AMERICAN BAR ASSOCIATION

JOINT COMMISSION TO EVALUATE
THE MODEL CODE OF JUDICIAL CONDUCT

A commission jointly appointed by the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Judicial Independence

PUBLIC HEARING
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P R O C E E D I N G S

CHAIRMAN HARRISON: Good morning, everybody. And as you all know, today is going to be devoted to what we have euphemistically referred to as a hearing, but specifically we'll receive comments by and suggestions from people who are taking the time and trouble to come with us and share with us their thinking as it relates to our work on the Code of

Judicial Conduct.

I wonder if it would be helpful for the record to go around the room and see who's here.

COMMISSIONER TURNEY: I'm having trouble hearing, Mark.

(Brief discussion off the record, brief recess)

CHAIRMAN HARRISON: I'm Mark Harrison, for the

record. And why don't we go around starting at my left.

MR. KUHLMAN: I'm George Kuhlman, ABA Ethics Counsel.

MR. KENDALL: I'm Doug Kendall from the Community Rights Council.

MR. ROSNER: Seth Rosner, the Center for Professional Responsibility.

MS. LIBBY: Eileen Libby, Associate Ethics Counsel.

COMMISSIONER ALFINI: Jim Alfini from Houston, Texas.

COMMISSIONER FITZPATRICK: I'm Tom Fitzpatrick from Seattle, member of the Commission.

MS. GRAY: Jeanne Gray, Director of the ABA Center for Professional Responsibility.

COMMISSIONER TURNEY: Harriet Turney from Phoenix.

COMMISSIONER McKEOWN: Margaret McKeown, San Diego.

MS. AMON: I'm Carol Amon. I'm an advisor to the commission and I'm a judge of the U.S. District Court for the Eastern District of New York.

MR. BOWIE: I'm Pete Bowie, bankruptcy

judge from San Diego.

MR. CUMMINS: Bob Cummins, a trial lawyer from Chicago and an adviser to the commission.

COMMISSIONER NEVILLE: Cara Lee Neville, state trial judge from Minnesota.

COMMISSIONER HILLIKER: Don Hilliker from

Chicago, a member of the commission.

MR. GEYH: Charlie Geyh. I'm a professor at Indiana University and the reporter to the commission.

MS. GALLAGHER: Eileen Gallagher. I'm with the Justice Center of the ABA.

CHAIRMAN HARRISON: And I know we have some guests in the room, but since they're going to each ultimately speak, we can have them introduced as they appear.

First on our agenda today is Judge Annette Scieszinski.

Did I do it right?

JUDGE SCIESZINSKI: Yes, you did.

CHAIRMAN HARRISON: Judge, why don't you tell us who you are and what you're going to talk about.

JUDGE SCIESZINSKI: I'm pleased to have a microphone. I'm also pleased to be in what is generally regarded as a hot seat although it's quite

chilly today under the surge of air.

Mr. Chairman, Commissioners, advisors and helpful staff, good morning. I'm Annette Scieszinski. I am a district court judge from the Eighth Judicial District of Iowa. I ride a circuit of ten counties with five other judges. Our court is rural and it's one of general jurisdiction.

I appear to you today in really three capacities to urge relief within a rewritten model code for judges who are managing self-represented litigants in trial courts. As a member of the Executive Committee of the National Conference of State Trial Judges, I was asked to follow the work of your commission by our chair, Judge Sophia Hall, and in doing that, I have had an eye toward the multi-faceted collected interest of the trial judges who make up our membership. Among those issues commanding our attention is the authority dilemma of what we do when confronted with pro se litigants vis-a-vis our duty to maintain and assure meaningful access to judge through our courts. As president of the Iowa Judges Association, I also bring you a message of urgency from those field judges who

comprise our membership in Iowa for the need for ethical insight and guidance in this area.

I would like to report to you that we recently convened the 2004 statewide Bench Bar Conference in our state and the conference was devoted to the subject of managing pro se litigants in our courts. We also have had an initiative arising out of our judges association to convene a pro se task force jointly populated by the Iowa State Bar Association and the Iowa Judges Association, and the work of that pro se task for is ongoing at this time.

Earlier this week, I was a participant in the Iowa Judicial Institute which is a traditional summer education program provided by the judicial branch of our state and, interestingly, there also topics of the ethical ramifications of working with self-represented litigants was a central part of the discussion.

All of the activities within the Iowa Judges

Association's focus on pro se litigants really arise out of recognition that judges need ethical guidance, protection and a nudge in this area. I refer to "a nudge" out of recognition that many judges experience a palpable chill on doing what they believe is necessary to assure access for pro se litigants, all the while knowing that what they do may be fraught with the uncertainty of ethical ramifications for

that judicial officer.

I also appear before you in a personal and professional capacity. I stand before you as a judicial officer living the near-daily struggle with pro se litigants and the constant worry about assuring those people meaningful access to our courts, while being apprehensive that in doing that I may step over an imaginary line into judicial impropriety.

I'm aware that the Commission benefits most by specific proposals for language in rewritten code,

and in preparation for this appearance and just in my general work in keeping up on what the commission is doing, I am aware of prior testimony that you've received, most specifically from Richard Zorza -- I believe he may have testified before you in your Washington, D.C. public hearing -- and I'm familiar with the specific proposals he made. And I am not really capable of improving much on those. I find those acceptable. I would also find any reasonable addition of his specific proposals acceptable.

The main thing is we need guidance out there in the field, and I urge you to include specific acknowledgement that judges have an enhanced responsibility in this area and also an understanding

that to do so is not going to place a judicial officer in ethical peril.

So in summary, I'm really in a position -- several positions -- to implore that you include some specific guidance for those of us the field.

I'd be happy to answer any questions that you have or expand upon my comments if it would be helpful.

CHAIRMAN HARRISON: Thank you very much, Judge Scieszinski.

Charlie?

MR. GEYH: Can you give us a couple of examples of the kinds of things that you as a judge confront that lead you to testify that you really just need more guidance? In other words, what kinds of ambiguous situations are you encountering in the code that could use -- stand clarification?

JUDGE SCIESZINSKI: Well, one that comes up in nearly every case involving a self-represented litigant is the need for clarification of what that litigant brings to the trial record, and it's common for myself and my colleagues to insert questions for clarification. We find some criticism from the bar, understandably, when we do that, and we wonder about what is enough, what is too much. So that would be a

specific instance.

Another arises out of a situation that is on the minds of many judges in my state -- it was sort of a moment of epiphany for us as to the ethical perils out there -- when one of our number was privately reprimanded for addressing a pro se litigant in a way that was later determined to be giving legal advice. I'm not really at liberty to discuss that situation in detail because we have a rule in conjunction with our state judicial qualifications commission that doesn't allow anyone, even the judge who may have been reprimanded, to discuss the details of the reprimand. But if you could imagine a situation where a judicial officer has a pro se litigant in front of him or her and is unable to deliver the relief that the litigant is seeking, and as a public official, the judge says, "I can't deliver that relief, and here's why you may want to consider small claims court," hypothetically speaking, that may be seen by some even disciplinary officials as the practice of law.

Those of you who practice in the trial courts

or who serve as judicial officers in the trial courts know that judges do that kind of thing all the time. That's just part of being the public official that

conducts that proceeding, and I'm doing that type of thing rather routinely with pro se litigants but it's a dangerous practice, and that would be another example of where we need guidance about what we can and cannot do.

Yes?

