National Association of Women Judges
1112 16th Street, N.W., Suite 520
Washington. D.C. 20036

May 26, 2005

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

Re: Comments of National Association of Women Judges on *March 2005 Draft Model Code of Judicial Conduct of the Joint Commission to Evaluate the Model Code of Judicial Conduct*

Dear Members of the Joint Commission:

The National Association of Women Judges (NAWJ) applauds the work of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, and is pleased to file the comments set forth below with respect to selected provisions of the *March 2005 Draft Model Code of Judicial Conduct*. NAWJ's commentary is focused on provisions deemed to be of particular concern to its constituency.

Founded in 1979, NAWJ is an organization of over 1,100 federal, state, military, tribal and administrative law judges. Its overarching mission is to ensure equal justice and access to the courts for women, minorities and other vulnerable populations; to increase the numbers, advancement and leadership status of women and minorities on the bench in order to accurately reflect the role of women and people of color in a democratic society; to fight to preserve judicial independence; and to serve as a leading provider of cutting-edge judicial training initiatives focused on issues of particular importance to women, minorities, immigrants, gay men and lesbians, people with disabilities and other historically disadvantaged groups.

1. Bias and Discrimination: Sexual Harassment

NAWJ concurs in the recommendations of the American Judicature Society (AJS) and the National Judicial Education Program (NJEP) that the Canons be amended to strengthen the prohibition on sexual harassment. Given the structure of the currently proposed Draft Model Code, NAWJ recommends that the Code be amended as follows:

Canon 2B (Adjudication), Rule 2.05 (a) should be amended to expressly require that a judge, in the performance of judicial duties, shall not engage in sexual harassment.

Canon 2C (Administration), Rule 2.13 should correspondingly be amended to expressly require that a judge, in the discharge of administrative responsibilities, shall not engage in sexual harassment.

Canon 2B, Rule 2.05 (b) and Canon 2C, Rule 2.14 should each be correspondingly amended to expressly provide that a judge shall require that lawyers and staff, respectively, shall not engage in sexual harassment.

The Commentary applicable to the above Rules should be amended, as recommended by AJS, to state that: "Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, comments about physical attributes, repeated and unwanted attempts at a romantic relationship, sexual gestures, offensive or suggestive remarks, sexually explicit questions, improper touching lewd and vulgar language, suggestive pictures or images, and other verbal or physical conduct of a sexual nature that is unwelcome, regardless of gender."[1]

Discussion

While some within the NAWJ membership reasonably assumed that judges are aware that sexual harassment is implicit in the notion of inappropriate conduct, the evidence appears to be to the contrary. Rather, as documented by dozens of gender bias studies by courts, bar associations and law schools, and as highlighted in the comments already filed by AJS, NJEP and others, the unfortunate reality is that sexual harassment--by judges, attorneys and supervisory court personnel--continues to be a significant problem in our nation's courts, effectively depriving female, and some male, attorneys and litigants of equal access to the system of justice and denying court employees and less senior judges equal employment opportunity.

Sexual harassment by judges is a particularly dangerous and destructive form of misconduct constituting a grievous, often legally actionable, violation of the public trust. Victoria Henley, Chief Counsel of the California Commission on Judicial Performance (CCJP), has noted that 40% of the publicly reported CCJP cases in 2004 in which punishment for judicial misconduct was imposed involved sexual harassment, including that of a judge making sexual propositions in chambers to victims of molestation and rape. Ms Henley also emphasized that these cases, more than any other, can result and have resulted in criminal convictions and substantial civil damage recoveries against courts.[2] It was for this reason that California first expressly included sexual harassment in its Commentary, and, more recently, in light of the continuing numbers and seriousness of the reported cases, incorporated the express prohibition of sexual harassment into the language of the Canon itself.

Yet, as noted with great concern by both AJS and NJEP, a concern shared by NAWJ, the Joint Commission's proposed March 2005 amendments actually *weaken* the

[1] AJS Proposals to Amend the 1990 ABA Model Code of Judicial Conduct Submitted to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, March 2004, p. 4

[2] Telephone conversation between Drucilla Ramey and Victoria Henley, 3.14.05

existing Canons with respect to sexual harassment by removing the express reference to sexual harassment which is currently contained in the Commentary to Canon 3B(5), and adding no express reference to sexual harassment in the new Rule applicable to such conduct.

