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August 1, 2005

Ms. Deborah Taylor  
Projects Manager  
American Bar Association  
ABA Justice Center  
321 North Clark Street  
Chicago, IL 60610

Re: ABA Code of Judicial Conduct  
Comments on Revision

Dear Ms. Taylor:

If the work of the juvenile and family courts of this country is to be successful, it is imperative that judges take on non-traditional, problem-solving roles, such as administrator, collaborator, convener, and advocate. Under both the current and the proposed revisions to the ABA Canons, it is unclear whether or not a judge is able to serve in these roles. We, therefore, strongly recommend, again, that the Commission utilize the language recommended in our previous submissions to clarify the leadership role of judges.

**I. If the work of the juvenile and family courts of this country is to be successful, it is imperative that judges take on non-traditional, problem-solving roles such as administrator, collaborator, convener, and advocate.**

“...When I removed three children from a young drug-abusing mother last month, at the initial hearing I was able to recommend that she receive a substance abuse assessment available in our courthouse and administered by experts from the drug and alcohol service providers in our community. When her attorney nominated her for our dependency drug treatment court, our drug court team, including representatives from a wide range of service providers, accepted her on condition that she enter a residential drug treatment facility, engage in substance abuse treatment, and participate in counseling. In the months ahead, she will receive services from a social worker, a public health nurse, a housing expert, a mentor from our Mentor Moms program that utilizes graduates from the drug court to counsel current clients, a special parenting class that will bring her and her children together with other mothers, their children, and Head Start and Early Start teachers, and other services as needed. All of her children will be represented by an experienced attorney. Moreover, one or more of her

children will have a trained volunteer, a court appointed special advocate assigned to assist them through this difficult time in their lives.

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All of this has become possible because in my role as a juvenile court judge I have been able to reach out to agencies, service providers, and to the community with the request that they work with me and the other members of the court system on behalf of children and families who come before the juvenile court. In essence, I asked for help and they responded to my request. I met with leaders of agencies and service providers, and I convened meetings bringing all members of the drug court team together in order to organize the drug court, to provide expert substance abuse assessors available in the courthouse, and to have the substance abuse treatment community work with the court. These are examples of the non-traditional work of the juvenile court judge. These are the kinds of tasks that I and my colleagues undertake every day as juvenile court judges. These tasks also exemplify the complexities that recovery and rehabilitation involve during the family reunification process in juvenile dependency court.”

“Many of these roles are not traditional for a judge. Yet for juvenile court judges, they are essential if the work of the court is to be successful, and if court orders will be carried out. The role of the juvenile court judge is unlike any other. In the traditional judicial role, deciding a legal issue may complete the judge’s task; however, in deciding the future of a child or family member, the juvenile court judge must, in addition to making a legal decision, also be prepared to take on the role of an administrator, a collaborator, a convener, and an advocate.<sup>1</sup>”

**II. Under both the current and the proposed revisions to the ABA Canons, it is unclear whether or not a judge is able to serve in these roles.**

We are including, below, summaries of several opinions from ethics advisory boards around the country. Whether or not you agree with the decision reached in each individual opinion, it is clear that there is great uncertainty among judges and widely divergent opinions among ethics advisory boards as to the type and level of community involvement allowed. The National Council of Juvenile and Family Court Judges (NCJFCJ) emphatically submits that the revisions as published by the ABA, if enacted by states, will do nothing to improve the situation for judges.

**Texas:**

A recent decision issued by the State Commission on Judicial Conduct reads, “...the Commission concluded that your service on the Board of Directors of Texas CASA could be perceived by litigants and others to reflect adversely on your impartiality in those cases in which CASA volunteers appear before you and testify. This appearance of impropriety should be avoided in order to preserve public confidence in the integrity, impartiality, and independence of the judiciary.”