COMMISSIONER McKEOWN: I'm trying to understand how this will work as a practical matter in terms of our drafting. If we leave in the general ethical principal that judges aren't permitted to practice law, that could be extended to the proposition that judges shouldn't give legal advice whether it be to your next-door neighbor or to a pro se litigant, and then we take the situation that you proffered, which is a very real one. How do you think as a practical matter we would take that and crystallize it into

something that would either be part of the code or the comments that would then have general applicability to all judges?

JUDGE SCIESZINSKI: The question is a good one, and the work with pro se litigants is so spontaneous and so varied that there wouldn't be a specific protocol that would work for all situations. But I'd liked Richard Zorza's language that referred to basic methods of engagement that courts might undertake --

and I don't have the specific language right in front of me but I do have access to it -- that would talk about being able to question, being able to make referrals to agencies, doing things that are designed to assure access to the court process but don't compromise the judicial officer's paramount duty to remain neutral. And it would be a rather amorphous and subjective standard of what in a given situation a judge can and should do that doesn't go over the line to becoming non-neutral.

COMMISSIONER McKEOWN: Again, you know, I am sympathetic to that.

Now my only question is, Doesn't that maybe land you right back in the same situation? It could be the Iowa Disciplinary Commission or it could be Maryland, but much of the interstitial discretion is really left with those commissions. And you're suggesting that the rule can't really, you know, put the meets and bounds on it, so I'm just trying to figure out how we would do this. If you have any other suggestions --

JUDGE SCIESZINSKI: Well, just the recognition that there is a responsibility to do it.

COMMISSIONER McKEOWN: Okay.

JUDGE SCIESZINSKI: It's one thing to say that

a judge should assure access and it's another to say a judge may and should take affirmative steps to do that within the context of the courtroom and the case, and all the while being mindful of the

responsibility to remain neutral.

I don't think there's anything that can be done in the wording of the model code or in our day-to-day actions that will insulate us entirely from criticism in this area by the bar or in any given case, and we're not seeking something that will, because it's such a moving target, but just some acknowledgement that gives us the confidence to go forward with what we judge to be our duty.

CHAIRMAN HARRISON: Seth and then Jim.

COMMISSIONER ROSNER: Yeah, to extend that --

CHAIRMAN HARRISON: Could you speak up just a little bit, Seth?

COMMISSIONER ROSNER: Isn't the most significant, the inherent problem in this issue the fact that the circumstances you have in any given case are very fact-specific and, as you just said, the judge's response is a spontaneous one: "It's got to be right now. I've got to decide how I deal with this issue now. I can't think about it for an hour." And that's very -- it seems to me very hard to define

essentially because it is so fact-specific.

JUDGE SCIESZINSKI: The dilemma might be illustrated in the difference between clarifying facts that are brought forward by the pro se litigant who would have a responsibility to bring forward his or her case as compared with maybe an element that is missing in a pro se's case. And I would say that a judge steps over the line of propriety in initiating inquiry about a missing element but does not step over the line when the judge seeks clarification about a fact that's already been presented.

For example, a very common elementary fact that usually needs clarification is a pro se litigant in testifying may refer to "he" this, "he" that. And to clarify for the record that the "he" the witness/pro se litigant is talking about is a certain individual -- "Who are referring to when you say 'he'?" -- I would see that as a proper line of inquiry for the court to make for clarification of the record. But if the pro se litigant failed to present a key element of the case that was being presented, I would

see it as stepping over the line for the court to say, "Well, you haven't talked about this, and this is key for me to know. What do you have to say about that?"

COMMISSIONER ROSNER: I didn't make myself clear, I'm afraid. What I meant was that the circumstances of the proceeding, of the situation of the pro se litigant, are fact-specific. In other words, this circumstance of this case at this moment is going to be different than it might be twenty minutes from now or it might be for the next pro se litigant. And since those circumstances differ from case to case, from pro se litigant to pro se litigant, it seems to me very difficult to craft a rule that would give specific guidance to the judge, "Yes, I can do this here. No, I should not do this there."

JUDGE SCIESZINSKI: Your point is very well taken. And when I speak of specific guidance, I'm

talking about the kind of thing that Richard Zorza recommended: just acknowledging that judges can question in appropriate situations, that judges can make referrals in appropriate situations, all the while having all these other responsibilities to remain impartial and to not do anything that would be prejudicial to the other side.

COMMISSIONER ALFINI: I wonder if I could ask you if we could somehow relate this to the small-claims experience. Certainly in small claims courts

we have -- they are generally populated by pro se litigants for the most part, and we've got -- every state, every jurisdiction in this country has some experience, long experience with handling pro se litigants in small claims courts.

Is there something that we could borrow there? I mean I was thinking particularly of my experience. We have some court staff assisting the pro se litigant in drafting a complaint and sort of setting

up the case, et cetera. Is there more staff work that could be done to assist in more general-jurisdiction cases involving pro se litigants? I'm fishing here for you, to see if we can relate that experience to the broader experience that we're talking about here today.

JUDGE SCIESZINSKI: Certainly staff work is a central focus for the discussions that we've had. The magic piece of that puzzle is funding, if I'm following what you're suggesting.

As you mention small claims court and methodologies that might be borrowed from that that would give us some guidance, the one that pops into my mind is the informality of the small-claims docket. And that would be a model that most courts, myself included, adopt on an ad hoc basis as we're

dealing with pro se litigants. Some of the situations we're confronted with don't lend themselves to that, though. We're starting to se pro

se plaintiffs, for example, in jury cases for personal injury cases and things of the sort, and so the informal model only goes so far in taking care of our concerns.

CHAIRMAN HARRISON: Any other questions of Judge Scieszinski?

JUDGE SCIESZINSKI: Thank you for considering my views and thank you for all the hard work that you're putting in on this commission.

CHAIRMAN HARRISON: Thank you for the time and trouble to come visit with us.

Our next guest is Ann Young.

JUDGE YOUNG: I'm going to pass down some copies. There are two things I'm handing out.

Thank you for having me.

CHAIRMAN HARRISON: Thank you for coming, and as is often the case, we're a little behind, so I wanted to just move on.

JUDGE YOUNG: I'm passing around two things. One is -- and I apologize, it is has some handwritten edits, and then I'm going to give Eileen a clean edited copy to put in the web site. The second is a

one-sheet thing that gives some examples in response to hearing some requests for that kind of thing.

Just to give you an idea of my background and experience and the source of some of the comments I'm going to give you, for seventeen years I was an administrative law judge on Tennessee central panel of administrative law judges. For the past four years, I've been with the U.S. Nuclear Regulatory Commission as an administrative judge. Back in the early '80s, I also worked for awhile doing juvenile court reform activities. But what I'm saying today are my own views and should not be taken to represent the positions of any -- of my employer or any other organization with which I'm associated. I'm also on the Administrative Law Council as the administrative judiciary member, but again, I'm speaking for myself.

I want to speak on two subjects: One, the applicability of the Code of Judicial Conduct to the administrative judiciary and with whom I've talked with Ms. Turney, Judge Turney -- and it's nice to

meet you in person -- and second, your request for comments on the ex parte provisions in four areas: very briefly, on obtaining information and opinions on matters other than the law, on whether the provision should be relaxed for any specialized

tribunals and also on the extent to which the ex parte provision should be adapted for the administrative judiciary, and, finally, the related subject of whether settlement judges should be permitted to hear cases that fail to settle.

