

**National Association of Women Judges
1112 16th Street, NW, Suite 520
Washington, DC 20036
202.393-0222**

February 3, 2006

American Bar Association
Joint Commission to Evaluate the Model Code of Judicial Conduct
321 N. Clark Street
Chicago, IL 60610

Re: Preliminary Comments of National Association of Women Judges on *December 2005 Final Draft Report of the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct*

Dear Members of the Commission:

The National Association of Women Judges (NAWJ) again commends the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct on its exhaustive and thoughtful work. We are pleased to file at this time our preliminary comments on the Commission's *December 2005 Final Draft Report (Final Draft)*. We have also notified Ms. Kladder of our intent to accept the Commission's invitation to briefly testify before the Committee at the February 11, 2005 hearings in Chicago. Following the hearing, NAWJ may file additional comments as appropriate prior to the March 15, 2006 deadline.

NAWJ previously filed written Comments on two earlier Commission drafts, by letters of May 26, 2005 and September 14, 2005, respectively, and presented oral testimony before the Commission on August 5, 2005. Although we are not in complete accord with all of Commission's most recent amendments in the areas of concern to NAWJ, we applaud the Commission for the substantial positive additions it has made in the Rules and/or Comments dealing with sexual harassment, *ex parte* communications and *pro se* litigants.

NAWJ would like to call to the Commission's attention our concerns, as more fully discussed below, with respect to newly proposed language in Rule 4.04(b)(3) ("Participation in Civic or Charitable Activities") and Comment 8 to that Rule. These changes were not included in the Commission's introductory section highlighting *Principal Substantive Changes from the 1990 Code, and Significant Controversies*. NAWJ believes that these provisions could significantly and unjustifiably operate to impair a judge's ability to participate in the civic or charitable activities of his or her community, and would isolate judges from the mutually beneficial interactions that both

enhance the understanding and perceived legitimacy of the system of justice in the greater community, and broaden and inform a judge's perspective.

NAWJ recognizes that the appearance and reality of judicial independence, integrity and impartiality must be the touchstone for a judge's decisions relating to extra-judicial activities. We recommend, however, that the Commission delete the language in question, and amend these provisions to include language from the California Code of Judicial Ethics, as described below, that will permit a judge in delineated circumstances to attend, speak at, or accept an award from certain organizations, so long as the judge makes a conscious effort to ensure that he/she is open to participation in the events of organizations representing different types of clients or positions (much as the Commission's proposed rules on expense reimbursement set forth a comprehensive set of criteria for judges to weigh).

Should the Commission reject the California approach, NAWJ recommends that at a minimum Rule 4.04 (b)(3) and Comment 8 be amended to include language removing from proscribed activities a judge's attendance at, speaking at, or receiving awards from "...public service organizations that seek improvement in the administration of justice, benefit indigent representation, or assist access to justice..." (Alaska Canon 4(C)(3)(b)(i)). "... Access to justice includes increasing minority representation on the bench, preserving judicial independence, and assisting the advancement of the legal profession." Commentary to Canon 4(C)(3)(b).

DISCUSSION

Canon 4 seeks to strike the appropriate balance between the uniquely important role judges can and do play in the civic and charitable life of the broader community they serve, and the overriding principle that, in the words of Canon 4, "A Judge shall conduct the Judge's extra-judicial activities so as to minimize the risk of conflict with the obligations of judicial office."

As in the 1990 Code and preceding drafts of the Commission's Report, Rule 4.01 (Extra-Judicial Activities in General) subparts (A) and (C) generally restate the parameters of this interplay: "A judge may engage in extra-judicial activities to the extent that the activities do not: (A) lead to frequent disqualification of the judge or otherwise interfere with the proper performance of judicial duties...(C) cast reasonable doubt on the judge's ability to perform judicial duties with independence, integrity and impartiality."

Comments [1] and [3] to Rule 4.01, as in earlier versions, attempt to flesh out the Rule's admonitions, on the one hand emphasizing the societal importance of judges engaging in appropriate extra-judicial charitable and civic activities, and encouraging them to do so, while on the other hand cautioning that judges must not thereby compromise (or appear to compromise) their independence, integrity and impartiality.

Thus, Comment [1] states: “To the extent that time permits, and independence and impartiality are not compromised, judges are encouraged to engage in appropriate extra-judicial activities. Such participation will help prevent judges from becoming isolated from their communities, and will further public understanding of and respect for courts and the judicial system.”

