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Dear Ms. Gallagher:

On behalf of Community Rights Counsel (CRC), I appreciate the opportunity to provide comments on the drafts of Canon 4.13 to Canon 4.16 released in late September by the Joint Commission to Evaluate the Model Code of Judicial Conduct. This letter builds upon, and incorporates by reference, the joint comments CRC submitted to the Commission with HALT on October 15, 2003, and my testimony at the Commission's public hearing on August 6, 2004. Like those prior submissions, my comments will focus primarily on the issue of privately-funded judicial seminars.

At the outset, I want to make clear that I support certain aspects of the Commission's response to the problem of private judicial seminars. By including a specific section of the Code that discusses travel-related expenses, and by making clear in the commentary that attendance at private seminars can raise concerns over the impartiality and independence of judges taking these trips, I think the draft sends an important message to judges about these trips. I also support the disclosure obligations imposed by comment 3 of Canon 4.14, and the reporting requirements imposed by Canons 4.14 and 4.16.

That said, I agree completely with New York University law professor Stephen Gillers, who told the *L.A. Times* that he believes that the Commission's response is inadequate. The response is inadequate primarily because the draft lacks what HALT and CRC called for in October 2003: a bright-line rule. The multi-factored test established by Canon 4.14 is simply too malleable to solve the problem. To give just one example, the standard appears to limit a judge's required inquiry to the sources of funding for a seminar itself. As a result, apparently, Texaco could be litigating a major environmental case before a judge and simultaneously provide three-quarters of the budget of a group hosting an environmental seminar attended by the presiding judge. As long as the host claims that Texaco's money did not directly support the trip provided to the presiding judge, a judge would appear to have no obligation whatsoever to investigate or consider Texaco's funding of the host organization. This test could make the problem worse, not better.

It is incumbent upon the Commission to distinguish between judicial seminars run by and at law schools and bar associations of general membership, on the one hand, and those that are run by private organizations seeking to advance a particular view on the

law, on the other. With respect to the latter category of programs, there needs to be a limit on the size of the gift that can be accepted by a judge. Such a limit should be sufficiently low to prohibit judicial participation in the multi-day trips to vacation settings that have done so much to damage the reputation of the federal judiciary in recent years.

The current draft is also inadequate because it is ambiguous in one important respect. Canon 4.14 is specifically limited to "necessary travel, food, and lodging" associated with a judge's participation in extra-judicial activities permitted by the code. For many such activities, this will cover the entire landscape of costs. For example, if a judge is asked by a university or a bar association to give a speech, typically the judge will be offered and will accept only such travel-related expenses.

In the context of expense-paid seminars, however, judges also typically receive a gift of free tuition. Indeed, tuition expenses—the costs of speakers, materials, conference facilities, etc.—often dwarf the per-judge travel, board, and lodging expenses for the sponsoring organization. Tuition also clearly constitutes a gift as that term is defined in the Code. Thus the ambiguity: before attending a private seminar must a judge first consider Canon 4.13 with respect to the tuition, and then satisfy Canon 4.14 with respect to the acceptance of travel-related expenses?

As I read the Canon, judges must engage in this two-step inquiry: how else can they properly accept the tuition gift? But if this is the case, the Commission should make this requirement explicit. The Commission should also clarify how the judge should determine whether acceptance of a tuition gift is appropriate. It should clarify, in particular, that a privately-run program designed to advance a particular perspective on the law is not an "activity devoted to the improvement of the law, the legal system or the administration of justice."

Finally, the Commission must change the current definition of "widely attended event" or drop this exception to Canon 4.13's gift prohibition altogether. As an initial matter, the list of qualifying events is so broad that it would appear that this exception would allow a corporation to pay for a trip by a judge to a film "viewing" at the Cannes Film Festival, as long as the corporation is not then appearing before the judge. It seems impossible to imagine that the Commission intended to permit such blatantly problematic activities. At a minimum, the term "viewing" should be removed from the definition of "widely attended event."

As importantly, a closed-door, invitation-only event is no less problematic simply because more than 25 like-minded people participate. Widely attended events are only less problematic if they are open to a broad category of participants or open to the media. Sunlight can be expected to disinfect open forums, not closed forums. At a minimum, the clause "and to which the media, the general public, or a broad cross-section of the legal profession is invited" should be added to the end of the definition of widely attended event.

More broadly, the Commission should seriously consider dropping entirely this exception for widely attended events. The potential for abuse seems far greater than the need for this exception.

Thank you for your consideration of these comments. If the changes suggested in this letter are made, I believe the Commission's work will finally address the problem of privately-funded judicial seminars and help restore public confidence in the impartiality and integrity of the judiciary.

Respectfully submitted,

Douglas T. Kendall
Executive Director