On the application of the code to the administrative judiciary, in 2001 a resolution on which I had been working for what seemed like many, many years was adopted by the house of delegates as Resolution 101-B, and I've attached a copy of that to the back of my comments. This provides among other things that members of the administrative judiciary should be held accountable, quote, "under appropriate ethical standards adapted from the ABA Model Code of

Judicial Conduct in light of the unique characteristics of particular positions in the administrative judiciary." That language was compromise language that was actually taken from a footnote to the 1990 code -- the 2000 version, actually.

The rationale for applying the code to the administrative judiciary derives from the fact that administrative law judges, administrative judges, members of the administrative judiciary, whatever their title, perform essentially the same function as

a trial judge hearing a case without a jury. We are held out as providing due process and being independent decision-makers who conduct fair hearings affecting members of the public. The integrity of these proceedings depends on the competent and ethical conduct of the judges who preside in them.

The principles behind the code apply equally in administrative adjudication where it has been said

more members of the public come in contact with the legal system than in a judicial branch. And members of the public in such tribunals deserve as much fairness, competence, lack of bias and conflict and integrity in adjudicators who hear their cases as do those who come before members of the judicial branch. To all of them, it's the system with which they must deal, and how well we serve the public affects others' faith in the legal system across the board.

For these reasons, whether or not the Commission formally recommends that the code be applicable to the administrative judiciary, I strongly urge you to emphasize in at least the comments to the code. And actually if you're looking at language, the next part of it, the same principles that apply to members of the judicial branch should govern the administrative judiciary in the conduct of

adjudicatory proceedings.

Moreover, although not every position may be

relevant to the administrative judiciary, it should also be stated that the burden of establishing that any provision either is not applicable or should be adapted in any way that would relax the requirement should be on the proponent of any such exception or relaxation.

On the issue of judges obtaining information and opinions essentially outside the record, without parties present, I agree with the Massachusetts approach as described in Andrew Kaufman's June 9th comments.

I understand from a former member of the Tennessee court of the judiciary that almost certainly a large percentage of the complaints against judges there involve ex parte communications; and that would mean that there's a large faction that's left out: those that are not disclosed, that people never hear about. And even though such communications may be very innocently intended, I think most of us would not like to be the absent party in such circumstances in any litigation of importance to us. And if it remains, then it should be limited to issues of law on which there's a

recognized system of research, everyone has access to it, as opposed to off-the-record discussions or opinions about facts or circumstances that might affect a decision.

On the possibility of relaxing the ex parte provisions of the code for certain specialized courts, I can talk about juvenile and family courts. I've worked on reform in those areas. Both in my experience doing that as well as being an ALJ in Tennessee in which I heard cases involving health-care relating to minors and the elderly, I have seen for myself how very well-intended ex parte communications in context can have unintended consequences and lead to a sort of patronizing and big-brother approach. The better approach I think would be to make more use of guardians ad litem and the elder guardianships. Again I think the Massachusetts approach to communications with probation officers being held in the presence of

parties who've availed themselves of the opportunity to appear and respond is a better approach. I think without the checks of the ex parte prohibition, blind spots can really occur that may not be apparent on the surface.

I'm just going to try to skip down.

In Tennessee, I remember when we adopted the 1990 version of the ex parte provisions. Before that, oftentimes people would say, "Well, it's just procedural so it doesn't matter." I found the new version, the current version, to be invaluable in giving guidance on exactly what to do if you receive some contact, and I would hate to have that be gone. From a standpoint of someone in the administrative judiciary, this not only provides protection for the public but for the judge. If you're told, "Well, the code doesn't apply," or, "This doesn't apply because this is just procedural," then that opens the door for all sorts of abuse.

Doing settlement negotiations in both my old office and my current office -- where, by the way, nothing like what's in the example I passed out happened -- we had cases where a hearing judge and a settlement judge would be assigned to certain types of cases and they would not talk with each other, and that worked very well and has in both places.

Just to conclude, I want to point out that there are members of the administrative judiciary who do suffer consequences from time to time when they conduct themselves in an ethical manner but in a manner that may not please the powers that be.

For this reason, the practical importance of the protection of independence, impartiality and fairness the code provides cannot be over-emphasized.

On the problems associated with ex parte communications, these problems are not going to disappear, arising as they do out of the normal human instinct to talk about what's of interest to you and

the cumbersomeness that is seen in having to make sure everybody in a case, every party in a case, is involved in any communication.

I therefore urge you to not relax any of the ex parte provisions of the code and would be glad to answer any questions, and I can provide language if you like in the future if that would assist you.

Yes?

JUDGE BOWIE: What sort of code applies to you now sitting where you're sitting?

JUDGE YOUNG: What sort of --

JUDGE BOWIE: Code.

JUDGE YOUNG: -- code? Well, since I'm federal, there's not really any code. There is case law that says you look to the ABA Model Code, and I've always considered that whether formally covered or not, it's a good idea to follow the code. In Tennessee, the first four canons of the code apply by

rule that was adopted by our office.

JUDGE BOWIE: Why I asked was because I was trying to figure out what we could do that would address your interest. I mean I'm puzzled at the notion that this commission would come out with a model code that says we intend it to be applicable to all judges sitting everywhere -- state, federal, administrative law, et cetera. And it would seem to me that it's within subsets of the judiciary just as the states determine what they want to adopt from the ABA Model Code. The various administrative law judge organizations or entities that establish them or create them would be in the posture to do that.

JUDGE YOUNG: Several states have included the administrative judiciary under the code of judicial conduct and I think that's the good trend, but it's not gone very far yet.

I think, again, if you don't formally recommend that the administrative judiciary be covered -- which I think would be a good idea, personally, at least to say that the principles do apply or should be applied and that any exception or relaxation -- the burden of showing that that's appropriate should be on the proponent of any exception or relaxation. As I say,

I think it not only protects the public but it really

protects the judges out there who want guidance and who want to be able to have something to rely on if there are undue pressures brought.

CHAIRMAN HARRISON: It occurs to me that the current preamble of the model code simply indicates that the code is intended to cover the ethical conduct of judges. We could easily broaden that to including administrative law judges or we could probably consider adding a section at the beginning of the code which is, in the model rules, called "Scope," which purports to define to what judges the code is applicable and so forth.

And before I turn the floor over to Judge McKeown, you indicated a willingness to submit specific language.

JUDGE YOUNG: Sure.

CHAIRMAN HARRISON: If you have specific language in mind, we would very much appreciate

receiving it.

JUDGE YOUNG: All right.

And just if I could say one other thing in response to what you just said. One thing we have to be careful about is to me, it's sort of silly, but there are some discussions about whether an administrative judge versus a hearing officer,

hearing examiner. The term that a lot of us use now to bring into the umbrella, all, is the "administrative judiciary," and so I think it's helpful to use that term, and as a matter of fact, I believe that the national conference has now changed the name to the National Conference of the Administrative Judiciary.

Any other questions?

CHAIRMAN HARRISON: I think Judge McKeown may have a question.

COMMISSIONER McKEOWN: Well, it was really along the lines of the scope issue that I think, you

know, somebody already picked up. And then just noting that we have an extensive Footnote 11, as you know, in the current model code --

JUDGE YOUNG: Right.

COMMISSIONER McKEOWN: -- it talks about the applicability to administrative law judges. And maybe along the same lines that Mark Harrison suggested, it would be helpful to hear from you and/or even the ABA --

JUDGE YOUNG: Uh-huh.

COMMISSIONER McKEOWN: -- you know, section dealing with administrative law or administrative law judges or administrative judiciary, revisions either

to Footnote 11 or suggested provisions to the scope or some combination because there is some suggestion in Footnote 11 that not all of these principles are necessarily applicable in the same way, and so we would be interested to know your comments on those things and submit your --

JUDGE YOUNG: Okay.