Proposed Comment [3], as amended, elaborates on this theme, broadening somewhat the current Comment [3] by stating, “As a judicial officer learned in the law, a judge is in a unique position to engage in extra-judicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. **In addition, judges are permitted and encouraged to engage in civic or charitable extra-judicial activities, whether or not the activities involve legal subject matters, so long as the judge complies with this Rule and other provisions of this Code; see Rule 4.04.**” (emphasis added)

While the language of Rule 4.04 (“Participation in Civic or Charitable Activities”) would at first appear to broaden the scope of permissible judicial participation in civic and charitable activities by judges--newly allowing, for example, judges to speak and accept awards at fundraisers--the Commission has added new language to 4.04(B)(3) and Comment 8 that is dangerously vague and that potentially proscribes the lion’s share of the very activities the Rule purports to encourage.

1. Proposed amended Rule 4.04(B)(3)

“...a judge may participate in activities on behalf of civic or charitable organizations...unless the organization’s membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client.”

Although Rule 4.04(A) states that, “Subject to the requirements of Rule 4.01, a judge may participate in activities on behalf of civic or charitable organizations,” the proposed second clause of Rule 4.04(b) now would insert the following language of exception: “.. **unless the organization’s membership includes predominantly lawyers who chiefly advocate a particular position or represent a particular client or type of client.**” (emphasis added). This is so, notwithstanding the fact that the first clause of Rule 4.04(B)(3) appears on its face to elaborate on the theme of judicial participation, stating that, “Notwithstanding the provisions of paragraph (A), a judge: ...(3) may appear at, speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with an event of a civic or charitable organization concerned with the law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose...”

If 4.04(B)(3)’s ambiguous second clause is intended to apply solely to membership organizations of attorneys, it would clearly sweep within its ambit judicial attendance and/or participation in the events, including educational programs, of groups including the Association of Business Trial Lawyers, the Defense Research Institute,

ATLA, the International Association of Defense Counsel, the American Immigration Lawyers Association, the Federation of Defense and Corporate Counsel, the Federalist Society, the American Constitution Society, state and local trial and consumer lawyers' associations, the National District Attorneys Association, the National Legal Aid and Public Defenders Association and lawyers' groups who represent the victims of domestic violence, and might well have a chilling effect on judicial participation in the events of women's and minority bar associations.

If, however, this prohibition has an even wider reach, and is intended to apply to all of the civic and charitable organizations referred to in the first part of the Comment (as at least one ABA counsel to the Committee believes to be the case), then judges would be precluded from attending the events, presumably including educational programs, of groups such as the NAACP Legal Defense Fund and MALDEF, and, possibly, the local legal aid society.

The practical result of even a narrow reading of this prohibition will be the further isolation of judges from the communities they serve. The impact of this isolation is not limited to the resulting negative impact on the public's perception of our judiciary. Also significant is the fact that by isolating judges, we deprive them of the salutary effect, in terms of the broadening of experience, that comes from leaving the courtroom to participate in civic and charitable events. This benefit of promoting judicial participation in civic and charitable events is particularly significant at a time when the overwhelming majority of judges sitting on our state benches are white, male and middle-class. That these judges should be inhibited from seeking out opportunities to broaden their experiences, thereby to enhance their understanding of the issues facing the diverse populations they serve, is troubling as well as inconsistent with the broad mandates of the Canons themselves.

2. Proposed amended Comment 8

“...it would be inappropriate for a judge to speak at a fundraising event for a specialty bar association whose members are closely identified with certain clients or particular positions on legal issues.”

The above-cited newly added last sentence to Comment 8 similarly confounds the otherwise clear, reasonable and important message of the first clause of that Comment and of Comments [1] and [2] which precede it. Thus, Comment [1] states that “A judge is permitted to participate in civic or charitable activities for the benefit of the community of which the judge is a part, provided that such participation does not take inappropriate advantage of the judge's position, or otherwise interfere with the performance of the judge's judicial duties;” Comment [2] provides that “...judges may promote broader access for people unable to afford legal services by encouraging lawyers to participate in pro bono publico legal services programs, if in doing so the judge does not misuse the prestige of judicial office. It is also permissible and generally commendable for judges to assist in training lawyers to do pro bono publico legal work, and to participate in events recognizing lawyers who have done pro bono publico work.”

The first sentence of Comment [8] appropriately contains the caveat that, “Even with respect to law-related civic and charitable organizations, a judge should consider whether the membership and purposes of the organization, or the nature of the judge’s participation in or association with the organization, would conflict with the judge’s obligation to refrain from activities that reflect adversely upon a judge’s independence, integrity, and impartiality.”

