National Association of Women Judges
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September 14, 2005

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

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

Dear Members of the Joint Commission:

On behalf of the National Association of Women Judges (NAWJ), I want to thank the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct for the opportunity to appear before you in Chicago on August 5, 2005 to orally present NAWJ's comments on your *Preliminary Report* (*.Report).* We are pleased to file the comments set forth below with respect to selected provisions of the *Report* deemed to be of particular concern to our constituency.

Founded in 1979, NAWJ is an organization of over 1,100 federal, state, military, tribal and administrative law judges. Our overarching mission is to ensure equal justice and access to the courts for women, minorities and other vulnerable populations; to increase the numbers, advancement and leadership status of women and minorities on the bench in order to accurately reflect the role of women and people of color in a democratic society; to fight to preserve judicial independence; and to serve as a leading provider of cutting-edge judicial training initiatives focused on issues of particular importance to women, minorities, immigrants, gay men and lesbians, people with disabilities and other historically disadvantaged groups.

As I stated at the hearing, NAWJ, first, wishes to acknowledge and applaud the Joint Commission's decision to return in the *Preliminary Draft* to the current Rules' "appearance of impropriety" prohibitions, retaining, in the text of Canon 1 and in Rule 1.03, the requirement that judges must avoid not only impropriety but also the appearance of impropriety.

We also support the Committee's decision to separately address in Canon 5 the rules pertaining to judges involved in non-partisan elections and retention elections, respectively.

NAWJ additionally strongly supports the Joint Commission's decision to retain in this *Preliminary Draft* certain changes it had proposed in the March 2005 draft, including:

1. The addition to Rule 3.05 of "ethnicity" and "sexual orientation" to the list of prohibited bases of discrimination in membership entities to which judges belong;

2. The addition to Rule 3.04 of a prohibition against judges' use of benefits or facilities of discriminatory organizations "to any significant extent," and the amendment to the Commentary to that Rule of language, at Comment [4], that replaces the one-year "grace period" of the earlier comment with the requirement that judges immediately resign from such an organization upon discovering that it engages in invidious discrimination;

3. The addition of new Rule 2.19, requiring judges to take appropriate action with respect to judges or attorneys whose performance they know to be impaired by drugs, alcohol or other mental, emotional or physical condition; and

4. Rule 4.04 A. (2)'s broadening of permissible participation by judges in civic or charitable activities provides important and welcome guidance to judges wishing to participate in such activities. Commentary [6] is particularly useful in clarifying questions which have been troublesome gray areas for judges, by stating, for example, that "…a judge may, for example, accept an invitation to speak at or be recognized or honored at an event hosted by a legal organization, law school, or other entity devoted to improving the law, the legal system or the administration of justice, even if such an event raises funds for the benefit of the sponsoring organization." (emphasis added)

Proposed changes to *Preliminary Draft*

A. Amend Rule 2.05 to include an express prohibition of sexual harassment by Judges, and amend the Comment to Rule 2.05 to include a definition of "sexual harassment."

For all of the reasons contained in our earlier written Comments and testimony, however, NAWJ strenuously urges that the Joint Commission reconsider and amend Rule 2.05 and its Comment to follow California's example, by including an express prohibition on, and definition of, sexual harassment by judges, and the responsibility of judges to prohibit such behavior by staff, court officials and others subject to the judges' direction and control, including attorneys in proceedings before the judge.

We find it particularly troubling that, directly contrary to the direction taken recently by many states in response to a growing body of evidence of frequent and very serious patterns of sexual harassment by judges, this Commission has not only failed to include specific prohibitions on sexual harassment, but has in fact removed the sole reference to such harassment which is currently contained in the Canons.

At the August hearings, a few Commissioners indicated that the Commission's rationale for this action was its belief that the umbrella term "harassment", as discussed in Comment [3] to Rule 2.05, adequately and equally addresses all the forms of harassing misconduct the Rules should, and are intended to, prohibit. However, although sexual harassment may compound other forms of impermissible harassment, (indeed, women of color are probably the group most vulnerable to and victimized by sexual harassment), sexual harassment differs qualitatively from other forms of harassment, because it is conduct involving physical, verbal and/or pictorial intrusion of a *sexual nature*. Moreover, although verbal sexual harassment alone constitutes an extremely demeaning and destructive misuse of power, sexual harassment can, and very often does, involve unwanted touching or more serious physical sexual intrusion by the perpetrator.

We refer the Joint Commission to NAWJ's March 2005 Comments emphasizing the grave and unique injury caused to litigants, court employees and the overall justice system by the all-too-frequent pattern of this egregious form of judicial misconduct, and particularly call to your attention comments and testimony by Lynn Schafran, Director of Legal Momentum's National Judicial Education Program, and the Comments earlier filed by the American Judicature Society in this regard. As Ms. Schafran has noted, express prohibition of sexual harassment is necessary in light of:

> "…the significant harm to victims; the indifference to this harm often displayed by state court systems when they are asked to intervene; the failure of some court systems to have effective sexual harassment policies and training programs in place; the trivializing attitude sometimes displayed by judicial conduct commissions toward complaints of sexual harassment by judges; [and] the damage to public trust and confidence in the courts when the community learns of judges' misconduct and court systems' failure to respond appropriately."[1]

NAWJ specifically proposes that, as recommended by AJS, Rule 2.05 be amended to include a new subpart (c) as set forth below:

(c) A judge shall not engage in sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.