COMMISSIONER McKEOWN: -- proposed language.

JUDGE YOUNG: Okay. I guess just if I could say one thing on that now. There are differences of opinion on that, and the ex parte rule is a critical area. And Jim Alfini, I know, can speak to this. One of the areas of controversy is the extent to which agency members may -- it may be appropriate for agency members to have communications with members of the administrative judiciary.

It's my view that it's important to recognize any contacts for what they are and at least put those on the record, disclose those, and that's the example that I've given you. The one-page example sort of points up some of the uncomfortable situations that you can be in if we don't go farther than the current footnote reads. Because the current footnote is vague, it's open-ended in terms of the kinds of adaptations it would allow, and that's why I was

suggesting that -- and I will give you written language -- but saying that the burden should be on the proponent of any exception or relaxation, but I will get language to you.

Any other questions?

Thank you very much, and thank you for all you're doing.

CHAIRMAN HARRISON: Thank you very much. We appreciate your taking the time to visit with us.

I think our next visitor is Doug Kendall.

Even though you're previously identified yourself for the record, please do it again.

MR. KENDALL: I'm Doug Kendall. I am the Executive Director of the Community Rights Council.

Good morning. And thank you, Mark, for inviting me here and thanks to all the members of the committee and the advisory board for allowing me to participate in the hearing today and also for hopefully taking at least a quick look at a pretty voluminous set of materials that I've sent to each of you recently that includes an organization report of mine as well as some of the numerous stories and editorials that have been written on the topic of

private judicial education, what some call "junkets for judges."

Also I wanted to reference that I have submitted written testimony in conjunction with a group called HALT, or Americans for Legal Reform. That was submitted in October of 2003, and I know a representative of HALT has already appeared before this committee, and so I reference that.

I've also submitted written comments on the first two -- first drafts of the two -- first two model canons.

Community Rights Council, as probably none of you know, is a public-interest environmental law firm that's based in Washington, D.C. Our clients are state and local governments. We represent state and local governments in defending constitutional challenges to environmental protection. That's our mission. I reference that for two reasons. One is that we were not and are still not, don't think of

ourselves as a group that's involved in judicial ethics or as a group that's focused on judicial-ethics issues, and second of all, because we litigate, I litigate, our firm litigates, and it doesn't -- it's not the easiest thing to raise judicial-ethics issues when you are a litigator or putting yourself out in court.

We stumbled upon the issue of private judicial

seminars literally quite by accident. A friend of mine was clerking for a federal district judge who received an invitation from a group called Foundation for Research on Economics and the Environment. They're a Bozeman, Montana-based group. The judge was invited to attend a week-long seminar out in the Gallatin Gateway Inn in Bozeman, Montana, to learn about what is called "free-market environmentalism."

Now, for those who don't know, which is probably most of the people around the room, free-market environmentalism is environmentalism without

the law. It's effectively, "We like the environment but we don't like environmental laws that are commanding control and make people comply with them. We think the free market can adequately or in most cases adequately protect the environment." Thus, the unifying theme of the seminars from the words of the director of FREE is rejection of command-and- control top-down environmentalism; rejection of environmental law.

As someone who goes to court to defend environmental laws against a variety of constitutional challenges, I found it's equally offensive that an organization was bringing judges out to Montana, taking them fly-fishing, horseback

riding through Yellowstone country, Montana; bringing lectures to them which emphasized a particular point of view, and, most importantly, were getting money from corporations and foundations that had a direct interest in environmental litigation in the courts.

I shared that information with a friend who writes for the Washington Post, back in 1998, became a front-page story on the Post, a 2000-word story that documented this problem. That story was picked up in papers all around the country. It spurred without any effort on my part or anybody else's as far as I know, editorials in over a dozen papers from across the political spectrum.

It spurred a hearing on capitol hill. It spurred an effort within the federal judiciary to re-examine the existing guidance on private judicial seminars, so it caused a bit of an uproar. And yet, six years later after hundreds of subsequent stories, after two hundred-page reports by my organization that document the extent of the problem, why it's a problem, where it's a problem, what cases it's a problem in, nothing has been done. Not a single piece of new guidance has been issued to judges. The practice is flourishing, expanding over recent years; getting worse, not better.

Why has that happened? The best I can tell is that this happened because judges like these trips. They're held at lovely places. They have a faculty that is interesting. They are thought-provoking topics. There's enough balance, enough alternative views expressed that judges don't think they are being brainwashed. And I'm very sympathetic from that perspective. I'm sure from a judge's perspective these can be useful things. My wife is a judge. I understand the collegiality, that you often lack the fact that you can go to one of these presentations, go to one of these seminars, spend informal time with your colleagues from all across the country.

But that's not the only perspective, and I think you need as this commission needs, this committee needs as it's considering what, if anything, to do about this problem, it needs to at least share two other perspectives.

One is the perspective of FREE. Well, what do we know about that? We know from their perspective that their seminars promote a unifying theme of

rejection of command-and-control top-down environmentalism. We know that they get their money from corporations including Texaco, Shell, Monsanto,

and foundations such as foundations run by Charles Coke of Coke Industries, Richard Mellon Scaife, the Coors family, who also fund other groups, groups like Pacific Legal Foundation to go to federal court to litigate environmental cases, attack environmental laws in federal court.

We know from one of their funders that they are key to attract the key environmental decision-makers on the bench. We know, in short, that what they are trying to do is influence the federal judiciary on environmental cases. That's what they're about. That's why they're doing it. That's why they're spending $10,000, approximately, per judge per one of these trips. It's effectively a million-dollar-a-year bet by these funders that it will have an influence on the federal judiciary.

A third perspective I want to share is the perspective of an environmental lawyer named Cristobal Bonifaz. Cristobal is from Ecuador. He's a Massachusetts lawyer. He brought a case in the mid '90s on behalf of 30,000 Ecuadorian Indians challenging or seeking over a billion dollars from Texaco for remarkably rapacious environmental conduct throughout the '50s, '60s and '70s by Texaco which destroyed about 2 million acres of the Amazonian

rainforest. He brought his case in the Southern District of New York where Texaco is headquartered. The case was thrown out based on the premise that it was an inconvenient forum for the case to go forward.

While the case was on appeal, the judge presiding over the case went to a free seminar in Bozeman, spent six days there. One of the lecturers was Alfred DeCrane, the former CEO of Texaco, who, according to Bonifaz, was one of the key witnesses

that he would have called in the case. Mr. DeCrane gave a lecture called, "The Environment: Some Thoughts From the Corner Office."

Texaco funded FREE that year; gave them $50,000, approximately 6 percent of their budget. They gave FREE about -- they gave FREE $125,000 in the three years surrounding that.

When the case was returned to the judge in question from the Second Circuit, his initial ruling was reversed. There was a recusal motion which was denied that was appealed to the Second Circuit. The recusal denial was upheld. The case was returned to the judge in question. He dismissed the suit.

According to Mr. Bonifaz, he will forever feel disadvantaged because of the seminar that the judge

took while the case was pending. He will always feel outraged by the fact that his clients never had any opportunity to talk to the judge except in the courtroom, and the former CEO of Texaco spent a week

at a program and got to lecture to the judge and part of the reason is because Texaco was funding the program.

