National Association of Women Judges
1112 16th Street, NW, Suite 520
Washington, DC 20036
202.393-0222

March 15, 2006

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

Re: Final Comments of National Association of Women Judges 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 National Association of Women Judges (NAWJ) again commends the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct on its exhaustive and thoughtful work. NAWJ's Secretary, Massachusetts Appeals Court Justice Fernande Duffly (who also chairs NAWJ's Ethics Committee) and NAWJ's Executive Director, Drucilla Ramey, appreciated the opportunity to testify before the Commission on February 11, 2006, and we are pleased to file at this time our Final Comments on the Commission's *December 2005 Final Draft Report.*

NAWJ previously filed written Comments on the current draft, as well as on two earlier Commission drafts, by letters of February 3, 2006, September 14, 2005 and May 26, 2005, respectively, and first presented oral testimony before the Commission on August 5, 2005. Although we are not in complete accord with all of Commission's most recent amendments in the areas of concern to NAWJ, we applaud the Commission for the substantial positive additions it has made in the Rules and/or Comments dealing with sexual harassment, *ex parte* communications and *pro se* litigants.

In accordance with the Committee's interchange with Justice Duffly and Ms. Ramey at the February 11, 2006 hearing, NAWJ at this time respectfully submits a final summary of our recommended changes to Draft Rule 4.04, as more fully set forth below, plus one additional recommendation not discussed at the hearing regarding use of court resources in connection with judges' organizations. We believe that these recommendations embrace the substantial improvements wrought by the Commission in the current draft with respect to judicial participation in civic and charitable activities, allowing judges to engage in activities that both enhance the understanding and perceived legitimacy of our system of justice in the greater community and broaden and inform a

judge's perspective, while at the same time ensuring both the appearance and reality of a judge's independence, integrity and impartiality.

Rule 4.04(B)(3)

For the reasons set forth in our February 3, 2006 letter, in our February 11, 2006 testimony, and in the discussion below, NAWJ therefore recommends that the Commission:

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, **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. 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 to attend such a function 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 giving the impression that the sponsor is in a special position to influence the judge or possibly requiring disqualification if the judge were to attend the function. See Rule 2.12. Other considerations include whether the purpose of the event is educational and whether the judge pays to attend, both of which are less likely to create an appearance problem."[1]

[1] Alternatively, the Committee could consider the approaches taken in Alaska and California. *See* Alaska Canon 4(C)(3)(b)(i)) (judges' attendance at functions of "…public service organizations that seek improvement in the administration of justice, benefit indigent representation, or assist access to justice…");

RULE 4.01(D)

Although NAWJ has not previously addressed this issue, we, lastly, note that in some state court systems, including, *e.g.*, Massachusetts, a judge's participation in the educational and other activities of judges' associations may be treated, in effect, as an "extra-judicial" activity. Insofar as necessary with respect to the applicable statutory and regulatory framework in any particular state, NAWJ therefore recommends that Rule 4.01(D) be amended to create an exception to the prohibition on a judge's use, for extra-judicial activities, of "court premises, staff, stationery, equipment or other resources" to authorize the reasonable use of such court resources in connection with a judge's participation in judges' associations (*e.g.*, the Conference of Chief Justices, the American Judges Association and the National Association of Women Judges), to the extent consistent with law and local rules of court.

5. NAWJ therefore recommends 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 not prohibited by law or court rule."** (emphasis added to show proposed addition)

DISCUSSION

The paramount importance of allowing judges, subject to appropriate caveats, to participate in the events, including fundraisers, of "civic or charitable organization[s] concerned with the law, the legal system, or the administration of justice" has been

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"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)); Formal Ethics Opinion No. 50 of the California Judges Association Committee on Judicial Ethics (October 12, 2000) ("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.").

thoroughly discussed in the earlier written and/or oral testimony submitted by NAWJ, the ABA Commission on Racial and Ethnic Diversity in the Profession, the National Judicial Education Program, the National Women's Bar Association, the National Bar Association, the American Trial Lawyers Association, and (though time did not permit their oral testimony in February) the ABA Commission on Women in the Profession. Among the reasons that these and other organizations representing disadvantaged populations and specialty bars so strongly urge this position are the following:

- Major events held by organizations which focus on the legal rights of women, minorities, immigrants, victims of domestic violence and other vulnerable groups are almost always, by necessity, fundraising events. These organizations 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.

- 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) (*i.e.*, "unless the organizations' membership includes predominantly lawyers who chiefly advocate a

particular position or represent a particular client or type of client") is intended to apply solely to membership organizations of attorneys, it could be interpreted to 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, as well as 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.

- To the extent that the term "specialty bar", as contained in Comment [8] to Rule 4.04, is a term of art, it is generally understood to include all specialty interest and affinity bar associations, including women's bars, minority bars, Gay, Lesbian, and Transgender bars, and other bars comprised largely of lawyers practicing in a particular substantive area, including tax lawyers' bars, plaintiffs' lawyers bars, the defense bar and clearly the other lawyer membership organizations listed in the above discussion. Thus, this Comment serves to exacerbate the problems created in proposed Rule 4.04(B)(3), further increasing the enforced isolation discussed above

- The practical result of even a narrow reading of these prohibitions will be the further isolation of judges from the communities they serve. The impact of this isolation is not limited to the resulting negative impact on the public's perception of our judiciary. Also significant is the fact that by isolating judges, we deprive them of the salutary effect, in terms of the broadening of experience that comes from leaving the courtroom to participate in civic and charitable events. This benefit of promoting judicial participation in civic and charitable events is particularly significant at a time when the overwhelming majority of judges sitting on our state benches are not evenly drawn from all the diverse populations affected by their rulings. That these judges should be inhibited from seeking out opportunities to broaden their experiences, thereby to enhance

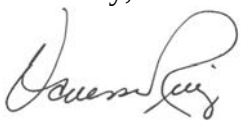
their understanding of the issues facing the diverse populations they serve, is inconsistent with the broad mandates of the Canons themselves.

- Thus, as clearly articulated at the February 11, 2006 hearing by all the relevant speakers, any supposedly "neutral" prohibition in this area would operate to have a disparate and deleterious impact, prohibiting judicial participation in the events of organizations representing sectors of the community which are underrepresented in the system of justice, less likely to be a part of most judges' socio-economic group, and less likely to have a voice on the highly influential boards and committees of "neutral" organizations like the National Center for State Courts, the American Judicature Society and other similarly prestigious and powerful groups.

Lastly, NAWJ urges the Commission to amend Rule 4.01(D), allowing for the use of court resources in connection with judicial participation in organizations composed entirely or primarily of judges that exist to further the educational and professional interests of judges. A judge's participation in judicial education, both in the development and presentation of such programs for judges as well as attendance at and participation in such programs, fulfills a judge's obligations to perform the duties of judicial office competently, as required by Canon 2.04. As such, and to the extent that the use is permitted by applicable law and court rules, a judge should ethically be permitted to make such incidental use of court resources as would facilitate her or his participation and involvement in judicial organizations.

NAWJ again thanks the Joint Commission for this opportunity to further comment on this important draft Report. We look forward to reviewing the final document upon its presentation to the House of Delegates this summer at the ABA Annual Meeting in Hawaii.

Sincerely,



Judge Vanessa Ruiz
President