

**Canons 2, 4 and 5**

**ABA Center on Children and the Law**

**Lauren Onkeles**

**August 31, 2004**

The ABA Center on Children and the Law (“Children and Law Center”) analyzes the opinions of state courts and state judicial ethics committees addressing a judge’s involvement in extra-judicial activities related to the promotion and protection of child welfare and identifies areas of concern in the Commission’s revision of the Model Code of Judicial Ethics.

While each state has its own version of a code of judicial ethics and standards, the Children and Law Center concludes that similarities outweigh differences, and there are common themes throughout the jurisdictions about issues surrounding judicial participation in child welfare organizations. When considering a judge’s extra-judicial activities, state ethics committees appear most concerned about three predominant issues:

- Whether involvement will generate the appearance of impropriety or prevent the judge from doing his or her work
- For activities not charitable in nature, whether the organization is focused on improving the law, the legal system and the administration of justice. Differences among states in the degree of recommended judicial restraint stem from the states’ differing interpretations of the meaning of the terms “the law,” “the legal system,” or “the administration of justice.”
- For charitable activities, whether the organization is likely to come before the judge or be considered an advocacy group focused on the benefit of one party over another.

In addition, only a few state ethics committees recognize the importance of judicial involvement in the community, especially in terms of child welfare work.

**Canon 4**

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The Children and Law Center urges the Commission to consider revision of the language of current Canon 4 to encourage judicial involvement in the community. Mild, passive statements in commentary to Canons 4(B) (judges are, time permitting, encouraged to use their unique position to “contribute to the improvement of the law, the legal system and the administration of justice”) and 4(A) (“complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives”) should be replaced with encouraging or imperative statements to support participation. In addition, rules such as current Canons 4(C) (1) and 4(C) (2) that are stated as an admonition to

avoid participation, followed by exceptions to the general prohibition, should be retooled to encourage participation.

**Canon 4**

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The Children and Law Center recommends that the Commission define the clause “concerning the law, the legal system or the administration of justice.” The current Code’s definition of the term “law” gives the incorrect impression that all extra-judicial activities involving participation in a governmental committee, agency or organization must be concerned with “court rules as well as statute, constitutional provisions and decisional law.” As acknowledged by most jurisdictions, the “legal system” in child welfare cases encompasses not only statutes and prior court decisions,” but also provision of services and programs related to the child’s best interest.

The Children and Law Center endorses in this regard the recommendation of the National Council of Juvenile and Family Court Judges (NCJFCJ) that the Commission add the phrase “the provision of services” to each reference to the clause “concerning the law, the legal system or the administration of justice.” By including the provision of services in the list of proper legal concerns, NCJFCJ appears to advocate more leeway in judicial participation with organizations and governmental commissions or agencies.

**Canons 2(A),(B) and 4 (A)(1)**

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The Children and Law Center observes that the current Model Code prohibits a judge’s taking part in activities that create a reasonable doubt on the judge’s ability to act impartially or allowing other relationships that create the particular interest being in a position to influence the judge. The Children and Law Center’s research reveals no consensus among state ethics committees concerning which activities constitute advocating for a particular side of an issue.

**Rule 1.01, Comment 5**

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The Children and Law Center applauds the Commission’s clear support of a judge’s role in the community, as illustrated by Rule 1.01, Comment 5 that encourages judges to be critical of the judiciary and address the problems they see in the administration of justice.

**Rule 4.02(b) and Rule 4.02(b), Comment 11**

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The Children and Law Center supports the Commission's revision of Canon 4.02(b) which grants to judges an expanded ability to appear before or confer with executive or legislative bodies. These changes recognize that judges often have information related to broader topics than those traditionally considered as "concerning the law" and that other branches of government may find such information invaluable. Noteworthy in this regard is the inclusion in Rule 4.02(b), Comment 11 of the example of the unique position of a juvenile court judge to comment on the effects of particular community-wide improvements on delinquency among minors.

**Rule 4.04, Comment 1**  
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The Children and Law Center regards Canon 4.04, Comment 1 as a major break-through in promotion of extra-judicial activity participation and will help provide judges with needed ethical support for participation in community organizations and groups concerned with child welfare and other issues.

**Rule 4.04, Comment 7**  
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The Children and Law Center recognizes the Commission's attempt to address concerns that judges are unnecessarily deterred from serving on governmental committees or agencies through the additional reassurance of Rule 4.04, Comment 7 that the Canon "does not prohibit a judge's service in a governmental position associated with the improvement of the law, the legal system or the administration of justice." The Children and Law Center urges enhancement of this revision by an expanded definition of what it means to concern the law, the legal system and the administration of justice, as well as an explanation of what organizational behaviors constitute advocacy.

**Canon 3**  
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The Children and Law Center urges the Commission to reconsider the National Council of Juvenile and Family Court Judges (NCJFCJ) recommendation of inclusion in the black letter a new section to Canon 3 addressing a judge's civic responsibilities. The specific language of the NCJFCJ recommendation that the Children and Law Center endorses is as follows:

D. Civic Responsibility

- (1) Subject to the requirements of this Code, a Judge should provide leadership in:
  - (a) Identifying and resolving issues of access to justice;
  - (b) Developing public legal education programs;
  - (c) Engaging in community outreach activities to promote the fair administration of justice;
  - (d) Convening, participating or assisting in advisory committees and community collaboratives devoted to the improvement of the law, the legal system, the provision of services, and/or the administration of justice
- (2) A judge may publicly or individually endorse project goals concerning the law, the legal system, the provision of services or the administration of justice, in principle, and actively support the need for funding of such an organization of governmental agency.

The Children and Law Center observes that this proposed rule not only serves to remove barriers to a judge's involvement in his or her community, but also provides an affirmative charge that, subject to the other requirements in the Model Code, civic involvement in legal matters is a judge's duty. While the Commission has incorporated this recommendation in comment to the rules, the Children and Law Center urges reconsideration of inclusion of this proposal in the rules themselves.