A final perspective and I think the last perspective to share is the public's. I circulated a collection of some of the editorials that have been written on the topic. There have been over 30 editorials now from most of the top papers in the country. I don't believe there has been a single editorial that has supported judges going to FREE's programs. It is what the New York Times called two months ago "a festering scandal," and I think this is the committee that has to do something about it.

Now, one thing I've been asked, and I'm sure someone will ask me here or I suspect someone will wonder, "Is your problem with these programs the bias or the size of the gift or the source of the funding?" And the answer is, "It's all of the above." It's the combination of three things: the combination of funding from interested parties, the size of the gift -- a very large gift, you know,

room, board, flight, a program designed specifically to advance a particular purpose; the cost involved, which is approximately $10,000 per trip per judge -- and the fact that they are trying to advance a particular perspective.

Now, obviously, programs differ in the types, the locations, the length, and that makes your job here very challenging. And I want to open it up to any questions and I want to talk about what can be done about this problem. I provided one answer in the written commentary we submitted in October. There's legislation that's still pending before the United States Congress which provides another answer.

I'm happy to talk about what precisely can and should be done. But a point I want to emphasize and the only point I really want to emphasize is that something has to be done. It's a problem that has festered for six years. If this group doesn't do anything about it, it's going to continue to fester, and you will have done in my opinion a disservice to lawyers, to the public and, ultimately, the judicial

branch. Thank you.

CHAIRMAN HARRISON: Thank you.

Judge Bowie?

JUDGE BOWIE: Well, I have a series of

questions, Mr. Kendall. Just trying to get a frame of reference and just picking a place to start, you talk about this roughly $10,000-per-judge figure to attend a FREE seminar.

MR. KENDALL: Yes.

JUDGE BOWIE: And I read your materials, and as I understand it, that calculation comes from two places. It comes from FREE's tax reports that indicate what they spend on an annual basis coupled with the number of judges who filed their financial disclosure statements indicating in that year that they went to a FREE seminar.

MR. KENDALL: That's correct.

JUDGE BOWIE: Okay. So if there were -- and I don't know the answer to this -- if there

were more people, some like law professors, for instance, who attended a FREE program, then you have to amortize the cost differently.

MR. KENDALL: Yeah. The tax form specified specifically what they spent on -- the amount of money they spent on judicial seminars.

JUDGE BOWIE: Right.

MR. KENDALL: And they don't typically allow anyone besides judges and the presenters to attend their judicial seminars. So it's one way of getting

at the overall cost. Obviously, there's fixed costs which are the room, board, flight, which are something somewhere between probably a thousand and two thousand dollars and then there's all the other costs that the organization spends to host these things, and that's the best estimate I could get about that.

JUDGE BOWIE: Okay. You talk about, as I understood it, the ten cases that your group

selected to review and then went to check to see if any of the judges who attended FREE participated in these --

MR. KENDALL: Right.

JUDGE BOWIE: -- activist cases --

MR. KENDALL: Right.

JUDGE BOWIE: -- as you labeled them.

One of my -- I have a series of questions related to this, and that has to do with an examination within some whatever window of time of all the environmental cases decided around the country and what the ratios are of decisions made by judges who attended FREE programs to judges who didn't attend FREE programs.

I guess part of the question that comes to mind -- and it's only a question, because I have no idea

what the answer is -- but if they are as one-sided as you believe they are, I mean a number of the judges I know are quite competent at recognizing that and

might even be quick to discount. Might find that if you looked at the total numbers in a zone -- and again, I have no idea -- that in fact more of them coming out of a FREE program favor idealogy that you support rather than the other side, and I -- and I don't know the answer to that. But what I'm wondering is whether there's been any statistical analysis to look at -- for instance, you say a million dollars a year. So it's your $10,000 a judge. That's a hundred judges in a year; right?

MR. KENDALL: They don't -- FREE's total organizational budget is a million dollars. They only spend about $220,000 a year on judicial education, so it's something that their attendance range is somewhere between 20 and 40 judges a year, 20 and 50 judges a year.

JUDGE BOWIE: All right. And have you checked the voting records of all those judges for some windows of years for instance on how they voted on environmental issues?

MR. KENDALL: No. I don't want to make too much of the correlation that we demonstrated in

"Nothing for FREE" and judicial decision-making, because I don't really think that's the most relevant question. I think --

JUDGE BOWIE: Well --

MR. KENDALL: -- there is a correlation --

JUDGE BOWIE: -- but isn't the inference you ask everybody to draw the nefariousness of this relationship is the judges are in a position to be influenced to vote a certain way because of the combination, as you say, of the value of the gift coupled with the bias of the presentation?

MR. KENDALL: I think the programs are nefarious, if at all, because of the intent of the groups that are holding them.

I don't think the propriety of the seminars should be judged based on the convincing-ness of the evidence that they are actually working as their sponsors intend. I think simply the fact that we have groups that are attempting to influence the judiciary in this way should be enough to warrant a

response.

And I do. I stand by the evidence that we have of a correlation in Nothing for FREE. I think it's a very serious issue and I do -- I believe that those are objectively the most important and worst

environmental cases that were decided over that timetable. And the correlation between judges attending programs and judges writing those opinions is deeply disturbing to me, and I stand by the research and I stand by the conclusions of Nothing for FREE. But I don't think it should be incumbent upon me to prove to all of you that there is an actual quid pro quo effect between a judge attending one of these programs and someone -- and rulings that are adverse to my interests. I don't think that's the way this question should be framed.

JUDGE BOWIE: Well, but that -- And that's not the question I'm posing to you. I don't suggest it's your burden to do that. I'm looking at

information that tells me what your statistical sample is from which you have derived this information and these inferences.

For instance, was there any study done of the block of environmental decisions for some finite period of time before FREE came into existence --

MR. KENDALL: Right.

JUDGE BOWIE: -- that would say: Of these X-number of decision, Y-number fall in a block that I would consider environmentally active?

MR. KENDALL: I don't believe that empirical

information has been -- empirical study has been done.

CHAIRMAN HARRISON: There are a number of people that want to ask questions, Doug, but as a point of information -- And forgive me; I can't recall what your specific suggestion was back when you joined with HALT --

MR. KENDALL: Right.

CHAIRMAN HARRISON: -- back in October. Can you refresh my recollection?

MR. KENDALL: There was a suggestion that there be a $500 cap on the size of a gift that a judge could accept in conjunction with a private judicial-education program.

CHAIRMAN HARRISON: And one other question before I turn the floor over to the other commissioners. Do you regard this primarily as a problem of appearance? It sort of goes to what Judge Bowie was asking. Do you regard this as a problem that really raises questions of appearance in the minds of the public, litigants and so forth or do you really believe this is a manifestation of situations involving actual bias?, if my question is clear.

MR. KENDALL: I don't believe simply attending a seminar makes a judge incompetent to hear an

environmental case. I don't believe there's an issue of bias in that sense. I think there are cases in

which the circumstances are such, the funding from a specific corporations appearing before a judge hearing an environmental case involving that corporation can be sufficient that recusal is warranted because of a reasonable perception of bias. But I think the principal problem, the overall problem, the problem that is comprehensive to the issue is one of appearances, one of why are we allowing interested parties to provide continuing legal education for our judges.

CHAIRMAN HARRISON: Thank you. Bob Cummins and then Jan Baran.

MR. CUMMINS: Mr. Kendall, I don't understand the significance of the $500. Would you not really be suggesting that judges should be proscribed from participating in issue-oriented seminars, stated simply?

MR. KENDALL: No, I certainly wouldn't be saying that. And I certainly wouldn't say that judges can't spend their own money to go and attend an issue-oriented seminar no matter how biased it is. The bias is, again, one factor that I'm concerned about.