As noted by NJEP in its emphatic objection to this inexplicable move in what is perceived to be the wrong direction, "The Commission's proposal to eliminate this language is extremely puzzling given the testimony submitted by the [AJS] and the [NJEP] on the need to strengthen the prohibition on sexual harassment with a new Canon and Commentary that provides an explicit, non-exclusive list of what constitutes sexual harassment." [3]

NAWJ finds this all the more disturbing in light of the fact that the Commission's proposed Commentary [3] to Rule 2.05 adopts nine (9) of the specifically enumerated kinds of prohibited biased conduct suggested by AJS, including acts "suggesting a connection between race or nationality and crime," but excludes AJS's tenth enumerated manifestation of biased conduct, "insensitive statements about crimes against women." Among the examples of illustrative horrific cases cited by AJS in its July 2004 Comments are a judge's query to a police witness as to whether the alleged assault was "just a Saturday night brawl where he smacks her around and she wants him back in the morning" and advice to the defendant to "watch your back" because "women can set you up", and a case in which the judge told the defendant,"…You didn't need to bite her. Maybe you needed to boot her in the rear end, but you didn't need to bite her."[4]

NJEP Director Lynn Schafran, with whom NAWJ has worked closely for over 20 years, cites in her Comments on this issue three egregious, but unfortunately not unique, cases in New Jersey, Nebraska and Illinois, respectively, involving judicial sexual harassment of employees and the absence of effective court response thereto. In one case, "[T]he judge initiated talk of sexual relations, bragged of his sexual prowess, asked her about her views on premarital sex and various sexual acts, questioned her about her underwear, attempted to place her hand on his crotch, and touched her inappropriately." (The judge resigned as the New Jersey Assembly was considering impeachment proceedings). In a second case, the judge's actions included "…repeatedly touching [the plaintiff clerk's] buttocks as she entered the courtroom, asking her to sit on his lap, pressing her to come to his hotel room, watching her home…and walking into her home unannounced without knocking." In a third, pending case, "[W]hen [the judge] learned [the employee] was seeking a divorce, he offered to buy her a vibrator so she would not 'mess around' with other men, told her he wanted her to 'sit on his face', and told her he would kill her if he learned she was 'shacking up for another man.'"[5]

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[3] Memorandum from Lynn Hecht Schafran, Director of the National Judicial Education Program, to ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, responding to Draft Revision of Canon 1 and Canon 2, July 8, 2004, p. 2.

[4] AJS Comments on May 2004 Partial Draft of Revisions to ABA Model Code of Judicial Conduct, July 2004, pp. 3-4 (hereinafter "AJS May 2004 Comments")

[5] Testimony to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct, submitted by the National Judicial Education Program, April 2004, pp. 3-6 (hereinafter "Schafran Testimony")

In conclusion, NAWJ concurs in NJEP's stated rationale for the need for the above-recommended express and for a separate focus on sexual harassment in the Canons, including:

> "…the significant harm to victims; the indifference to this harm often displayed by state court systems when they are asked to intervene; the failure of some court systems to have effective sexual harassment policies and training programs in place; the trivializing attitude sometimes displayed by judicial conduct commissions toward complaints of sexual harassment by judges; [and] the damage to public trust and confidence in the courts when the community learns of judges' misconduct and court systems' failure to respond appropriately."[6]

2. <u>Ex Parte Communications</u>

Canon 2 (Judicial Conduct), Rule 2.09 (Ex Parte Communications) should be amended to address and authorize the special procedures adopted for judges sitting in specialized problem-solving courts, subject to the proviso proposed by AJS that, "[A] judge should avoid communications that in substance, extent, or type exceed what a defendant may reasonably be considered to have consented to when agreeing to participate in the specialized court."[7]

<u>Discussion</u>

Eileen C. Gallagher's Winter 2005 article on the Joint Commission's body of work observes that the Reporter's Memo accompanying the release of the Canon 2 draft "…notes that some observers have expressed concern that the ex parte communications rule does not sufficiently address communications that are required or encouraged for judges serving on specialized courts—often referred to as problem-solving courts—such as drug courts, or mental health courts. The role of the judge in these courts requires a very different level of involvement with the defendant, including close interactions to monitor progress." [8]

Many NAWJ members shared this concern, and we base our recommendation on the reasoning articulated by a member who is a drug court presiding judge. "Fundamentally, this Rule presumes that there are no proceedings of any substance for which counsel of record would not have the right to prior notice and an opportunity to be heard before a decision is made by the judge. This presumption does not apply to certain kinds of 'therapeutic courts,' such as 'drug courts.' In these special situations, criminal defendants often waive their rights to various formal procedural steps.

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[6] Schafran Testimony, p. 3

[7] AJS May 2004 Comments, p. 5

[8] The ABA Revisits the Model Code of Judicial Conduct: A Report on Progress," by Eileen C. Gallagher, published in The Judges Journal, Volume 44, No.1, Winter 2005, American Bar Association

Thus, the ground rules of a therapeutic court usually depart considerably from the formal rules of criminal procedure. For example, most drug courts are those using treatment programs that are expressly requested by the defendant. Some involve formal contracts that include an agreement to submit to the exercise of very broad discretion on the part of the judge and an agreement to be bound by the judge's decision without the usual adversarial exchange between lawyers.

