

## **AJS Comments on October 2004 Partial Draft of Revisions to ABA Model Code of Judicial Conduct**

Submitted to the ABA Joint Commission to Evaluate  
the Model Code of Judicial Conduct  
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- AJS is opposed to the exclusion of “ordinary social hospitality” from the definition of gifts. The proposed draft could encourage a judge to repeatedly accept hospitality from an attorney (or other individual) who frequently appears before the judge without limitation or disclosure. AJS does not believe this is appropriate.
- Allowing judges to accept loan terms, opportunities, and benefits based “on factors other than judicial status” would be a difficult if not impossible standard to enforce. Bank officers or car dealers are not going to acknowledge that a special deal was based on the person being a judge. The 1990 model code language that allows judges to accept loans on the same terms available to persons who are not judges is preferable.
- Catch-all language such as “unless other provided by law” should be added in several places to remind judges that their acceptance of gifts, reimbursement, and honorarium may be governed by state or federal law that may be more restrictive than the code.
- Because a loan is not generally considered a gift, the definition of “gift” in the terminology section may not be sufficient to notify all readers that loans from individuals are restricted. Therefore, either the text or commentary of Canon 4.13(a) should indicate that a loan from an individual is governed by the same restrictions as a gift.
- AJS disagrees with the creation of an exception that would allow judges to accept an invitation to attend without charge a “widely attended event.” The apparent justification for the exception – that judges will not be able to afford to attend many community events and become isolated from the public they serve – is unconvincing. If judges cannot afford to attend the events, then the vast majority of the public they serve will also be unable to attend as well. The exception threatens to undermine the dignity of the office by appearing to reflect a sense of judicial entitlement and giving judges privileges not shared by the public that they serve simply by virtue of their office. There are innumerable free or reasonably-priced community events in which judges may participate to ensure that they do not become isolated. The proposed exception may actually tend to isolate judges from the general public by linking them with the much smaller group of people in a position to give out free invitations to widely attended events.

- The restrictions in Canon 4.13(a)(7) should make clear that members of the same law firm or other entity are considered the “same source” for purposes of the dollar limits and that if any member of a law firm or other entity (such as a prosecutor’s office) has appeared or is likely to appear before a judge, the judge is precluded from accepting a gift from any other member of the law firm or entity (except a family member).
- AJS suggests adoption of an express exception that would allow judges to take advantage of a reduction in membership dues for a bar association or other organization devoted to the improvement of the law, the legal system, or the administration of justice except for an organization whose members comprise or frequently represent the same side in litigation.
- The term “government entity” should be deleted from second sentence of Comment 1 to Canon 4.14. If it is inappropriate for a judge to attend a seminar sponsored by a private entity under certain circumstances, given the frequency with which government entities are litigants, it would also be inappropriate for a judge to attend a seminar sponsored by government entity under comparable circumstances.
- The list of factors a judge should consider in determining the propriety of attending seminars in comment 2 to Canon 4.14 omits several important factors. AJS proposes several additional, specific considerations.
- AJS supports making financial disclosure reports widely available and easily accessible.

## Canon 4 Gift Provisions Draft

### Terminology

“Gift” means any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, bequest, or anything of monetary value, but does not include:

~~(a) Ordinary social hospitality extended for a non-business purpose by an individual, not a corporation, limited to the provision of modest items, such as food and refreshments, that is so common among people in the judge’s community;~~

(a) items with little intrinsic value intended solely for presentation, such as plaques, certificates, trophies and greeting cards;

(b) loans from banks and other financial institutions on the same terms available to persons who are not judges~~on terms that are available based on factors other than judicial status;~~

(c) opportunities and benefits, including favorable rates and commercial discounts, that are available to persons who are not judges~~based on factors other than judicial status;~~

(d) rewards and prizes given to competitors in contests or events, including random drawings, that are open to the public and that are available to persons who are not judges~~based on factors other than judicial status;~~ or

(e) scholarships and fellowships awarded on the same terms and based on the same criteria applied to non-judge applicants;

(f) reimbursement or waiver of charges for travel-related expenses governed by Rule 4.14;

(g) compensation for extra-judicial activities that is governed by Rule 4.14.

“Ordinary social hospitality” is that type of social event or other gift that is so common among people in the judge’s community that no reasonable person would believe that the donor was intending to or would obtain any advantage. Relevant considerations include the cost of the event or gift, whether the benefits conferred are greater in value than that traditionally furnished at similar events sponsored by bar associations or similar groups, whether the benefits are greater in value than that which the judge customarily provides the judge’s own guests, whether the benefits conferred are usually exchanged only between friends or relatives, whether there is a history or expectation of reciprocal social hospitality between the judge and the donor, whether the event is a traditional occasion

for social hospitality, and whether the benefits received must be reported to any governmental entity.