MR. CUMMINS: And you rationalize the $500 on what basis?

MR. KENDALL: There is no easy to way to draw a line here. It's not a magical line. We say that in our comments. It's approximately -- The idea was that you could pay a judge's expenses to come to a single-day seminar, perhaps with an overnight program, and that would facilitate, it would provide an exception which would allow judges to come to the ABA for a day to hear a particular seminar on a particular issue and let a private interest pay for it.

I don't think there's any magic in our proposed solution. I think it's one way of getting at the problem that's relatively clean. In other words, if you put that bar on it, FREE's operations can continue to exist. And it's simple and I can tell it to you in one sentence. I don't think it's the only way of solving the problem.

CHAIRMAN HARRISON: Jan?

COMMISSIONER BARAN: Thank you very much for coming. Obviously, this is an issue that commission is spending a great deal of time and attention on and we are --

MR. KENDALL: Appreciate that.

COMMISSIONER BARAN: -- working genuinely for some solutions here, but we do, you know, run into some practical problems every once in awhile in terms of trying to differentiate, you know, proper seminars from improper seminars. And I was struck by your stated concerns about both the source and size and the bias of the organizations that might be sponsoring different events, and we have discussed among ourselves, you know, for example, how would this affect the American Bar Association?

I served on a commission to study public financing of judicial campaigns. It was funded by George Soros, about a quarter of a million dollars a

year for two years. We have judges on that commission, and that was some nice places. This commission met in Naples last time. Obviously, we have a lot of judges participating in this exercise, which also is privately funded by the Joyce Foundation. And it seems to us that we have to start with the proposition that there are going to be appropriate and necessary sponsored events that really warrant participation of the judge and may even be beneficial to the education of the judge.

So from my own personal view, I'm trying to approach this issue from my experience in dealing

with how other governmental bodies have handled the same issue. Congress, for example, a few years ago amended its rules to ensure the senators and congressmen don't abuse opportunities to go travel to nice resort areas at some private interest's expense. And their solution was to first of all limit exactly what is the benefit to the judge, of a personal

nature, to food, lodging and room. They can't go out golfing and fly-fishing at the expense of a private sponsor. And secondly, in that case, house and senate, they said, well, you can't go on a trip for more than two or three days. They have time limits as to the length of the trip.

I would like to have your reaction to that type of approach; and then when you do provide us with some comments on that, I want to ask you about disclosure, which is a separate issue.

MR. KENDALL: Okay. There are, as I alluded to before, a number of ways that you could get at this problem. One other way I'd bring up is the way that the Department of Justice allows their attorneys to participate in ATLA and other educational seminars, which is that they have a pool of money that is available, all you need to do is get your supervisor's approval, and the public pays for any

needed continuing legal education.

And one thing that I would differentiate between judges and members of congress, although I'm not opposed to your approach at all, but I would say that members of congress are supposed to be going out and mingling with constituencies and hearing peoples' viewpoints much more than I think our typical vision of what a judge's role is, and so there probably are some differences there.

And I also, though, getting to the first point that you raised, wanted to try to distinguish if we can between things that are designed to educate a judge and where the program is intended to do that, versus things where judges are on the panel or participating to share their wisdom. And I find the latter, even if it's funded by the Joyce Foundation or the Coors Foundation, much less objectionable and should be subject to much less strict scrutiny. I think there is a category, and it's not the most easy-to-specifically-define category, but there is a difference between continuing legal education for judges and the judges who serve on a body like this or judges who participate in some sort of panel and speaking engagements, and I think they have to be

treated differently.

You wanted to go to disclosure? Is that --? I'm not sure if I answered all of your questions, but --

COMMISSIONER BARAN: Well, is your answer, then, that if we adopt some greater restrictions on what constitutes a gift and proper reimbursement, that that would be a step in the right direction?

MR. KENDALL: I think that's right. I think certainly something which limits privately-funded programs to two or three days would eliminate the most serious problems I see.

COMMISSIONER BARAN: Well, then, moving to disclosure, the current code doesn't say anything about disclosing reimbursements.

MR. KENDALL: Right.

COMMISSIONER BARAN: And I'd be interested in your experience in obtaining this type of information from the reports that judges may file with state and

federal administrative organizations. I'm not clear in my own mind as to whether your research encompasses just federal judiciary or also some state judiciary.

MR. KENDALL: It has for the most part focused exclusively on the federal judiciary. I know enough about the general lay of the land to know that these

types of programs are being run for state judges but I don't have anywhere near the detailed knowledge I have about the federal programs as I do for the state judge programs.

So we have used extensively the procedure by which you can examine a federal judge's financial disclosure form. It's certainly a good system to have in place. It's a source of information. It's not a perfect system at the federal level by any stretch of the imagination but it does at least provide the basic information.

COMMISSIONER BARAN: What steps do you have to

take to obtain that information on federal judges?

MR. KENDALL: You have to file what is called an A-10 form with the Administrative Office of the United States Courts. There is a preclearance process by which the judge is notified, the judge has a chance to redact any sensitive information they want from the form. That whole process takes -- Just this month, a General Accounting Office report issued on the disclosure process, the federal judiciary disclosure process, demonstrates that it takes on average two or three months for you to get a judge's disclosure form from the time you request it, oftentimes making the whole process not worth going

through. So there are problems with the disclosure process. But certainly, in my opinion, the more sunlight you can shine onto this process, the better, and it is something specifically that the written comments that we submitted to the committee requested.

COMMISSIONER BARAN: Thank you.

CHAIRMAN HARRISON: George, and then Judge Amon.

Mr. KUHLMAN: Doug, George Kuhlman. You and I have spoken a couple times -- many years ago, I think, really -- and I can't tell you how happy I am that there is a court reporter here recording our conversation because in our earlier conversations ultimately there was a suggestion that there was some form of collusion that was occurring because we had conversations at all. So this is all out in the open, and that's very good.

I'm curious, in going back to your citing the Cristobal Bonifaz Ecuadorian case, he was only the lawyer for the plaintiffs. There are those who might listen to the brief encapsuled history of that case and simply wonder whether that wasn't a lot of bad decision-making. And that made me wonder -- And I'm not sure. I don't know the case myself, so, you

know, I can't really say.

But I'm wondering what your feelings are about whether in light of the fact that the code as it presently exists has any number of provisions that relate to a judge's obligation to disqualify herself or himself under certain circumstances in which his or her impartiality might be questioned, there isn't a question or a suggestion underneath the Community Rights Council's expressions of interest of some concern that there's no appetite on the part of judicial-discipline agencies to identify these situations that allegedly might be egregious violations and do something about them.

Do you have anything to -- What response would you have to that?

MR. KENDALL: I do believe that at the federal level the existing guidance, which is generally most specifically laid out in what is called Advisory Opinion 67, should prevent judges from going to programs and should perhaps or less frequently result in judges recusing from cases than it is.

In other words, I think under existing guidance, some of the trips that we've identified and

some of the circumstances have been inappropriately handled by the judge in question. There has been one

case where a judge has a recused himself from a case after finding out that one of FREE's funders was appearing before him in a case at the time he was attending a seminar. Judge Royal Ferguson down in Texas recused himself from the case that's discussed in "Tainted Justice." So I do think there is inadequate compliance right now with existing guidance. And if you look at the statistics on the federal level on judicial discipline and responses to complaints filed under 28 U.S.C. 351, which is the judicial discipline statute -- which actually is misnamed because it's really a statute which allows judicial councils to take action, which is much broader than taking discipline -- I think one of the problems is that judges -- these judicial councils believe that their only possible response to an ethics complaint is to discipline a judge.

