19, 2004, and through my testimony before the Commission on August 6, 2004. Some of these comments, such as the concern expressed in my testimony and July 14th letter about the need for changes in the rules on recusal in cases in which a judge owns stock in a party, remain relevant, and I incorporate those comments herein by reference. I appreciate this additional opportunity to comment on the *Final Draft Report.*

In this letter, my comments will focus exclusively on the issue of privately-funded judicial seminars and my concerns with respect to the language and guidance offered by *Canon 4, Rule 4.11 Reimbursement or Waiver of Charges for Travel-Related Expenses of the Judge of the Judge's Spouse, Domestic Partner, or Guest* and the Comments for that Rule.

CRC recognizes the societal and judicial benefit realized from judges engaging in continuing legal education, civic, and charitable activities. However, as our previous submissions to the Commission and numerous studies have detailed, corporations and

special interests use expenses-paid seminars to lobby the judiciary. Serious conflicts of interest and perceptions of impropriety can arise when judges attend private trips. In his September confirmation hearings, Chief Justice John Roberts recognized this problem, stating simply, "I don't think special interests should be allowed to lobby federal judges."

As the Commission may know, on January 27, 2006, Senator Patrick Leahy introduced the Federal Judicial Ethics Reform Act of 2006 (FJERA), a bill that would establish a fund for continuing legal education and would prohibit judges from accepting gifts associated with certain private judicial seminars. This legislation provides the type of bright-line rule that I have recommended in prior comments to the Commission, and that I still think is the best solution to this problem.

With that said, I believe that the *Final Draft Report* is, in important respects, already an improvement to the previous guidance issued by the federal judiciary and the ABA on this topic. If the relatively minor changes proposed below are incorporated into the Comments to Rule 4.11, I believe the Commission will have correctly enumerated the factors a judge should consider when determining whether to attend a particular expenses-paid seminar. These Comments would go a long way toward providing the guidance required to adequately preserve the independence, integrity, and impartiality of the judiciary.

Canon 4, Rule 4.11: Reimbursement or Waiver of Charges for Travel-Related Expenses of the Judge of the Judge's Spouse, Domestic Partner, or Guest

Comment 4 of Proposed Rule 4.11 lists "factors a judge should consider when deciding whether to attend a particular educational activity on an expenses-paid basis."

1. Proposed Rule 4.11 Comment [4](a)

Comment [4](a) states that, when deciding whether to attend a particular educational activity on an expenses-paid basis, a judge should consider:

> "(a) whether the sponsor is an accredited educational institution or bar association rather than a for-profit entity or trade association"

This language is helpful, but the guidance offered to judges is critically incomplete. In prior comments, I noted the importance of distinguishing between judicial seminars run by and at law schools and bar associations on the one hand, and those run by private organizations seeking to advance a particular view on the law, on the other. These private organizations are frequently non-profit corporations that are funded by corporations and other special interests.

The current language of this Comment makes no mention of non-profit entities other than an educational institution or bar association, and will thus leave judges with no guidance on those entities. In this particular respect, the deeply flawed Advisory Opinion

No. 67 (AO67), issued by the Committee on Codes of Conduct of the U.S. Judicial Conference, provides better guidance. Factor (1)(a) of the AO67 states:

> "(a) whether the sponsor is an accredited institution of higher learning or a bar association, which are recognized and customary providers of educational programs; *sponsorship by such a provider usually raises fewer concerns that sponsorships by other entities*;
>
> "(b) whether the sponsor is a business corporation, law firm, attorney, other for-profit entity or a non-profit organization not described above; *invitations by such a provider should be carefully examined by the invited judge*." (emphasis added).

