

## SUMMARY

### National Association of Women Judges

May 26, 2005

#### **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. NAWJ makes a number of specific recommendations for amendments to the Code. It is an 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.

#### **2. Ex Parte Communications**

**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.”<sup>1</sup>**

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.

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<sup>1</sup> AJS May 2004 Comments, p. 5

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. Disability and Impairment**

**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. Affiliation with Discriminatory Organizations:**

**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.**

#### **Discussion**

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.

**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.**

#### **Discussion**

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.**

### **Discussion**

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 in 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. Gender Neutral Language**

**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.**