And I don't think that's right. I think they can issue an opinion saying what the judge is doing is inconsistent with ethical guidelines and just demand the judges don't do it in the future or demand, for example, that judges leave the board of an organization. And they're not doing that. The judicial councils have responded by taking action in approximately .01 percent of the cases that the

ethics complaints that have been filed. So there is a problem both with line compliance with existing standards, with the procedure by which you could ensure compliance with ethical standards, but I think there is also a problem with the specificity and the clearness of the existing rules, and so I think there's -- the problem needs to be gotten at from several directions.

CHAIRMAN HARRISON: Judge Amon?

JUDGE AMON: Yes. The question I have is that Mr. Kendall did raise the situation of the

Ecuadorian case. The 2nd Circuit in that case wrote a very detailed, comprehensive opinion about it, pointing out, among other things, that assuming that the content of the program was biased. Have you talked about --

MR. KENDALL: Right.

JUDGE AMON: -- among other things, that none of the topics of the seminar directly related to anything that was the subject matter for the litigation? And they also pointed out in that litigation that the finding that Texaco had a very small percentage of the direct -- of the funding of FREE but did not fund the seminars.

My question to you is do you think that that

decision was wrongly decided because -- And, you know, it's not clear to me. You said that you think that the individual still has a bad feeling, and I understand that that is a feeling. But are you saying that in your view, that opinion which said

that Judge Rykoff appropriately did not recuse himself, do you think it's wrong?

MR. KENDALL: I do. I think it's -- well, it's several things. One is there's a difference between whether a judge should recuse after having attended one of these seminars and whether a judge should go to a program in the first place. So I think the better course of valor would have been for the judge to not have gone to the program in the first place, and I think if you do look at the obligations imposed by Advisory Opinion 67, which included investigating or looking at the source of funding, the judge would have realized that or I hope would have realized that this is something he shouldn't have attended in the first place. And obviously, it is a much more difficult question after you've attended a program, whether recusal, which means you'll get off the case after having spent some time on it, is appropriate, and I think that's a more difficult question.

I think the 2nd Circuit's opinion is wrong for

a couple reasons: One, I don't think 6 percent of a budget and grant of $50,000 from a company who is doing these programs is an insignificant amount of funding. Second, the opinion does not consider at all the problems stemming from the fact the CEO who would lecture to the judge in question was, at least according to Mr. Bonifaz, one of what he considered the key witnesses in the case.

The Second Circuit says in the Aguinda opinion, it might be a different case if there were -- it involved witnesses; but doesn't even address the fact that, at least from the plaintiff's perspective, one of the key witnesses lectured to the judge about his views on the environment. Now, maybe the case wasn't about -- maybe it was about international -- the Alien Tort Claims Act in specific legal terms, but it's about, from the plaintiff's perspective, what Texaco did to the environment in the Ecuadorian rainforest.

JUDGE AMON: That person wasn't a witness in the proceeding before the judge, was he?

MR. KENDALL: Alfred DeCrane was the CEO of

Texaco during the time all the practices occurred. Bonifaz wanted to call him as a witness in the case if the court had expressed --

JUDGE AMON: In other words, he wasn't a witness.

MR. KENDALL: No, he hadn't appeared yet as a witness.

JUDGE AMON: There weren't affidavits or anything filed on that.

MR. KENDALL: Oh, no. The case was dismissed before he ever got to that point, but that's not -- I mean this doesn't mean that this guy who lectured to him isn't somebody that -- I mean the person who lectured to the judge is one of the people that Mr. Bonifaz and his clients found was most responsible for the conduct.

COMMISSIONER McKEOWN: I have several questions, and let me just limit it to two areas that I'd like to talk to you about. One is the

target organization, which here is FREE, and I'd like to talk about the spillover effect to other organizations; and then the second point, to come back to your comment about being some degree of difference when someone is a speaker as opposed to an attendee at a program.

So let me start with the target. I've never - - I'm a federal judge that has chosen not to attend various programs, so what I know of them is what you

have provided and what I have read in other available sources, but your target certainly is FREE because of the nature of your organization.

But one of the things that I think we struggle with is, leaving aside what one may or may not think about FREE, the kind of restrictions that you suggest or that others have suggested would seem to fall collaterally on other organizations; for example, university-sponsored events, bar association events, The Federalist Society, American Constitutional

Society. You can get, you know, both sides --

MR. KENDALL: Sure.

COMMISSIONER McKEOWN: -- into the play, so. And the reality is that, you know, there is limited federal funding for judicial education. So what I'm concerned about and would be interested in comments on is that by imposing this hard-and-fast rule of $500 and a couple of days, one, that seems inconsistent with your other suggestion that even a penny of involvement should, you know -- should invoke recusal. What's that going to do to these other organizations who might be distinguished in some degree from FREE?

MR. KENDALL: I point to the legislation that has been introduced by Senators Lahey and Carey as an

alternative approach which I supported in the report in detail in the fifth chapter. That addresses some of those nuances. It exempts certain programs run by national, state and local bar associations of general

admissions, meaning they don't limit themselves to any particular type of lawyers. It exempts certain programs run by universities at universities. I think there does or there could well be a lot of nuance that you put into a particular solution and I think there are gray areas between FREE and a --

COMMISSIONER McKEOWN: Say the Federalist Society.

MR. KENDALL: Well, the Federalist Society as far as I know doesn't do judicial education programs. They run symposia and they invite judges to speak. And I have no problem whatsoever with a judge going to speak at a panel discussion, at a Federalist Society annual meeting. It's not about the perspective of any particular group and it's not about judges sharing their wisdom, and where --

COMMISSIONER McKEOWN: Well, let me go to that point because that's something I'm trying to understand is in a lot of the discussions there is this issue of "Well, it doesn't matter if we just speak; it's if you attend." So let's say the judge

was invited to Hawaii by an organization --

MR. KENDALL: Right.

COMMISSIONER McKEOWN -- that is funded by a foundation, but the foundation like most foundations gets their money from corporations.

So the judge is a speaker. But you go, you speak, you hang out, you go to the whole symposium because you're there as a speaker. I'm trying to understand from your perspective, even though it's not technically a seminar for judges, if there are multiple judges, lawyers and others there, what is the distinction you're drawing that would be helpful to us in trying to craft some understanding?

MR. KENDALL: I think you'd have to limit the accepted gift, put it aside what you do about how much of a gift you could accept as part of a judicial education program.

In that context, I think you'd have to separate the accepted gift around what -- your speaking engagement, which I think has to be limited to your flight out there, hotel room for a night or so, and

the expenses you incurred during that time. I mean you'd have to separate that out from the time you spent out there basically at an educational seminar. And there do have to be some nuances drawn here

because if you say --

COMMISSIONER McKEOWN: So you shouldn't listen to the first half of the day, you just should listen to --

MR. KENDALL: No, that's not what I'm saying. I said --

COMMISSIONER McKEOWN: I know. I just don't understand, though, because what is the difference, then, between attending a couple days as a speaker versus an attendee?

MR. KENDALL: Well, the --

COMMISSIONER McKEOWN: What is the distinguishing difference?

MR. KENDALL: The question becomes whether it's a sham. The question becomes if it's a -- if you're

being -- And FREE could respond to a ban on its educational programs with a free ride for participating in panel discussions by having a little panel discussion one day at one of their -- at their seminar, and have all the judges speak for about five minutes and then go on business as usual. So there has to be a sham exception to get at the problem if you're going to get that nuanced and that specific.

