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

Dear Commissioners:

I appreciated the opportunity to address you in person at your Chicago hearing on February 11, 2006 concerning the draft version of Rule 4.04(b)(3). I submit these written comments to supplement that oral testimony.

My name is Robert S. Peck, and I am president of the Center for Constitutional Litigation, P.C., a private law firm in Washington, D.C. Among our clients are the Association of Trial Lawyers of America (ATLA) and approximately 20 state trial lawyer associations. It may be noteworthy, given the subject matter, that I have previously taught professional responsibility at the law school at American University, where I now teach an advanced constitutional law seminar, alternating semesters with George Washington University School of Law. I have also long been an active ABA member and currently serve on the Council of the Tort, Trial and Insurance Practice Section, as well as the ABA Commission on the American Jury Project.

As proposed, Rule 4.04(b)(3) would prohibit judges from speaking or receiving an award at certain lawyers association events for which members are charged a registration fee,[1] including bar conventions and continuing legal education courses, if members of that lawyers'

[1] It is difficult to come up with a convincing rationale that speaking at an event that generates revenue creates a distinction of ethical dimension, while speaking at a free event does not. Although there are a handful of judges who may qualify as "headliners" who might generate revenue by virtue of their participation, the typical convention agenda or CLE program of the specialty bars do not rely on judicial speakers for their marketing. It also appears that the proposed rule could easily be evaded by not requiring a registration fee for the event in which the judge participates or by excluding that particular panel from the events for which a registration fee is paid. If, however, judicial participation is a draw for a paying audience and the proposed rule's prohibition is applicable to specialty bars but not to general bars like the ABA, then a potential restraint of trade issue is created whereby the ABA has promulgated a rule that favors its own programming at the expense of others. *See, e.g.,* Wilk v. American Medical Ass'n, 895 F.2d 352 (7th Cir. 1990).

group predominantly advocate a particular position or represent a particular client or type of client. I recognize that the proposed language was intended to prevent the appearance that a judge is aligned with one camp or another. I submit, however, that the proposed rule creates far greater problems than the one it seeks to ameliorate, while potentially exacerbating the problem of judges being identified with particular advocacy.

The proposed rule is one of enormous and problematic breadth. Nearly every lawyers' group I am familiar with engages in some degree of advocacy that would appear to place it within the reach of the rule. Nearly all, including the American Bar Association (ABA), file *amicus curiae* briefs on issues of great importance to the profession. During the February 11th hearing, the Commission heard testimony that the minority bars regard themselves as advocates for diversity and civil rights.[2] Plaintiff bar associations, such as ATLA, regard themselves as advocates for consumers and injured persons. Often this perspective translates into opposition to "tort reform" proposals, such as caps on compensatory damages. The ABA has taken a similar position on many of these proposals, including, at the recent Chicago Convention, opposition to "health courts" as an alternative to trying medical malpractice cases in the general courts.[3]

From these different forms of advocacy, although the comment accompanying the proposed rule refers to "specialty bar associations," it becomes apparent that the rule could affect the wide variety of bar groups that exist and not just plaintiff or defense groups, ideological groups, or corporate counsel groups. A concrete example might help explain the breadth of what the proposed rule implies. On November 30, 2005, I represented the Academy of Florida Trial Lawyers (AFTL) before the Florida Supreme Court in *In Re: Petition to Amend Rules Regulating The Florida Bar, Rule 4-1.5(f)(4)(B) of the Rules of Professional Conduct,* Case No. SC05-1150. The petition at issue sought to prohibit waiver of limits on contingency fees in medical malpractice cases that had been adopted as part of a constitutional amendment initiative. Arguing with me in opposition to the petition was Barry Richards, representing The Florida Bar, which had taken a position identical to that of the AFTL. Counsel on the other side included a

[2] I understand that there was some discussion among members of your Commission about creating an exception for minority bars to avoid the harsh and isolating results that the proposed rule might impose on them. However, such an exemption, reflecting approval of the causes they advocate, would run afoul of First Amendment principles that require that any otherwise legitimate limitation on free-speech rights be content- and viewpoint-neutral, providing no advantage to those who discuss approved subjects or take approved positions. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115, 118 (1991)(a law that is not content-neutral is presumptively invalid and subject to strict scrutiny analysis); Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

[3] It should be noted that the "health courts" proposal is being pushed by a group, Common Good, which is a coalition of non-lawyer organizations and whose mission is to reform the legal system. It would be odd indeed if Common Good could legitimately include judges in a revenue-generating program on the viability of health courts, but a bar group that has taken a stance in opposition to health courts could not.

former state supreme court justice hired to file the petition on behalf of the Florida Medical Association (FMA), as well as counsel to the governor. Given that The Florida Bar, a unitary bar that is an agency of the Florida Supreme Court, had taken that strong stand on a disputed and high-profile legal issue, it would appear that the proposed rule might prohibit judges from speaking at functions of The Florida Bar for which registration fees are charged.