~~“Widely attended event” means a convention, conference, symposium, forum, panel discussion, dinner, viewing, reception or similar event at which more than 25 persons are expected to attend.~~

#### 4.13 Solicitation and Acceptance of Gifts.

(a) A judge shall not solicit or accept and shall urge members of the judge’s family residing in the judge’s household not to solicit or accept a gift from anyone or a loan (other than one from a financial institution) except that a judge may accept, unless otherwise provided by law:

1. a gift incident to a public testimonial;
2. books, magazines, journals, audio-visual materials, and other resource materials supplied by publishers or organizations on a complimentary basis for official use;
3. an invitation to the judge and the judge’s spouse or guest to attend without charge ~~a widely attended event~~ or a bar-related function or any activity devoted to the improvement of the law, the legal system or the administration of justice;
4. a gift, award or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge’s household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties;
5. ordinary social hospitality;
6. a gift from a relative or friend, for a special occasion, such as a wedding anniversary or birthday, if the gift is fairly commensurate with the occasion and the relationship;
7. a gift or loan from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification under Rule 2.12; or
8. reduced membership dues for a bar association or other organization devoted to the improvement of the law, the legal system, or the administration of justice (excluding any organization whose members comprise or frequently represent the same side in litigation.)

9. any other individual gift, valued at [\$50] or less, or series of gifts from the same source whose value in the aggregate does not exceed [\$150], [or loan \(other than from a financial institution\)](#) only if the donor [or lender](#) is not:
  - a. a lawyer, party, or third person who has come before the judge, or a person or entity whose interests have come before the judge, within the preceding five years, or
  - b. a lawyer, party, or third person who is likely to come before the judge, or a person or entity whose interests are likely to come before the judge, in the foreseeable future.

(b) For any gift, other than from a member of the judge's family, [or loan, other than from a member of the judge's family or financial institution](#), that alone or in the aggregate with other gifts [or loans](#) received from the same source in the same calendar year exceeds \$250.00 in value the judge must publicly report in the same manner as the judge reports compensation, reimbursement or waiver of charges pursuant to Rule 4.16.

Commentary:

[1] A judge may accept a public testimonial or a gift incident thereto only if the donor organization is not an organization whose members comprise or frequently represent the same side in litigation, and the testimonial and gift are otherwise in compliance with other provisions of this Code. See Rules 4.01 and 2.09.

[2] Because a gift to a member of the judge's family residing in the judge's household might be viewed as intended to influence the judge, a judge must inform those family members of the relevant ethical constraints upon the judge in this regard and discourage those family members from violating them. A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge's household.

[3] A gift to a judge, or to a member of the judge's family living in the judge's household, that is excessive in value raises questions about the judge's impartiality and the integrity of the judicial office and might require disqualification of the judge where disqualification would not otherwise be required.

[4] Rule 4.13 prohibits judges from accepting gifts [or loans](#) from lawyers or their firms if they have come or are likely to come before the judge; it also prohibits gifts [or loans](#) from clients of lawyers or their firms when the clients' interests have come or are likely to come before the judge. Rule 4.13(a)(5) prohibits a judge from accepting gifts [or loans](#), even of a nominal value, from people who are or will be substantively involved in a

matter before the judge. The rule requires a judge to consider whether a donor, or the donor's interest, might come before the judge in the foreseeable future. \_

[5] Rule 4.13 does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 5. Rule 4.13 likewise does not apply to the reimbursement for or waiver of charges for travel-related expenses, which is governed by 4.14. See the Terminology section. for the definition of gift and its exclusions.

[6] Acceptance of an invitation to a law-related function is governed by Rule 4.13(a)(1); acceptance of an invitation paid for by an individual lawyer or group of lawyers is governed by Rule 4.13(a)(5).

[7] Regardless of whether Rule 4.13 directly prohibits receipt of a particular gift by a judge or a member of the judge's family residing in the judge's household, other Rules may prohibit the gift. For example. Rule 4.01(b) would apply if the gift would cast reasonable doubt on the judge' s capacity to act with impartiality, integrity and independence.

[\[8\] For purposes of this canon, gifts are considered to be from the same source if the donors are members or employees or the same law firm, corporation, or government entity.](#)

#### Rule 4.14 Reimbursement or Waiver of Charges for Travel-Related Expenses of the Judge or the Judge's Spouse or Guest.