Most drug courts also have as a key component the imposition of immediate sanctions for evidenced violation of behavioral rules, such as a positive urine test, failure to submit to a urine test, or failure to attend a sanctions hearing. One important premise of judicial involvement is that a sanction is imposed swiftly, without formal written notice to defense counsel or the defendant, and with the judge having discretion to narrow or broaden the scope of the hearing on the matter. While many drug courts do supply appointed counsel for indigent defendants, voluntary participation in a drug court regimen may carry with it the defendant's consent to judicial sanctions without the presence of counsel and with the input of treatment staff and others.

Rule 2.09 (b), in particular, mandating that the judge "shall not independently investigate facts in a case", is completely contrary to the discretion ordinarily exercised by judges in therapeutic courts. In determining whether sanctions should be imposed and, in many instances, whether the defendant should be discharged from the treatment program altogether, judges in these courts regularly solicit open-court observations about the defendant's conduct, his or her out-of-court statements and behavior and other relevant facts. To be sure, it is appropriate for such decisions to be on the public record. However, the prohibition against "independent investigation of the facts" is impliedly a prohibition against seeking additional evidence, such as the results of computerized drug test information. In drug courts, and other special courts as well, it is now common for judges to have, and use without any impediment, computer access on the bench to numerous kinds of information.

The Rule should contain an express provision that recognizes the unique information-gathering and adjudicatory functions of judges in specialized, therapeutic courts, including the fact that the judge's function may often entail searching the facts and probing into matters that are raised solely by the judge. There need not be inordinate new detail in the Rule, because there are so many permutations of therapeutic courts across the country. A brief, common-sense recognition in the Rule of the nature of the operations of such courts will prevent unnecessary, presumably unintended interference with the ability of such courts to successfully function. This should not be relegated to Commentary."

3. <u>Disability and Impairment</u>

NAWJ supports the Commission's recommended addition of the new Rule 2.19 and its Commentary as necessary and appropriate to respond to a significant problem in the fair and diligent administration of the system of justice, and one that

will save lives and careers. The Rule requires that, "A judge having knowledge that the performance of a lawyer or another judge is impaired by drugs, alcohol, or other mental, emotional and/or physical condition shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program."

4. <u>Affiliation with Discriminatory Organizations</u>:

NAWJ believes that the currently proposed language of Canon 3 (Personal Conduct), Rule 3.03 (Affiliation with Discriminatory Organizations) appropriately addresses its prohibitions to "invidious" discrimination, and appropriately prohibits membership in such organizations or use of the facilities of such an organization to any significant extent.

<u>Discussion</u>

Invidiously discriminatory clubs continue to represent a significant barrier to the advancement of women, racial and ethnic minorities, gay men and lesbians and religious minorities in business and professional life. Judges, who are publicly entrusted with making critical and legally binding decisions affecting the lives of the litigants who come before them, must conduct their personal affairs in such a manner as to avoid the appearance or reality of tolerance or support of discrimination in any form. This rule appropriately prohibits judges' membership in, or significant use of the facilities of organizations practicing arbitrary and irrational discrimination, thereby precluding doubt as to the judge's impartiality or lack of bias.

The currently proposed language of Canon 3, Rule 3.03 appropriately amends the Rule to include "sexual orientation" as an additional prohibited basis of discrimination subject to the Rule's prohibitions.

<u>Discussion</u>

Many private organizations to which this Rule applies invidiously discriminate on one or more of the currently prohibited bases, but also discriminate on the basis of sexual orientation. For the same reasons relating to the appearance or reality of bias of other kinds, the Rule's prohibitions properly should be expanded to include this additional, not uncommon and equally reprehensible basis for ongoing invidious discrimination by certain private organizations.

Commentary [1] to Canon 3, Rule 3.03's exclusionary language must be narrowly construed to ensure that it does not swallow up the Rule itself.

<u>Discussion</u>

Commentary [1] excepts from the Rule's prohibitions a judge's membership in "an organization dedicated to the preservation of religious, ethnic or legitimate cultural

values of common interest to its members, or one that is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutional prohibited." While it does not oppose this language, NAWJ wishes to express its concern that the language must not be construed to apply to any but an extremely narrow group of exceptions, if any, to this important prohibition.

5. Civic or Charitable Activities

Canon 4, Rule 4.04 (a) (2) appropriately broadens the scope of a judge's permissible civic and charitable activities, so long as such activities do not otherwise violate the Code.