By contrast, no such mandatory prohibition appears to flow from the rule for the initiators of the petition, the FMA, which hired lawyers to shepherd the petition through the process for revising ethical rules for lawyers.[4] In other words, the proposed rule would permit a judge to speak at an FMA convention, even if it rendered such a speech prohibited before a Florida Bar or AFTL convention.

As in that matter, many of the key modern disputes about the viability and fairness of the civil justice system are not between legal groups, but between others and legal groups. The American Civil Trial Roundtable, a collaborative effort of diverse members of the civil trial bar, which includes both the ABA and ATLA, issued a white paper in 2000 that scored the skewed nature of the debate over our civil justice system, noting that the distorted picture the public has of the system comes from outside the bar from people who were taking a politically expedient and self-interested perspective. Amer. Civil Trial Roundtable, *A White Paper Containing an Overview of the Civil Justice System* (ABOTA 2000). It urged greater involvement and a more public defense of the system from those who know the system best, members of the bar.

The mounting conflict over the legal system between business and the bar is exemplified by symposia, sponsored periodically by the U.S. Chamber of Commerce, at which I have served as an occasional panelist. While the Chamber does not qualify as the type of organization that predominantly includes lawyers representing a particular position or client (*e.g.*, a "specialty bar"), because the Chamber's membership consists largely of businesses, the attendees at these meetings are overwhelmingly lawyers for those businesses. Typically, these panels are heavily slanted in favor of restricting legal liability and include, as speakers, judges who share that viewpoint. Under the proposed rule, there is no mandatory prohibition against participating in such a viewpoint-driven event before a group of lawyers, who do not represent the actual membership of the organization, while the proposed rule would provide precisely such a prohibition against a balanced version of such a panel sponsored by a specialty bar. Obviously, from an appearance of propriety perspective, the presumptions of the rule should be reversed in that example.

[4] Counsel for the Florida Medical Association was forced to disclose that he had filed the petition on behalf of a paying client. Under the Florida procedure, a petition with the signatures of 50 members of The Florida Bar may be filed in the state supreme court to seek a change of the rules after certain other prerequisites had been met. The petitioners met that rule by obtaining the necessary 50 signatures from the law firm hired to represent the Florida Medical Association and a handful of lawyer-lobbyists for the medical community. At oral argument, the justices raised questions about the propriety of that use of the petition procedure.

The discriminatory treatment that the proposed rule would foster between lawyers' groups and non-lawyer groups raises profound free-speech and equal-protection issues. As indicated earlier, these constitutional mandates prevent the promulgation of legally enforceable rules that "favor some viewpoints or ideas at the expense of others." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). The business or medical establishments that support certain "tort reforms" and have participated financially, both directly and independently in state judicial campaigns, are political and legal opponents of certain segments of the bar. That such litigants and/or political opponents would be treated differently for purposes of inviting judicial speeches or awarding recognition to judges destroys the level playing field that such rules must abide by and provide a separate and compelling reason that the proposed rule is ill-advised.

It should also be noted that the general bar association of a locality can easily be dominated by a single law firm or practitioners representing one side of disputes. Many plaintiffs' lawyers join their local trial lawyers association because of a perception that the general bar is defense-oriented and hostile to their type of practice. For that reason, the specialty bars comprise a different constituency within the legal profession than can be reached through the general bars.[5] As a result, each of the last three chairs of the Advisory Committee on Civil Rules of the Judicial Conference of the United States has sought an audience and received one at an ATLA convention to discuss proposed changes to the federal rules of civil procedure. I understand that they have made similar presentations at meetings of the Defense Research Institute. Their outreach to practitioners with practical insights into the impact of the proposals ought to be commended rather than condemned. A rule that prohibits such a presentation undermines the law-reform responsibility shared by lawyers and judges alike.

Other judges have used state trial lawyer association conventions (as well as meetings of other specialty bars) to rally lawyers' political support for the financial difficulties that state courts now face.

Though well-meant, the proposed rule has the twin failings of overinclusiveness and underinclusiveness. While addressing a perception problem of, at most, minor cognizance, it uses a blunt tool that both fails to resolve the perception problem while permitting other forums in which the prestige and neutrality of judicial office could be employed to advance certain types

[5] As I indicated in oral testimony, even ostensibly neutral legal organizations can be dominated by advocates of a particular viewpoint. Last fall, I became the first plaintiffs' lawyer on the Board of Directors of the National Center for State Courts (NCSC). Until then, in addition to judges and other judicial personnel, the Board's lawyers consisted solely of the general counsel for some of America's largest corporations and managing partners from some of its largest law firms. That lack of diversity in advocacy perspective influenced the types of programs held at sessions for judges and the types of lawyer-panelists invited to participate.

of advocacy, placing lawyers' groups at an unconstitutional disadvantage. I further submit that the dangers this Commission seeks to address do not come from specialty bar invitations to judges to speak at their functions, but those outside the profession who are not attuned to a lawyer or judge's ethical obligations.

Sincerely,

Robert S. Peck
President