(a) Unless otherwise provided by law, a judge may receive reimbursement or accept a waiver of charges from sources other than the judge's employing entity for the expenses of necessary travel, food and lodging associated with the judge's participation in extra-judicial activities permitted by this Code, if such receipt or acceptance does not cast reasonable doubt on the judge's capacity to act with impartiality, integrity, or independence.

Expense reimbursement and waiver of charges shall be limited to the actual cost of travel, food and lodging reasonably incurred by the judge and, where appropriate to the occasion, by the judge's spouse or guest. Any reimbursement or waiver of charges which alone or in the aggregate with other costs reimbursed from the same source in the same calendar year exceeds \$100 shall be publicly disclosed and the information relating to such reimbursement and/or waiver of charges shall be reported as required by section 4.16 and made accessible to the general public at least quarterly.

#### Commentary

[1] Judicial education in law-related and academic disciplines is in keeping with a judge's duty to remain competent in the law and is consistent with the provisions of Canon 4. Attendance at educational seminars where the expenses are underwritten by

individuals or entities other than the judge or the judicial system, ~~or a government entity~~ should be evaluated by the judge to determine whether attendance is consistent with the judge's obligations under the Canons, particularly the duty to preserve impartiality and independence, and the appearance of impartiality and independence.

[2] A variety of factors may affect the propriety of attendance at such seminars, including the educational nature of the seminar, the sources of funding, the identity of the seminar sponsor, ~~and~~ the reasonableness of the expenses paid or reimbursed; the number of participants; whether a broad range of judicial and non-judicial participants are invited; whether the program is designed specifically for judges; the length of the program; the expense of attending and who will pay the expenses; whether the expenses covered are greater than those traditionally furnished at similar events sponsored by the judiciary, bar associations, or similar groups; the amount of the program devoted to educational activities compared to the amount of time allowed for recreational activities; whether competing viewpoints are presented; whether the sponsor and/or source of funding are generally associated with particular interests likely to appear in the judge's court; and whether the topics covered in the program are related to likely subjects of litigation in the judge's court. The judge should consider whether the sponsor or the funding source of the seminar is currently appearing, or likely to appear, before the judge in a matter. In addition, the judge should determine whether attendance may create a conflict of interest, may result in disqualification or recusal in matters coming before the judge, may give rise to a judge's independence being questioned, or may interfere with the judge's performance of his or her judicial duties. A judge's decision whether to attend should be based on an assessment of all of the circumstances and the judge should undertake a reasonable inquiry to obtain the information necessary to make an informed judgment.

[3] Consistent with Rules 4.13(b) and 4.16, a judge should take reasonable steps to ensure that information concerning his or her participation in seminars and other events, well as reasonable information regarding the nature and circumstances of such events are available to the public. A judge should therefore promptly and publicly disclose participation in extra-judicial events at which the judge's expenses are paid by sources other than the judge's employing governmental entity.

#### 4.15. Compensation for Extra-judicial Activities

(a) Unless otherwise provided by law, a judge may receive compensation for the extra-judicial activities permitted by this Code, if such receipt or acceptance does not cast reasonable doubt on the judge's capacity to act with impartiality, integrity, or independence.

(b) Compensation shall not exceed a reasonable amount nor shall it exceed what a person who is not a judge would receive for the same activity.

Commentary:

[1] The Code does not prohibit a judge from accepting honoraria or speaking fees provided that the compensation is reasonable and commensurate with the task performed. A judge should ensure, however, that no conflicts are created by the arrangement. A judge must not appear to trade on the judicial position for personal advantage. Nor should a judge spend significant time away from court duties to meet speaking or writing commitments for compensation. In addition, the source of the payment must not raise any question of undue influence or the judge's ability or willingness to be impartial. See Rule 4.01.

4.16 Reporting of Compensation. Reimbursement and Waiver of Charges. A judge shall report the date, place and nature of any activity for which the judge received compensation, reimbursement or waiver of charges, and the name of the payor or waivor and the amount of compensation, reimbursement, or waiver of charges so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. The judge's report shall be made at least quarterly and shall be filed as a public document in the office of the clerk of the court on which the judge serves and ~~or~~ other office designated by law and when technically feasible, posted on the website of that court or office.

[1] Section 3E requires a judge to disqualify himself or herself in any proceeding in which the judge has an economic interest. See "economic interest" as explained in the Terminology Section. Section 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of judicial duties; Section IH requires a judge to report all compensation the judge received for activities outside judicial office. A judge has the rights of any other citizen, including the right to privacy of the judge's financial affairs, except to the extent that limitations established by law are required to safeguard the proper performance of the judge's duties.