**Nebraska:**

The Nebraska Ethics Advisory Committee determined that the Code of Judicial Conduct does not allow a judge to author a “recruiting letter” for the Nebraska State Bar Association’s “One Hour of Sharing” campaign. It makes no difference that the campaign seeks either “hours of service” or “cash contributions in lieu of services” from Nebraska attorneys, both are prohibited. The Code of Judicial

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<sup>1</sup> Excerpts from the remarks of Judge Leonard P. Edwards upon being the first juvenile court judge to receive the William H. Rehnquist Award, November 18, 2004. Judge Edwards is a Past-President of the National Council of Juvenile and Family Court Judges, and is the author of, “The Role of the Juvenile Court Judge.”

Conduct further prohibits a judge from providing the Nebraska Legal Services agency with a statement or quote for use in its fundraising pamphlet, even though the quote will be a general statement regarding the necessity and importance of the provision of civil services for low-income citizens.

The Nebraska Judicial Ethics Committee was presented with the following questions: May a judge attend a training conference concerning domestic violence issues? May the judge's tuition and expenses for attending the conference be paid for by a local domestic violence project or through a grant from the Department of Justice? The Committee concluded that, "The Code does not prohibit a member of the judiciary from attending an educational conference on domestic violence where the curriculum of the conference is not primarily prosecutorial in nature. However, the Code does prohibit accepting funding from either the local domestic violence project or through a grant from the Department of Justice, as each is a partisan group whose interests will likely come before the judge in future cases. The Code of Judicial Conduct would not seem to prohibit a judge's attendance at an educational training conference concerning domestic violence issues. However, the judge should not accept "tuition and expenses" being paid by a domestic violence project or the Department of Justice because acceptance of such payment could result in the appearance of partiality."

In another opinion, the Nebraska Judicial Ethics Committee concluded that the Code would prohibit a judge from serving on a CASA board because such service could create a perception that the judge's impartiality could be cast in doubt.

**Virginia:**

*Judicial Ethics Advisory Opinions, Opinion 03-3 (July 18, 2003)*

A judge asked the committee the propriety of serving on the board of a non-profit corporation that assists and educates attorneys who suffer from chemical dependency. The committee stated that judges have the power to regulate the performance of the attorneys who appear in court, and pursuant to that authority may refer an attorney to the program. The committee stated that the integrity of the disciplinary function of a judge would be compromised if a judge, while serving on the board, referred an attorney to the program, and the effectiveness of this judicial function would be diminished substantially if, by choosing to become a board member, a judge "loses the option of being able to make a referral to the organization, that, in particular circumstances, may be most able to help the attorney in question."

**Alaska:**

*Commission on Judicial Conduct, Opinion 2001-01 (February 26, 2001)* The commission was asked whether a superior court judge could serve on a state Children's Justice Act task force created by federal statute and requiring state judge membership. The commission warned that the mere fact that federal legislation requires state judge membership on a task force as a prerequisite for funding does not preclude an independent ethics analysis. The commission set forth the following four factors to assist judges in determining whether membership on a commission, task force, or committee is appropriate:

- Whether the members represent only one point of view or whether membership in the group is balanced;
- Whether the group will discuss controversial legal issues, issues likely to come before the courts, or merely administrative or procedural concerns;
- Whether the group will be viewed by the public as a political or an advocacy group or merely as an administrative group; and

- Whether the group will take public policy positions that are more appropriate to the other two branches of government than to the courts or whether the policy positions could be viewed as clearly central to the administration of justice.

Using the factors as a guide, the commission indicated that Alaska judges may be members of the state task force because it has balanced membership and appears to be chiefly concerned with administrative solutions to child abuse problems. But the judges must limit their involvement to public policy positions that are appropriate for the courts and are not legislative or executive in nature.

**Kansas:**

*Jud. Adv. Op. 129 (July 15, 2005):* Members of the Kansas Appellate Courts may not attend a national conference to “focus public attention on the state of civic education in America” where the expenses of each delegate are paid with funds appropriated by Congress. The Kansas Department of Education is currently a party in litigation pending before the Supreme Court and may be a party in litigation before the Court of Appeals. Moreover, there is no showing that the conference is a “bar-related function or activity devoted to the improvement of the law, legal system or the administration of justice.”

