

July 1, 2004

Mark I. Harrison, Chair
American Bar Association
Joint Commission on Evaluation of the Model Code
of Judicial Conduct
ABA Justice Center
321 N. Clark Street
Chicago, Illinois 60610

*Re: Written Testimony on Behalf of Oklahoma Bar Association Access to Justice Committee
Proposed Comments to Canons 1 and 4 Judicial Support of Pro Bono Activities*

Dear Mr. Harrison:

Thank you for affording me the opportunity to testify before the Commission at its meeting in Naples, Florida. Because I had not anticipated giving testimony in advance of the trip, I spoke only as an individual, and not in any representative capacity. What prompted me to testify were concerns raised by some local judges about the ethical propriety of actively encouraging or supporting pro bono programs. While these questions arose in the course of committee work with the Oklahoma Bar Association, I had not received prior authorization to speak as a committee representative. I now offer this written testimony, with additional support for the concerns raised, on behalf of the Oklahoma Bar Association Access to Justice Committee.

The current draft of Proposed Canon 1, Comment 3 encourages judges to participate in several different activities to promote ethical conduct, including to “encourage pro bono representation.” (May 2004 Draft). My oral testimony recommended that the comment more explicitly encourage lawyers to support and provide leadership on improved access to justice and pro bono work by attorneys.

My awareness of possible ethical constraints on judicial support of pro bono programs first arose in discussion of the 2002 revisions to Comment 6 of the Preamble to the ABA Model Rules of Professional Conduct: “Therefore all lawyers should devote professional time, resources and civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel.” The universality of this statement was questioned, insofar as it applied to judges who are prohibited from representing individuals, and subject to ethical requirements on avoidance of bias and

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restraints on extrajudicial conduct.

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At the last annual bar meeting, the Access to Justice Pro Bono Subcommittee made a presentation to state court judges and surveyed how the organized bar and judiciary might increase private attorney involvement. Virtually all of the responding judges stated that a pro bono panel of attorneys would be helpful to their courts and strongly endorsed possible initiatives of the organized bar to increase pro bono involvement. By contrast, they gave quite mixed responses to questions about specific actions the judiciary should do to encourage pro bono work. A summary of the numerical results to each survey question and comments is attached. Several written comments raised ethical issues. For example, in response to a question about referring pro se litigants to a website for free legal assistance: “no, it would be a conflict of interest – they would blame me when things go south[,]” “no, improper to refer litigants to any specific source of legal assistance[,]” “only if the website had the sanction of the OBA or Supreme Court[.]” A question about whether judges should commend or otherwise recognize lawyers for their pro bono work elicited comments that it should not be done in open court, and concern that it might raise an “appearance of bias for one side of the lawsuit.” The subcommittee attempted to discern what ethical constraints were behind these expressions of doubt. Perhaps some of the responses reflected an abundance of caution, wanting to avoid any suggestion of coercion, or that they were improperly lending the prestige of their office. Efforts to find specific guidance, and to assuage judges’ ethical concerns, were unavailing. When I could find nothing applicable in the leading treatise on judicial ethics, I contacted one of the authors, who also was unaware of anything specific on the topic.

These discussions and efforts to find clear guidance prompted my testimony. Strong leadership and support of the judiciary has been essential to successful local efforts to promote pro bono and access to justice. It is imperative that the Code of Judicial Conduct give assurance that such support is not only proper, but affirmatively encouraged. Accordingly, I recommend adoption of the following comment language, to follow what is currently marked as [3].

Public respect for and confidence in the legal system requires that persons with viable legal claims or defenses have meaningful access to the courts. Pro se litigants present special challenges to the orderly administration of justice. Accordingly, judges should actively support and encourage lawyers’ participation in pro bono activities, and legal reforms to improve access to justice.

(A red-lined copy of the proposed revisions is attached.)

