National Judicial Education Program Testimony to the
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct
Respecting the Commission's "Final Draft" Published December 2005
by
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The following comments are offered in response to the Commission's "Final Draft," published in December 2006.

Canon 2, Rule 2.02, Comment [4] re Sexual Harassment:

My thanks to the Commission for responding to the several requests, mine among them, to restore specific mention of sexual harassment to the Model Code of Judicial Conduct after it was eliminated in a preceding draft. While we are disappointed that this prohibition did not achieve canonical status in your revision, we appreciate the addition to the Commentary to Canon 2, Rule 2.02 of language stating that "[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature that is unwelcome, regardless of gender."

Canon 4, Rule 4.01: Extra-Judicial Activities in General and
Rule 4.04: Participation in Civic or Charitable Activities (A)

Again my thanks to the Commission for responding to the several requests, mine among them, for what I described in my April 2004 testimony as the urgent need to clarify judges' involvement in government commissions and in all community activities, and to do so by casting the relevant Canon and Commentary "in more positive language to clearly affirm that judges *can and should* be active in both community outreach and membership in or assistance to specific commissions, within the parameters of the code of judicial conduct."

The new language in Canon 4, Rule 4.01, Comment [1] stating that "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 the courts and the judicial system" is most welcome. Likewise the positive language in Rule 4.04 (A) stating that "Subject to the requirements of Rule 4.01, a judge *may* participate in activities on behalf of civic or charitable organizations…" (emphasis supplied) and the new text of Comment [3] to Rule 4.01 which states:

> 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. In addition, judges are

> permitted and encouraged to engage in civic or charitable extra-judicial activities, whether or not the activities involve legal subject matters, so long as the judge complies with this Rule and other provisions of this Code; see Rule 4.04

Canon 4, Rule 4.04 Participation in Civic or Charitable Activities

Unfortunately some of the language in Rule 4.04 (B) is so broadly and vaguely drawn that it threatens to swallow the encouraging language of Rule 4.01.

Rule 4.04, B (3) states that a judge:

> may 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, *unless the organization's membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular type of client;*(emphasis supplied).

Similarly, Comment [8] to this rule states:

> 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. *For example, it would be inappropriate for a judge to speak at a fund-raising event for a specialty bar association whose members are closely identified with certain clients or particular positions on certain legal issues.*(emphasis supplied).

Questions About Rule 4.04, B (3) and Comment [8]:

This language could take in a tremendous range of organizations and types of participation. What precisely is the Commission's intent? Is it only to restrict participation in fund-raising? Or, since the fund-raising event is given as but one example, does it go beyond fund-raising to restrict speech-making and participation in continuing legal education?

What is a "specialty bar"? This phrase is not defined in the Terminology section. Is it a bar devoted to a specific issue such as immigration or taxation? Is it a bar devoted to a particular type of membership, such as the National Bar Association, whose members are largely African-American, or the Florida Association of Women Lawyers? Does this

provision mean that a judge could participate in a program about immigration law for a plenary session of a state bar association but not for a bar association composed of immigration lawyers? What about bar association sections which are organized around a specialty? Could a judge speak to the Immigration Law Section of a state bar, or the Individual Rights and Responsibilities Section of the ABA? If the Commission decides to maintain this restriction, which I hope it will not, it must define the term with specificity so judges will know where they may not go.

In addition to specialty bars, the draft rules out judges' involvement with organizations "*whose membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular type of client.*" What would that mean to an organization like New York City's Lawyers Committee Against Domestic Violence? This is a membership organization of lawyers who represent a particular type of client and advocate particular positions. Each year the Lawyers Committee organizes a two-day conference at Fordham Law School. Attached to my statement is the announcement for this year's event, "Exploring Cross-Border Dilemmas of Domestic Violence Survivors with Children." Not only do the many speakers include six state judges and a federal judge, but the co-sponsors include the Appellate Division, First Department in its entirety. Would judges' participation in this event be barred under the Commission's Final Draft?

What about an organization like the National District Attorneys Association and its research and training arm, the American Prosecutors Research Institute (APRI)? The NDAA describes itself as "the nation's largest, primary and most influential organization of prosecuting attorneys." APRI presents continuing legal education programs across the country on issues such a prosecuting domestic violence and sexual assault. Judges are on the advisory committees for and teach at these programs. Would that be prohibited?