Yet the second sentence of Comment 8 states, “**For example, it would be inappropriate for a judge to speak at a fundraising event for a specialty bar association whose members are closely identified with certain clients or particular positions on legal issues.**” (emphasis added.)

To the extent that the term “specialty bar” is a term of art, it is generally understood to include all specialty interest and affinity bar associations, including women’s and minority bars, and clearly the lawyer membership organizations listed in the above discussion. Thus, this Comment serves to exacerbate the problems created in proposed Rule 4.04(b)(3), further increasing the enforced isolation discussed above.

California Approach

NAWJ recommends that the above Rule and Comment be amended to reflect the balancing approach adopted by California. As explicated in Formal Ethics Opinion No. 50 of the California Judges Association Committee on Judicial Ethics (October 12, 2000):

“The driving principle of the Code of Judicial Ethics is the need to preserve the integrity of the judicial decision making process. The principle requires a judge to refrain from activities or associations that would cast doubt upon the judge’s capacity to act impartially. On the other hand, judges are increasingly expected to be involved in community service activities. The Judicial Council has recently codified this expectation in Section 39 of the Judicial Administration Standards, which describes judicial participation in community outreach activities as an “official judicial function.” The tension between the principle and the expectation gives rise to predictable judicial uncertainty about accepting awards or honors for community service when the donor is a specialty bar association or other organization that serve a particular interest.

There is no ethical prohibition against a judge accepting an award or special recognition for service to the community from a specialty bar organization or other interest group. Indeed, the Canons expressly permit a judge to be the “recipient of an award for public or charitable service.” (Canon 4C(3)(d)(iv)). Judges are free to accept awards from trial lawyers associations, ethnic bar associations, community organizations and even, in the proper circumstance,

prosecutorial agencies or police departments. When asked to accept such an award, the judge must consider carefully whether acceptance would cast doubt on the judge's impartiality, demean the judicial office or interfere with the judge's proper performance of duty. The judge must also be confident that acceptance of the award does not constitute improper political activity... **It is the consensus of the Judicial Ethics Committee that acceptance by a judge of an award from a specialty bar or other special interest organization does not reasonably cast doubt on the judge's impartiality. The judge must assess the impact of accepting such an award on a case-by-case basis. ...[A] judge who accepts an award from an agency that regularly appears in the judge's courtroom should make it clear that he/she is open to receiving awards from agencies or groups with opposing interests.**"¹ (emphasis added.)

Opinion 50 concludes:

"Judges may accept awards or honors for service to the community from specialty bars and other interest groups and indeed should be open to accepting such awards as part of the official judicial function of participating in community outreach activities. Generally, acceptance of awards from such groups does not compromise a judge's impartiality. The judge must ensure, however, the acceptance of such an award does not cast reasonable doubt on the judge's capacity to act impartially or demean the judicial office. Moreover, the judge should decline any award that would entangle the judge in political endorsements or fundraising.

NAWJ recommends that 4.04(B)(3) and Comment 8 to that Rule be amended:

(1) to delete the problematic provisions discussed above; and (2) to include at the conclusion of Comment 8 a sentence embodying California's "equal participation" concept.

Alaska approach

Should the Commission reject the California approach and continue to seek to wholly prohibit judicial participation in the events of certain organizations, NAWJ recommends that language be added to Rule 4.04(B) and Comment 8 to clearly exclude from these prohibitions, "...public service organizations that seek improvement in the administration of justice, benefit indigent representation, or assist access to

¹ The California Judicial Conduct Handbook, for example, deems it permissible for a judge to attend a dinner promoting a prominent prosecutor so long as he or she would similarly attend an event honoring a prominent defense attorney. (1999 California Judicial Ethics Update, April 2000.) "The attendance at both functions eliminates the perception of judicial bias for one side."

Similarly, a judge may deliver a speech or receive an award at a specialty lawyers or special interest bar association if the judge is also available to speak at opposing bar association functions. (Canon 4(D) (1)(a); see also 2002 California Judicial Ethics Update, February 21, 2002.

justice...where the proceeds from the event seek to improve the administration of justice, benefit indigent representation, or assist access to justice.” Alaska Canon 4(C)(3)(b)(i), with additional language clarifying that “... ‘Access to justice’ includes increasing minority representation on the bench, preserving judicial independence, and assisting the advancement of the legal profession.” Commentary to Alaska Canon 4(C)(3)(b).

NAWJ appreciates this opportunity to further comment on the work of the Commission. We look forward to exploring these concerns with the members of the Committee in Chicago.

Sincerely,

Judge Vanessa Ruiz
President