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After the Naples conference, I have met or had the opportunity to confer with members of the Access to Justice Committee, and now have the authorization to present this testimony on behalf of the committee. While preparing a document for presentation to our Supreme Court, we have acquired additional information that substantiates the earlier, somewhat amorphous concerns about ethical constraints on judicial support of pro bono activities. In fall of 1998, the Nevada Commission on Judicial Discipline admonished a state court judge for permitting his name and judicial title to be used in announcing a fund-raiser for a pro bono program, as a possible violation of Canon 4C(3)(b)(i). Opinion JE 99-001 of the Nevada Standing Committee on Judicial Ethics and Election Practices held that a judge could not properly sign a letter as an officer of a judicial district pro bono foundation, soliciting lawyers to contribute to the foundation as a means of fulfilling their voluntary pro bono responsibilities. While that opinion was reversed in a subsequent opinion, its very existence substantiate the concerns raised by some judges about the propriety of actively supporting pro bono programs. (See Opinion JE 00-00-004, holding that judges can participate in such fund raising activities to a limited extent.) On October 28, 2003, the Nevada Supreme Court, on motion and after comments from interested persons, entered an order amending commentary to Canon 4(C)(3)(b) of the Code of Judicial Conduct. (See attached.)

The Oklahoma Bar Association Access to Justice Committee urges the Commission to both broaden the commentary in Canon 1, generally to encourage appropriate judicial support of pro bono matters, and to more precisely address the issues in commentary to Canon 4, in the style of language adopted in Nevada.

Sincerely,

Judith L. Maute
President's Associates Presidential

Professor

Attachments:

Oklahoma Judges' Survey
Proposed Revisions to Canon 1 Commentary

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Nevada Amendment to Canon 4(C)3(b) Commentary

**American Bar Association
Model Code of Judicial Conduct**

MAY 2004 DRAFT

CANON 1

CONDUCT IN GENERAL: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL THE JUDGE'S ACTIVITIES, SO AS TO UPHOLD THE INTEGRITY, INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY¹

[3] In addition to complying with the high standards of judicial conduct, a judge is encouraged to participate in activities that promote ethical conduct generally among judges and lawyers, including efforts to study, develop, maintain, implement and enforce codes of conduct, encourage ~~pro bono representation~~, and support professionalism within the judiciary and the legal profession.

Proposed Additional Comment Language

add to end of [3]

Public respect for and confidence in the legal system requires that persons with viable legal claims or defenses have meaningful access to the courts. Pro se litigants present special challenges to the orderly administration of justice. Accordingly, judges should actively support and encourage lawyers' participation in pro bono activities, and legal refers to improve access to justice.

¹Canon 2

Nevada Commentary *Canon 4C(3)(b)*

1. A judge may solicit membership or endorse or encourage membership efforts for an organization devoted to the improvement of the law, the legal system or the administration of justice as long as the solicitation cannot reasonably be perceived as coercive and is not essentially a fund-raising mechanism. Solicitation of funds for an organization and solicitation of memberships similarly involve the danger that the person solicited will feel obligated to respond favorably to the solicitor if the solicitor is in a position of influence or control. A judge must not engage in direct, individual solicitation of funds or memberships in person, in writing or by telephone except in the following cases: (1) a judge may solicit for funds or memberships other judges over whom the judge does not exercise supervisory or appellate authority; (2) a judge may solicit other persons for membership in the organization described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves; (3) a judge who is an officer of such an organization may send a general membership solicitation mailing over the judge's signature; and (4) a judge may be listed as a host or member of an honorary dinner committee for an organization's fund-raising event.

Recruitment of attorneys or law firms to provide pro bono legal services pursuant to Supreme Court Rule 191 is not membership solicitation. A judge may assist an organization in recruiting attorneys so long as the recruitment effort cannot reasonably be perceived as coercive. A judge may provide an organization with general endorsement or solicitation material for use in the organization's recruitment materials. Similarly, this Section does not preclude a judge from requesting an attorney to accept pro bono representation of a party in a proceeding pending before the judge.

Use of an organization letterhead for fund-raising or membership solicitation does not violate Section 4C(3)(b) provided the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must also make reasonable efforts to ensure that the judge's staff, court officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, law-related or otherwise.

A judge may be a speaker or guest of honor at such an organization's fund-raising event. [As amended effective October 28, 2003.]