NAWJ additionally recommends, as urged by AJS, that the Comment to Rule 2.05 be amended to include a new subpart [4] as set forth below:

[1] Lynn Hecht Schafran, "Testimony to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct submitted by the National Judicial Education Program," April 2004, p. 3

[4] "Sexual harassment" includes but is not limited to: sexual advances; requests for sexual favors; comments about physical attributes; repeated and unwanted attempts at a romantic relationship; sexual gestures; sexually offensive or suggestive remarks, sexually explicit questions; improper touching; lewd and vulgar language; suggestive or explicit pictures or images; and other verbal or physical conduct of a sexual nature that is unwelcome, regardless of gender."

B. Amend Comment [2] to Rule 2.05 to include, as a prohibited manifestation of bias, "insensitive statements about crimes against women."

NAWJ reasserts its recommendation that the examples of manifestations of bias contained in Comment [2] to Rule 2.05 be amended to include "insensitive statements about crimes against women." Although the Commission otherwise adopted in its entirety the American Judicature Society's recommended list of manifestations of bias, this example was inexplicably excluded.

Significant evidence establishes that this form of misconduct continues to pose an extremely serious--and dangerous--barrier to equal treatment for women litigants, especially in the area of domestic violence, a national scourge which continues to imperil millions of women and their children each year. I again refer the Joint Commission to the egregious examples contained in our earlier-filed Comments at p. 3, paragraph 2 (including, for example, the characterization by a judge with reference to an assault against a woman as "…just a Saturday night brawl where he smacks her around and she wants him back in the morning."), and the other testimony and submissions of Lynn Schafran and the AJS.

C. Canon 2 (Judicial Conduct), Rule 2.10 (Ex Parte Communications) should be amended to address and authorize special procedures customarily adopted for judges sitting in specialized problem-solving courts, subject to the proviso proposed by AJS that, "[A] judge should avoid communications that in substance, extent, or type exceed what a defendant may reasonably be considered to have consented to when agreeing to participate in the specialized court."[2]

In response to two requests for comment by this Commission, NAWJ again strongly supports the appropriate amendment to Rule 2.10 (B,) and inclusion in the Commentary to Rule 2.10, of language addressing and authorizing judges of so-called "specialized courts" to independently investigate certain facts and to engage in certain kinds of ex parte communications with individuals and entities integral to the functioning and success of these courts. I refer the Joint Commission to our written comments on these issues, at pp. 4 and 5.

[2] AJS May 2004 Comments, p. 5

D. The Rules should be amended to expressly authorize and provide guidance in the exercise of the judicial rule with respect to pro se litigants:

NAWJ joins AJS, Richard Zorza and others in urging support for inclusion in these Rules and/or their Commentary, of specific language authorizing and providing guidance in the exercise of the judicial role in protecting the right of equal access to justice of pro se litigants, at both the trial and appellate stages.

Many of our members, at both the trial and appellate levels, preside over courts, or are members of appellate panels where one or both litigants are unrepresented. This is particularly common, for example, in courts with special jurisdiction over family and housing matters, and in the trial courts of limited jurisdiction, where individuals may be sued for consumer or hospital debts.

Neither the current Code nor the proposed *Preliminary Draft*, however, provides any guidance for judges in this difficult area. Some specific possibilities include the kinds of interventions contained in the recommendations of the American Judicature Society[3]. NAWJ specifically urges:

- Rule 2.05, or its Commentary should prohibit discrimination based upon whether or not the party is represented by counsel;

- A Comment should be added to 2.09 authorizing, in aid of ensuring an unrepresented litigant's right to be heard, a judge's taking such affirmative steps as:

    1. At trial, questioning witnesses, modifying the order of trial, explaining the rules of evidence and giving adjournments for the party to obtain appropriate evidence;
    2. At argument on motions, explaining the nature of required submission and, where appropriate, extending the time to submit papers;
    3. Upon settlement, allocuting the settlement on the record to ensure that the unrepresented party understands the settlement and is acting without coercion or pressure;
    4. On appeal, explaining to the pro se litigant how the appeal differs markedly from the trial, guiding the litigant through a discussion of legal issues identified by the court to be potentially meritorious; and
    5. In all such situations, making referrals to organizations that may provide legal advice or representation and explaining the relevant law.

[3] "A judge may make procedural accommodations to provide diligent pro se litigants the opportunity to have their cases fully heard, and such an exercise of judicial discretion does not raise a reasonable question about the judge's impartiality. Reasonable accommodations include liberally construing pleadings, explaining the basis for a ruling, refraining from using legal jargon, questioning witnesses for clarification, freely allowing amendment of pleadings, and explaining general matters such as the burden or proof and what types of evidence may and may not be presented."

6. A comment should be added to 2.04 to the effect that the obligation to act impartially and fairly will not be violated if the judge takes affirmative steps (as suggested above) to protect the rights of an unrepresented litigant.

E. NAWJ joins NJEP in urging that in light of the overwhelming consensus of Gender Bias studies across the country, the Commission should include in its final report a comment on the need for states to ensure the gender neutrality of the language in their respective codes of judicial conduct.

NAWJ once again applauds the Joint Commission's work and thanks the Commission for the opportunity to address critical issues which have particularly important consequences for women and other vulnerable populations.

Sincerely,

Judge Sandra Thompson
President