

March 14, 2006

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

Re: Comment on Final Draft Report of the ABA Joint Commission to Evaluate
the Model Code of Judicial Conduct

Dear Members of the Commission:

The National Foundation for Judicial Excellence (“NFJE”) is a not-for-profit corporation organized under the laws of the State of Illinois in 2004 for the purpose of providing privately funded educational programming to judges serving on state courts of last resort and intermediate courts of appeal having jurisdiction over civil suits. Having reviewed the Final Draft Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct (the “Commission”), the NFJE has concerns about the last clause recently added to Rule 4.04(B)(3) (“PARTICIPATION IN CIVIC OR CHARITABLE ACTIVITIES”). While the language appears in context to have been included merely to carve out specialty bar groups from the set of civic and charitable organizations at whose fundraising events judges may permissibly appear, speak or receive an award or other recognition, the language may nonetheless cause unintended confusion regarding judges’ ability to heed the encouragement given in Comment [1] to Rule 4.11 to attend privately funded law-related educational programming where such attendance is consistent with the requirements of the Model Code of Judicial Conduct as proposed in the Final Draft Report. Accordingly, the NFJE requests that the Commission either delete the last clause of Rule 4.04(B)(3) or modify the rule to clarify that it is not intended to prohibit attendance at educational programming that does not have as its purpose fundraising for the sponsoring organization.

Discussion

A. Evolution of Rule 4.04(B)(3).

The basis for the NFJE’s inference that the last clause of Rule 4.04(B)(3) has been added merely to remove specialty bar groups from the set of civic and charitable organizations at whose fundraising events judges may permissibly appear, speak or receive an award or other recognition is found in the evolution of the rule.

1. Current Canon 4.C.

Judges’ participation in the activities of civic or charitable organizations is addressed in Canon 4.C of the current Model Code of Judicial Conduct. Focusing specifically on the subject of judges’ participation in the fundraising activities of such organizations, Section 4.C(3)(b) provides:

(b) A judge as an officer, director, trustee or non-legal advisor, or as a member or otherwise:

(i) may assist such an organization in planning fund-raising and may participate in the management and investment of the organization's funds, but shall not personally participate in the solicitation of funds or other fund-raising activities, except that a judge may solicit funds from other judges over whom the judge does not exercise supervisory or appellate authority;

(ii) may make recommendations to public and private fund-granting organizations on projects and programs concerning the law, the legal system or the administration of justice;

(iii) shall not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund-raising mechanism;

(iv) shall not use or permit the use of the prestige of judicial office for fund-raising or membership solicitation.

The Commentary section immediately following Section 4.C(3)(b) directs that a “judge must not be a speaker or guest of honor at an organization’s fund-raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code.”

2. The Commission’s Preliminary Draft Report.

On July 19, 2004, the Commission issued its draft of partial proposed revisions to Canon 4, including Rules 4.01 through 4.12. In its accompanying memorandum, the Commission noted that proposed Rule 4.04 would broaden the scope of permissible judicial participation in the activities of civic or charitable organizations by permitting “a judge to speak, be recognized or honored at an event sponsored by a variety of law related entities even where the event raises funds for its sponsor.”

In the Commission’s Preliminary Draft Report (issued June 15, 2005) this concept was carried forward in Rule 4.04(B) in the form of an exception to otherwise prohibited activities relating to civic or charitable organizations. Thus, according to the draft of Rule 4.04 as presented in the Preliminary Draft Report, whereas a judge would be forbidden to “use or permit the use of the prestige of judicial office for fundraising or membership solicitation” for the organization (Rule 4.04.B(1)(a)), “personally solicit funds for the organization ... ,” (Rule 4.04.B(1)(b)), or “personally participate in membership solicitation if the solicitation is primarily a fundraising mechanism ... ,” (Rule 4.04.B(1)(c)), a judge *would* be permitted by Rule 4.04.B(2)(c) to ...

... appear at, participate in and permit the judge's title to be used in connection with an event of an organization devoted to the improvement of law, the legal system or the administration of justice, even though the event may serve a fundraising purpose.

Comment [7] following Rule 4.04.B in the Preliminary Draft Report provided that:

Judges are an integral part of the legal community and may participate as judges in the activities of organizations within the legal community without inappropriately lending the prestige of office to those activities, even when they serve a fundraising purpose. Therefore, 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.

3. The Commission's Final Draft Report.

The Commission's Final Draft Report addresses the subject of judges' participation in the fundraising activities of civic or charitable organizations in Rule 4.04(A) and (B). The concept expressed in Rule 4.04.B(2)(c) of the Preliminary Draft Report now appears in Rule 4.04(B)(3), where it has been modified to state 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 client or type of client

Comment [8] following Rule 4.04 in the Final Draft Report counsels that judges should be circumspect regarding whether their participation in or association with a civic or charitable organization would conflict with the obligation to refrain from activities that reflect adversely on the judge's independence, integrity and impartiality, citing as an example that "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."