How should a judge decide when an organization that *represents a particular type of client* is composed <u>*predominantly*</u> *of lawyers*? At the National Judicial Education Program's train-the trainers programs for our *Understanding Sexual Violence* curriculum, we explore with judges how they can be involved in community outreach on this topic without violating the code of judicial conduct. Two Colorado judges who participated in one of these training programs subsequently gave a wonderfully interactive, highly praised workshop at the annual meeting of the Colorado Organization for Victims Assistance (COVA). These judges demystified the process of how the court system works in sexual assault cases and explained the restrictions on the judge, why a judge might accept a plea bargain in a case that seems to call for millennia in prison and so forth.

COVA has over 900 members, most of which are other organizations, as opposed to individuals. Of these organizations, most are law enforcement or victim based, and therefore the majority have attorneys who are members of those organizations. There is no way a judge could know exactly how many attorneys are involved in the organizations that are members of COVA. Under the Commission's new rule, could judges continue to make presentations about court process at COVA conferences?

In its written submission to this Commission objecting to the apparent wide sweep of Rule 4.04,B (3) the National Association of Women Judges observes:

> The practical result of even a narrow reading of this prohibition 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 white, male and middle-class. 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 troubling as well as inconsistent with the broad mandates of the Canons themselves.

The need for judges who are not themselves a diverse population to be exposed to input from all the communities they serve cannot be overstated. The Commission should not assume that this will become less and less of a concern because the judiciary is becoming more and more diverse. We have just seen the female membership of the United States Supreme Court reduced by half, and Justice O'Connor's successor is not a man of color. In Massachusetts the governor has appointed only three women out of nineteen judges ove ra two year period, "a record that threatens to recast the judiciary as the white male bastion it once was." (Eileen McNamara, "Backtracking on the Bench," Boston Globe Feb. 6, 2005.) Alaska's governor has named only one woman in his 20 judicial selections, reversing his five immediate predecessors' records and driving the percentage of women judges in his state back to its 1988 level. In my own state of New York our governor's last seven appointments to the Appellate Division First Department covering Manhattan and the Bronx are all white men. As a retired African-American appellate justice told the New York Times, "If you walk in and the bench is all white, you got a real problem selling there's justice to black and Hispanic people." (Justice William Thompson (ret) quoted in Joyce Purnick, "To Reach Pataki Judges, Take Highway, New York Times, Feb. 7, 2006 at B1,4.)

Does the Commission really mean to prohibit judges from participating in the programs of the NAACP Legal Defense and Educational Fund, Inc., the Puerto Rican Legal Defense Fund and the Legal Aid Society?

Questions about Rule 4.04 (B) (4) re Recuitment

The Commission's Final Draft contains a new rule respecting recruitment. Subject to the requirements of Rule 4.01,

> [A judge] may recruit members for an organization concerned with the law, the legal system, or the administration of justice, even though the membership dues or fees generated may be used to support the objectives of the organization.

While Rule 4.04(B)(4) is, like Rule 4.04 (B) (3), subject to the restrictions articulated in Comment [8], it seems odd that (3) includes in the Canon itself language restricting involvement with lawyers' organizations that chiefly advocate a particular position or represent a particular type of client while (4) does not. Surely it is more objectionable for judges to be out recruiting for an organization than to give a speech or participate in a continuing legal education program for that organization. While we all recognize that having judges involved in a program lends the organization cachet which is itself an inducement to join, lending some prestige for an evening seems quite a different animal than being a recruiter.

Recruitment is another form of fundraising and can be coercive. If the judge asks you to join an organization that she or he supports and you don't, will your clients pay for it in that judge's court?

New Language

In its submission to this Commission the National Association of Women judges urges elimination of the objectionable language in Rule 4.04 (B)(3) and adoption of California's rule in this area. Peter Moser has also submitted a statement objecting to the 4.04 (B) (3) language discussed above and offering a revision.

I am familiar with the California position and have urged states across the country to adopt it in order to provide their judges with clear guidance in this area. I would also welcome Peter Moser's formulation. However, I find it difficult to know what to suggest because I am unclear about what the Commission actually meant. I have heard about interpretations by one of the Commission's counsel and one of its reporters that are at odds with each other. I therefore suggest that the Commission first provide an explanation of exactly what it hoped to accomplish with the language in question, after which the organizations and individuals concerned with this issue can respond appropriately.

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