Community Rights Counsel recommends that the Commission amend the language of Comment [4](a) to track the more precise language of AO67. In particular, we recommend that Comment [4](a) be amended to read as follows:

"(a) whether the sponsor is an accredited educational institution or bar association rather than a **corporation, law firm, attorney, other for-profit entity, or a non-profit organization not described above**"

2. Proposed Rule 4.11 Comment [4](e)

Comment [4](e) states that, when deciding whether to attend a particular educational activity on an expenses-paid basis, a judge should consider:

> "(e) whether information concerning the activity and its funding sources are available upon inquiry"

This language should be amended to encourage greater disclosure on the part of the seminar sponsor. The requirement that the "information concerning the activity and its funding sources" be available "upon inquiry" does not designate to whom the information may be available. Basic information about entities paying for a judge's expenses should be made available to the public. Only then can the public be assured that the impartiality of the judiciary is safeguarded. Many sponsoring entities already provide publicly available statements of both their sponsored activities as well as the entities that provide their funding. This Comment should be amended to read as follows:

> "(e) whether information concerning the activity and its funding sources are **publicly** available."

3. Proposed Rule 4.11 Comment [4](f)

Comment [4](f) states that, when deciding whether to attend a particular educational activity on an expenses-paid basis, a judge should consider:

"(f) whether the sponsor or the source of funding are generally associated with particular parties or interests likely to appear in the judge's court"

By using the term "the source of funding," this comment infers that there will be only one source of funding for a particular educational activity. In many instances, a particular event will have more than one source of funding.

Additionally, as I have previously commented, this language appears to limit a judge's required inquiry to the sources of funding for a seminar itself. Under this reading, Corporation X could be litigating an important case before Judge Y, and could contribute 80% of the budget of Sponsor Z, which hosts a trip for Judge Y. As long as Sponsor Z asserts that Corporation X's money was not used for this particular event, Judge Y would have no obligation whatsoever to consider Corporation X's role in bankrolling Sponsor Z. It is not an onerous burden for the sponsors of expenses-paid events to produce a list of their major funding sources (those contributing $10,000 or more to the organization). In fact, many sponsors already do this. Judges should be informed who is paying for their expenses, especially when a litigant may be footing the bill hoping the judge would be influenced by the particular seminar. To clarify, this Comment should be amended to read:

"(f) whether the sponsor**, or a major source of funding (those contributing $10,000 or more) for the sponsor or the activity,** ~~are~~ **is** generally associated with particular parties or interests likely to appear in the judge's court"

4. Proposed Rule 4.11 Comment [4](h)

Comment [4](h) states that, when deciding whether to attend a particular educational activity on an expenses-paid basis, a judge should consider:

"(h) the number of participants, whether a broad range of judicial and non-judicial participants are invited, and whether the program is designed specifically for judges"

This Comment does not clearly indicate the conclusion a judge is to draw when the program is designed specifically for judges or when there is not a broad range of non-judicial participants. Programs designed to target a small, captive audience of judges are more suspect and must be reviewed with greater scrutiny than educational events open more generally to the bar. For clarification, the following sentence should be added to the Comment.

"The judge should more carefully examine an invitation to a program designed specifically for judges or if there is not a broad range of non-judicial participants."

5. Proposed Rule 4.11 Comment [2]

Comment [2] provides that a judge must "undertake a reasonable inquiry to obtain the information necessary to make an informed judgment." While this is a commendable recommendation to guide a judge, this comment does not advise a judge on the appropriate course of action should such information not be made available or if the information is inadequate to make a determination on the propriety of attending the event. This is a second area where AO67's approach is preferable. AO 67 states:

> "If the necessary additional information is not available, whether through public disclosure, disclosure from the sponsor upon inquiry, or other sources, the judge should not attend the seminar. If the information obtained by the judge does not resolve the question concerning the propriety of attendance, the judge should not attend."

Comment [2] should be amended to include this language.

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Thank you for your careful consideration of these comments. If the relatively minor edits suggested in this letter are made, I believe the revised Model Code of Judicial Conduct will do the judiciary and the public a great service by providing workable guidance on the problem of privately-funded judicial seminars.

Respectfully submitted,

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