*Jud. Adv. Op. 121 (April 1, 2004):* It is not appropriate for judges to attend a conference for district and municipal court judges entitled “Adjudicating the Drugged and Intoxicated Driver” sponsored by the Kansas Department of Transportation Drunk Driving Prevention Office and the Kansas Highway Patrol. While the purpose of the conference is laudable, the conference is designed to present law enforcement’s perspective of drunk and drugged driver cases to judges and to present judges with knowledge of the challenges faced by law enforcement agents during offender apprehensions and the methods used to enforce the laws. In addition, the defense bar and bar generally are not present or participating. As such, it presents ex parte communications to judges which are not permissible.

**South Carolina:**

*Jud. Adv. Op. 24-2003 (amended) (February, 2004):* A judge may not attend a training seminar which is funded by an agency that appears before him or her, unless the training seminar is approved by the Continuing Legal Education Commission. A judge may not attend a training program that is paid for with grant money funneled through an agency that appears before him or her, unless the training seminar is approved by the Continuing Legal Education Commission. (NOTE: The program was jointly given by the NCJFCJ and the Fund; the course was funded by the Department of Justice, with funds for the judge to attend made available through the local Safe Homes agency and the Spartanburg Department of Public Safety).

*Jud. Adv. Op. 16-2004 (September 29, 2004):* Magistrate judges may not serve on the Board of Family Violence Coordinating Council or A Community Response to Domestic Violence. While a judge may serve as an officer, director, trustee or non-legal advisor of an organization or governmental agency devoted to the improvement of law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit, service in such capacity is subject to several restrictions which must be carefully considered. In this case, law enforcement officers are likely to engage in proceedings that would ordinarily come before magistrate judges. This would possibly give the appearance of impropriety which judges are required to avoid.

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*Jud. Adv. Op. 12-1999 (September 27, 1999):* A family court judge may not attend a training seminar using funds from SAFE Homes Rape Crisis Coalition.

*Jud. Adv. Op. 9-1998 (March 12, 1998):* A magistrate should not attend an event hosted and financed by an organization, which is likely to appear before his or her court, where that organization is paying the judge's expenses. A magistrate may attend an event hosted and financed by an organization, which is likely to appear before his or her court, where he or she pays their own expenses, and he or she does not receive any gift or form of remuneration.

**West Virginia:**

*Opinion on September 17, 2004:* A family court judge may not properly speak at a one-day seminar for domestic violence advocates and domestic violence attorneys based on the fact that the seminar is not open to all members of the bar.

*Judicial Investigation Commission (December 18, 1998)* The Commission issued an advisory opinion finding that judicial participation in a statewide conference on full faith and credit of domestic violence protective orders invited unethical conduct since it would give the appearance of impropriety in violation of the Judicial Canons, relying on Canons 1, 2A and 4A. The Supreme Court of Appeals of West Virginia disagreed with the Commission and relied upon Canon 4B of the Code of Judicial Conduct in entering the following order, dated May 13, 1999, which granted authority to the judges and court personnel to attend the training

"Accordingly, and based upon all of the foregoing, this Court deems it appropriate to enter this Administrative order approving the attendance of court personnel, including judges at the West Virginia Full Faith and Credit Conference will not impinge upon the independence and fairness of judges as they determine the facts and the law in individual matters;. . . "

**Kansas:**

*Judicial Ethics Advisory Committee, Opinion JE 73 (February 3, 1997)* A district judge asked the committee if the judge may serve as a trustee for a community organization which was formed for the purpose of providing overall support, advice and resources to action groups composed of law enforcement officers, school officials, social workers, church members, city officials, business leaders, members of the media, and others within the organization which aim to bring about changes in program, policies and practices to increase the quality of life for children and youth. The committee indicated that although the purpose of the organization is praiseworthy, the vague mission statement does not allow the judge to assess the propriety of judicial participation under the constraints of Canon 4.