B. Proposed Modification or Clarification of Rule 4.04(B)(3).

The reason for the NFJE's concern is that, in the form proposed in the Final Draft Report, Rue 4.04(B)(3) might allow at least some argument that the restrictive clause "unless the organization's membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client" should not be limited to the

circumstance described in the immediately preceding clause – *i.e.*, “even though the event may serve a fundraising purpose,” but rather applied to the entire text of the rule, with the result that a judge “may appear at ... an event of a civic or charitable organization concerned with the law, the legal system or the administration of justice ... unless the organization’s membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client.”

For the reasons given above, it seems apparent to the NFJE that the intended purpose of the recent addition of the modifying clause “unless the organization’s membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client” to Rule 4.04(B)(3) is merely to carve out from the set of civic and charitable organizations at whose fundraising events judges may permissibly “appear, speak or receive an award or other recognition” those sorts of organizations that Comment [8] refers to, without definition, as “specialty bar associations.” Not only is such an interpretation suggested by both the evolution and context of Rule 4.04(B)(3) and accompanying commentary, it is also consistent with basic principles of statutory construction in two respects.

First, it conforms to the “rule of the last antecedent.” According to that principle of construction, “a limiting clause or phrase ... [here “unless the organization’s membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client”] should ordinarily be read as modifying only the noun or phrase that it immediately follows ... [here “even though the event has a fundraising purpose”].” *Barnhart v. Thomas*, 540 U.S. 20, 26, 124 S.Ct. 376, 380 (2003). Thus understood, Rule 4.04(B)(3) would have no application to the issue of propriety of a judge’s attendance at educational programming sponsored by a civic or charitable organization that does not have fundraising as its purpose.

Second, while Rule 4.04 deals specifically with the regulation of judges’ participation in the fundraising and membership solicitation activities of civic or charitable organizations, separate parts of the proposed revisions to the Model Code of Judicial Conduct have been drafted specifically to address judges’ attendance at privately funded, law-related academic programming – namely, Rule 4.11 and Comment (enabling provisions that permit judges to attend educational programs on an expense-reimbursed or expense-waived basis) and Rule 4.10(A)(3) (which in appropriate circumstances excludes “an invitation to ... [a] judge ... to attend without charge a bar-related function or other activity related to the law, the legal system or the administration of justice” from the scope of prohibited gifts). Comment [1] to Rule 4.11 affirms that judges “are encouraged to participate in educational programs in law-related and academic disciplines, in furtherance of their duty to remain competent in the law ... ,” and, where consistent with the requirements of the Code, Rules 4.10(A)(3) and 4.11 provide that judges may attend such programming on an expense-reimbursed or expense-waived basis. The determination of whether acceptance of any particular invitation to attend an educational program on an expense-reimbursed or expense-waived basis is consistent with the requirements of the Code is committed to the sound discretion of the invitee judge after consideration of the appropriate factors discussed in the Comment accompanying Rule 4.11. There is nothing in the enumerated factors that mandates that a judge be prohibited from accepting an invitation to attend a program related to improvement of the law, legal systems or the administration of justice that does not have as its purpose fundraising for the sponsoring organization merely

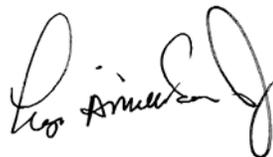
because the organization's membership includes predominantly lawyers who primarily advocate a particular position or represent a particular type of client.

The NFJE notes that the potential for misunderstanding created by the addition of the last clause of proposed Rule 4.04(B)(3) has led the National Association of Women Judges to advocate for the deletion of this "problematic" language. The NFJE concurs with this recommendation in order to eliminate altogether any confusion regarding judges' ability to heed the encouragement given in Comment [1] to Rule 4.11 to attend privately funded law-related educational programming where such attendance is consistent with the requirements of the Model Code of Judicial Conduct as proposed in the Final Draft Report. If, however (1) the intent of the Commission in inserting the last clause of Rule 4.04(B)(3) is consistent with the NFJE's understanding (as explained above), and (2) the Commission determines after consideration of all comments to retain that intent, in that event the NFJE recommends that Rule 4.40(B)(3) be revised to read as follows:

(3) 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; provided, however, that if the civic or charitable organization's membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client, a judge may only 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 that does not have as its purpose fundraising for the sponsoring civic or charitable organization.

The NFJE appreciates this opportunity to comment on the Commission's Final Draft Report.

Sincerely,

A handwritten signature in black ink, appearing to read "Lloyd H. Milliken, Jr.", written in a cursive style. The signature is positioned to the left of a vertical red line.

Lloyd H. Milliken, Jr.
President