Discussion

Commentary [5] is particularly useful in clarifying questions which have been troublesome gray areas for judges, by stating, for example, that "…a judge may, for example, accept an invitation to speak at or be recognized or honored at an event hosted by a legal organization, law school, or other entity devoted to improving the law, the legal system or the administration of justice, even if such an event raises funds for the benefit of the sponsoring organization." (emphasis added)

6. Political Activity

Canon 5, Rule 5.04 (Prohibited and Permitted Political Activity of Candidates for Judicial Office in Non-Partisan Public Elections and Retention Elections) should be bifurcated into two separate groups of rules applicable, respectively, to (1) non-partisan public elections and (2) retention elections.

Discussion

As noted by several NAWJ members is states with pure retention systems, the same conduct may produce variable, and sometimes unintended, consequences, depending on whether the jurisdiction is one characterized by non-partisan public elections or one characterized by pure retention elections. Therefore, separate rules should be promulgated for each respective type of system.

7. Appearance of Impropriety

Discussion

Opinions varied widely within NAWJ's membership with respect to the overarching issue of the Commission's proposed changes in the Canons' prohibitory provisions relating to judicial conduct which creates the appearance of impropriety. Some felt it imperative that the Canons clearly prohibit conduct which creates the

appearance of impropriety even if such conduct does not necessarily violate any other specific rule. Others felt that such a standard is too vague to put judges on notice of conduct which might be prohibited, and, therefore, not an adequate basis for discipline. As a result of these differing views, while NAWJ is not proposing a recommendation on this issue, the organization offers the following observations.

The current Code prohibits conduct creating the appearance of impropriety in the title to Canon 2, but not in its individual sections. Therefore, enforcement has largely been based on the current Canon 2A's provision that, "A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

In order to respond to objections of vagueness and difficulty of enforcement of the current Canons (concerns which are shared by some NAWJ members), the Committee's current draft: (1) eliminates the current Canon 2A directive, (2) while retaining in the title to the newly proposed Canon 1 the "appearance of impropriety" language (though titles in the newly proposed Code now serve more as general outlines and guiding principles, rather than binding rules); and (3) while also including within Rule 1.01 the admonition that, "A judge shall observe the high standards of conduct embodied in these Rules so that the integrity, impartiality, and independence of the judiciary, and the public's confidence therein, are promoted and preserved."

The Commentary to Rule 1.01 contains the proviso, however, that, "Ordinarily, when a judge is disciplined for engaging in conduct that creates an appearance of impropriety, it will be in conjunction with charges that the judge violated some other specific rule under this or another Canon."

Some within NAWJ strongly oppose this new formulation of the "appearance of impropriety" standard, believing, as articulated by an NAWJ member who serves as a Justice of a state Supreme Court, that it misinterprets governing case law across the country, and "also seems to create a presumption that without charging another actual impropriety along with the appearance, an appearance of impropriety alone will not suffice for discipline."

This Justice notes that in three of the five highly publicized instances in which her Court has sanctioned a judge, it was solely on grounds of the appearance of impropriety. "The case law in our state," she states, "has thus developed to create a legal standard that provides a benchmark for determining when a judge has violated the public's trust through actions that technically comply with the law." She concludes that, "It is important that the Model Code of Judicial Conduct provide not only guidance for the ethical conduct of judges, but also a statement to the public that the judiciary demands the highest standards for itself. By eliminating the current 'appearance of impropriety' standard and reducing the standard to merely complying with the law, the judiciary is lowering our own standards in a way that leads to a further erosion of the public's confidence in the impartiality of the judiciary."

AJS has similarly commented that, "The current model code serves both as an inspiration for judges and a set of rules that can form the basis of discipline. Many of the changes in language proposed in the draft undermine the aspirational function of the code, a step that AJS believes is ill-advised. The draft suggests that judges should follow the rules and not worry about conduct that has not been captured in a specific rule even if it undermines public confidence in the judiciary." Citing the "appearance of impropriety" changes as a prime case in point, AJS comments that the Committee's proposal "neither helps a judge interpret the standard prospectively nor appropriately limits what the conduct commissions can do", and that the proposed definition of "impropriety" is both less clear than that contained in the current version and more suggestive "of a disability definition than a misconduct definition." [9]

NAWJ is hopeful that the Commission will take the above views into consideration as it completes its formulation with respect to this issues.

8.<u>Gender Neutral Language</u>

NAWJ joins NJEP in urging that in light of the overwhelming consensus of Gender Bias studies across the country, the Commission should include in its final report a comment on the need for states to ensure the gender neutrality of the language in their respective codes of judicial conduct.

[9] AJS July 2004 Comments, pp. 1-2