**Delaware:**

*Judicial Ethics Advisory Committee, Opinion JEAC 2002-1 (January 11, 2002)* A judge asked the committee whether she could perform volunteer work for a female juvenile detention facility, such as giving technical advice on the care of farm animals and evaluating the suitability of horses or ponies for adoption, and either donate or permit the facility to use her pony. The judge receives reports from the facility and hears requests for placement at the facility daily. The committee indicated that the judge's proposed volunteer work was prohibited because the organization is regularly engaged in proceedings before the judge and would reflect adversely on the judge's impartiality. The committee advised that they did not see any hindrance with an

outright donation of the pony to the facility, so long as the donation did not lead to an ongoing relationship with the organization outside of the courtroom.

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**Georgia:**

*Judicial Qualifications Commission, Opinion 201 - Revised (July 28, 1995)* The Georgia Commission on Family Violence and several individual judges urged the commission to reconsider their original opinion that judicial participation on the family violence task force for the judicial circuit in which such judge sits would be inappropriate. In the revised opinion, the commission stated that participation by a judge on a limited basis in the Commission on Family Violence and the local task forces is permissible in certain activities such as offering expertise and knowledge; teaching, speaking and presenting information designed to educate the public as to the underlying purposes and efforts of the local task force; and accurately portraying the role of the judges in the court system. The commission stated that judicial participation in the formulation, distribution, or dissemination of actual protocols for use by judges would be inappropriate and reiterated a statement found in Opinions 115 and 78, "that a judge should not become personally associated as an activist with particular causes which relate to issues which may come before such judge in a judicial capacity."

**Florida:**

*Judicial Ethics Advisory Committee, Opinion 98-26 (November 10, 1998)* A judge enquired concerning serving on the Mayor's Victims' Assistance Advisory Council (VAAC) and whether it would be appropriate to take a leadership role in the Council. The opinion stated that a judge may serve as appointed on the VAAC as it is concerned with the improvement of the law, the legal system or the administration of justice. The stated mission "is to insure and enhance the rights of crime victims by providing a forum for public and private community to work together for the development and implementation of effective programs in education, prevention and intervention." One committee member stated, "in light of the Supreme Court's announced desires that judges become more active in areas of enhancing the image of the judiciary, it would appear that participation in the VAAC program is encouraged within the bounds of the Canons." The committee indicated that the judge may assume a leadership role if the VACC is not responsible for raising funds, initiation of legislation, enforcement of the law, or prosecution of crimes.

**Ohio:**

Under the Ohio Code of Judicial Conduct, common pleas court judges should not serve on judicial corrections boards for community-based correctional facilities and programs.

A judge's consultation and participation may be sought in collaborative efforts regarding domestic violence, but written endorsement of the protocols that set forth the required behavior of peace officers, prosecutors, and judges, interferes with the independence of the judiciary, implies partiality of the judges, and appears to commit a judge with respect to cases and controversies that may come before the judge in a court of law. It is not prudent for a judge to make a written endorsement of a protocol for responding to domestic violence.

**III. We, therefore, strongly recommend, again, that the Commission utilize the language recommended in our previous submissions to clarify the leadership role of judges.**

The submissions that NCJFCJ has provided you with over the past two years were developed in response to resolutions of the Conference of Chief Justices. In passing Resolution 22 in August 2000, the Conference of Chief Justices (CCJ) took a strong, supportive stand recognizing the need for juvenile, family and other state

courts to be problem-solving courts. In part, the resolution stated that "the public and other branches of government are looking to courts to address certain complex social issues and problems they feel are not most effectively addressed by the traditional legal process."

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In January 2001, the CCJ passed Resolution 21, entitled "Statements of Principles Regarding Children and Families." Below, two of the principles are highlighted:

\* "In that family matters, in times past, not always have been accorded a high priority, we will seek to assure those courts and judges the facilities, resources and stature among their colleagues that they need and deserve to have."

\* "We will, by speeches, programs and other activities, continue to focus attention both on the development of law related to children and how the law can better protect the interests of children and promote the well-being of their families."

We repeat, below, our five main suggestions for changes to the revisions you have posted which we submitted in January, 2005. We submit that if the Commission is unwilling to include our proposed language in Suggestion #1 as an affirmative duty, they consider including it in the black letter law of the Canon as permissive.

