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**COMMENTS OF ALAN B. MORRISON  
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TO  
ABA JOINT COMMISSION TO EVALUATE  
THE MODEL CODE OF JUDICIAL CONDUCT**

**REVISED DRAFT OF CANON 4**

I have previously submitted some brief comments on Canons 3 and 4. These comments focus on Canon 4 since the revised draft of Canon 3 presents no new issues.

*Rules 4.03 & 4.04:* These Rules deal with judges accepting appointments and otherwise participating in governmental bodies and civil/charitable organizations, respectively. As I understand the two Rules, a judge is generally freer to serve on private bodies than on government bodies, which seems rather odd, if not actually backwards. This can be seen most clearly from comment [12] to Rule 4.04, where the draft tells a judge that it is proper to serve on the board of a private law school, but not on the board of a public university. It seems to be that the concerns expressed in Rule 4.04(b) in the “unless” clause, relating to the likelihood of future litigation before that judge, are the primary reasons for such prohibitions, beyond the time they may take. I see no reason to treat other governmental bodies differently from civic and charitable entities and thus would add the governmental bodies to 4.04 and eliminate 4.03.

Either way, Earl Warren would have been forbidden from serving as Chair of the Commission that investigated the assassination of President John F. Kennedy (as he should have been), and Robert Jackson could not have served as the prosecutor at Nuremberg, without giving up his position on the Court (that seem correct also). But what about the Smithsonian, on whose Board the Chief Justice of the United States serves by statute? It

is a governmental body, and yet it is hard to imagine why (time aside), the Chief Justice cannot serve in that position, yet Rule 4.03 would seem to prohibit it since it does not deal with the legal system or the administration of justice.

Rule 4.04(a)(2)(iii) allows judges to attend, and allows their names to be used to publicize certain events by certain non-profit organizations. The problem is that the scope of what organizations come within the ambit of this Rule is not clear. Law schools are included under comment [6], which is fine, but so are other “legal organizations” and “other entities devoted to improving the law, the legal system or the administration of justice.” Does the ACLU or the Federalist Society come within this exception? Part of the problem is that there is no definition of a legal organization or these other terms in the Code.<sup>1</sup> It seems to me that the concerns in this area are based on the group taking controversial positions or the likelihood of them appearing as parties, or providing counsel to a party, in litigation before a judge or others on her or his court. Judges should be allowed to appear as speakers or on panels, even if the organization charges admission, but some events are so obviously fundraising in purpose that judges cannot help but be seen as endorsing the organization if they attend. This Rule needs adjustments.

*Rule 4.12:* This Rule relates to gifts and, in general, prohibits judges from accepting them, which is a good idea. It makes certain exceptions, some of which have conditions, while others do not. I am troubled by (a)(3) which allows a judge *and the*

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<sup>1</sup> On the matter of definitions, the definition of political organization in the terminology section is too narrow since, as written, it does not cover political committees organized by corporations, trade associations, or labor unions, and it does not include the so-called 527 organizations that are independent of candidates and parties and often make no contributions but only make independent expenditures. The prohibitions of Canon 5 should also cover these other organizations, but they do not now. This can be corrected most simply by adding a comma after “group” in line 15, and then adding the phrase “whether or not” immediately thereafter.

*judge's spouse* to be taken to dinners, even lavish ones, if they are widely attended, but the judge's spouse, under (a)(4), cannot accept a gift based on the spouse's own separate activities if it could "reasonably be perceived as intended to influence the judge in the performance of judicial duties." Why is the qualification, which I find quite sensible, in (4) but not in (3)? Comment [4] explains that gifts that are "excessive in value" raise possible disqualification questions, and under this Rule that depends on the circumstances, rather than a bright line rule. This is in contrast to the approach taken for campaign contributions in Rule 2.12(a)(4), which is quite mechanical and based on bright line dollar amounts; this approach is preferable for the reasons I have given in response to Rule 2.12. Of lesser significance, (5) deals with gifts from a relative or friend, where as (5) deals with gifts from a relative or *personal* friend? Why the difference?

*Rule 4.13(b)*: This Rule allows judges to be reimbursed for certain travel expenses from third parties, with certain sensible limits. But it also allows the expenses of the judge's spouse, domestic partner or guest to be reimbursed "where appropriate to the occasion." The comments go into considerable detail on whether the judge should accept the expenses, but say nothing about the conditions for determining whether spouses should be allowed to accept them when accompanying the judge and hence whether they are "appropriate." The addition of the phrase "to the occasion," modifying "appropriate," confuses more than it explains; surely a spouse would not attend, let alone be reimbursed, if it were not appropriate to attend the occasion. The real problem is why the spouse should be reimbursed at all, an issue also raised by Rule 4.12(a)(3), and not answered satisfactorily. Again, if the sponsor is potentially currying favor with the judge, then the spouse should not receive a ticket without charge or have travel expenses picked

up. Judges are different, as the Code makes clear, and this is one of the areas where the lines should be drawn: no spousal expenses from private entities.<sup>2</sup>

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<sup>2</sup> There are two typos in comment [2] to Rule 4.13, lines 24 & 25. The references to Rule 3.03 should be to Rule 3.04.