#### **NCJFCJ Suggestion #1**

NCJFCJ suggests that a new section, "Civic Responsibilities" be added after Canon 2C (Administration) and before Canon 2D (Reporting).

#### **D Civic Responsibilities**

##### **2.18**

Subject to the requirements of this Code, a Judge should provide leadership in:

- a identifying and resolving issues of access to justice;
- b developing public legal education programs;
- c engaging in community outreach activities to promote the fair administration of justice;
- d convening, participating or assisting in advisory committees and community collaboratives devoted to the improvement of the law, the legal system, the provision of services and/or the administration of justice

##### **2.19**

A judge may publicly or individually endorse project goals concerning the law, the legal system, the provision of services or the administration of justice, in principle, and actively support the need for funding of such an organization or governmental agency.

#### **Commentary**

**2.18: As a result of the evolving interpretation of the judicial canons and the increased demands and encouragement on the judiciary to provide leadership in their communities (local, state and nationwide), this Canon was created to encourage judges to provide leadership in exercising their civic responsibilities and to validate their efforts.**

**2.19: This Canon permits judges to endorse, consistent with other provisions of the canons, the need for funding without personally participating. The public has an interest in hearing the ideas of its judiciary within the public forum on matters concerning the administration of justice. Consistent with these provisions, a judge may exercise the constitutional right of free speech and association on such matters.**

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### **NCJFCJ Suggestion #2**

The following provision should be added under Canon 2 (Judicial Conduct), paragraph C (Administration) and after 2.16:

#### **2.17**

A judge should seek the necessary time, staff, expertise and resources to discharge all judicial and administrative responsibilities.

#### **Commentary**

**2.17: This new sub-section sets forth the express need for time, staff expertise, and resources to perform the necessary administrative functions. It gives juvenile and family court judges a defense if the budget is not adequate to perform judicial functions.**

### **NCJFCJ Suggestion #3**

In Canon 4 (Extra-Judicial Conduct), NCJFCJ strongly urges that the ABA not remove the paragraph about Avocational Activities. While some of the spirit of the paragraph does seem to be included in the Commentary to the Canon, we submit that removing the section from the “black letter law” of the Canon seriously diminishes the importance of the concepts.

Avocational Activities. A judge may speak, write, lecture, teach and participate in other extra-judicial activities concerning the law\*, the legal system, the administration of justice and non-legal subjects, subject to the requirements of this Code.

### **NCJFCJ Suggestion #4**

It is submitted that the following paragraph should be added as a new paragraph between H and I under 2.12 (Disqualification):

Official communications received in the course of performing a judicial responsibility and knowledge acquired by training programs or from experience do not create per se a basis for disqualification.

#### **Commentary**

**The inclusion of this language is intended to encourage judges to obtain additional knowledge in the course of performing a judicial responsibility (i.e.—training, expertise) to assist in administering justice.**

### **NCJFCJ Suggestion #5**

Add the qualifying phrase “of for profit entities” to Commentary [3] under 3.01 (Using the Judicial Office for Private Purposes):

Special considerations arise when judges write or contribute to publications **of for profit entities**, whether related or unrelated to the law.

#### **Commentary**

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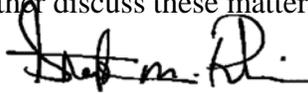
**As it stands, Commentary [3] is over restrictive. It might be interpreted to apply to any article written by the judge published by the National Council of Juvenile and Family Court Judges, the American Judicature Society, CASA, and other similar not-for-profit or charitable organizations. It appears that the restriction is intended to apply to "for profit" organizations and should be amended for clarity.**

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The President-Elect of NCJFCJ, Judge Dale Koch, will be present at the public hearing on Friday to answer any questions you may have about our proposals. The leadership of NCJFCJ is also willing to convene a meeting with the members of the Commission to further discuss these matters with you and to reach mutually acceptable language for the Canons.



Sincerely,

Mary V. Mentaberry,  
Executive Director  
Reno, Nevada

Judge Stephen M. Rubin  
President  
Tucson, Arizona