But in general, at least from my perspective, there's not a problem with a judge being reimbursed

to give a speech or to participate in a panel discussion.

COMMISSIONER McKEOWN: Okay. Thank you.

MS. GRAY: Mr. Kendall, I wanted to pursue just briefly one of the issues that was raised in your publication "Tainted Justice" about the service in this case of several federal judges on the board of FREE.

Taking it one step further, we specifically

talked about attendance and participation in a program. We've talked about serving as faculty for a program. One of the other issues you've raised, and I thought at least does suggests some credibility to me is the concerns associated with a judge serving on the board of an organization and, in this case, it was the organization of FREE.

I have a couple of questions. How would you amend the current Canon 4 to reach, I presume, the type of organizations that you feel should be prohibited in terms of having an ideological orientation or an announced advocacy position versus a judge being able to serve on the board of the American Bar Association or other entities, and have you thought about that bright line and are you prepared to provide any recommended language to us on

that topic?

MR. KENDALL: The example you gave about the American Bar Association gives me pause with my prior

answer. I think if you look at some of the compendium sites -- and the compendium being this federal eclection of informal advisory opinions issued to federal judges -- there's a specific site which talks about judges participating on the board of organizations like American Enterprise Institute. And there is a caution against it because in the opinion of the compendium, AEI is potentially advancing an ideological view on the law.

Now, that gets tricky. I think -- I think when we have in Tainted Justice put at the back a copy of the ethics petition that we filed against four -- now against four federal judges who sit on FREE's board of directors, and I think that speaks for itself and I won't go through it in any detail. That's one of the -- those are all four pending. Three of them have been pending for nearly four months, so we'll get -- the committee should have guidance from the four judicial councils on this issue quickly.

And I think I've laid out in the petition why I think there's clearly a problem for judges participating on FREE's board. They are trying to

advance a litigation interest of their corporations, and I don't think it's appropriate for judges to sit on their board.

I don't have a specific fix for you other than I think the compendium sites and the guidance give pretty good indications of what should and should not be allowed, and I think we can wait to see what the judicial councils say.

CHAIRMAN HARRISON: Other questions of Mr. Kendall?

Well, I expected it to be sort of provocative, and it was, and I appreciate your coming.

MR. KENDALL: Well, thanks again for having me.

CHAIRMAN HARRISON: I can tell you we are spending a good bit of time wrestling with this.

MR. KENDALL: Well, I appreciate your time

CHAIRMAN HARRISON: We're going to take a break. Amazingly, we're almost right on schedule. We will reconvene at 1:00.

(Recess)

CHAIRMAN HARRISON: Are we ready to reconvene?

Our first guest this afternoon is an old friend and I think someone known to everybody. His unattributed commentary is in our materials and simply says "The Appearance of Impropriety, Amended."

Is that your --

MR. FOX: I have no idea what it looks like.

CHAIRMAN HARRISON: Well, you sent us something.

MR. FOX: I did. I sent something to George.

CHAIRMAN HARRISON: Is that how you --

Ms. GRAY: Yes.

MR. FOX: Or to Jeanne.

Ms. GRAY: Yes.

MR. FOX: And however it showed up, it showed up.

Ms. GRAY: Yes.

CHAIRMAN HARRISON: The reason I knew it is because it has a copyright mark at the bottom, 2004,

LJF.

MR. FOX: Oh, that's probably because I was planning --

Ms. GRAY: To publish it.

MR. FOX: -- to publish it.

CHAIRMAN HARRISON: Market it big-time.

MR. FOX: It improves my business.

CHAIRMAN HARRISON: The floor is yours. Please identify yourself for the record and tell us why you're here and who you represent.

MR. FOX: I'm Larry Fox. I'm a lawyer in

Philadelphia and I represent only myself and I speak on behalf of no organization. My remarks are my own and I will take the brick backs for them.

I thank you very much. It's nice to see so many friends around the table in having participated in similar exercises. I know that the American Bar Association owes the people who are on this commission an extraordinary debt of gratitude. You

don't know how big a debt of gratitude we owe you yet because you're not even close to the end, but when you are at the end you will appreciate fully how much we should appreciate what you're doing. It's grand work and important work, and I commend you for it. And I always think that we lawyers would get a lot better publicity and be viewed much better -- judges, too -- if they could see how much time we spend in windowless conference rooms arguing over fine points of various provisions of various codes rather than getting excoriated because we're bad lawyers.

I also thank you for letting me go now. I had a terrible choice: I could go before lunch when Marvin wasn't yet here, and stand between you and lunch. That's not a very good idea for a trial lawyer. But then I've always been told, as I learned in Chicago from some of Don Hilliker's colleagues

years and years ago, you don't want to go immediately after lunch either, because at that point as the jury

sits there having had lunch, I've been assured by every psychologist who's studied this, that within ten minutes, every juror has had a sexual fantasy and is not listening to you at all.

I don't know whether that's going to be true of this group. May be.

VOICE: Do you want a show of hands?

MR. FOX: No. I'll let you all be your private judges.

CHAIRMAN HARRISON: All right.

MR. FOX: It's the appearance of impropriety that's worrying me.

I don't have lengthy remarks. I've submitted what I submitted, and I came here before you merely on the proposition that perhaps if somebody wished to engage in a dialogue over what I submitted, I would be prepared to talk about that.

I did want to emphasize one point I made because I think it's -- other than my attempts to come up with some language for some comments for you, which clearly is the kind of thing that should just get thrown into a big hopper with a lot of other things and certainly is not the subject of

discussion. I think the principal proposition's before you on the one item I addressed -- and I know there are many issues before you -- whether or not we retain in the Code of Judicial Conduct something that addresses appearances. And on that proposition, I hope that there is no doubt that appearances are terribly important and that we have to worry about appearances. We actually worry about appearances for lawyers and we have to worry about appearances for judges. And whether we have the appearance of impropriety I think is a proposition that we should not be debating whether we address the conduct of judges as it appears. Even if the judges can assure us, twelve bishops from Boston can assure us that I have been unbiased, it should not appear that the judge in any way is biased. And so I think that we have to address appearances, but obviously, that's a threshold issue for you.

And my second point was that the appearance of

impropriety is a terrible standard. "Impropriety" is a terrible word. It's taken on sort of a secondary meaning, I suppose, or maybe no meaning because we've used the word so often. We keep talking about the appearance of impropriety. We talked about it for lawyers as long as we had the code, but nobody really

thinks about what it means. And the problem with it is I think it captures far too much conduct and is not definite enough to be helpful to anybody and it really does have a "Miss Manners" aspect to it that I found really quite difficult to come to grapple with.

And I participated not as much as my friend Bob Cummins here on the debates when we adopted the rules and jettisoned the appearance of impropriety and did participate in the debates in New Jersey a little bit when they jettisoned the appearance of impropriety for lawyers, and I think what applies to lawyers for this standard also applies to judges.

But I submit that we can come up with far more

definite appearances which judges should not engage in, and those are appearances that you should pick. I've suggested three. But there could be five or there could be two, but there should be certain things: an appearance of bias, an appearance of lack of impartiality, appearance of incompetence. You know, those categories of things can be defined and are much more easily understood by everybody and I think would be a helpful addition to the code.

And the New York Times, notwithstanding their shrill attack on your attempts to come to grapple with this issue, I think you're doing exactly the

right thing in focusing on the appearance of impropriety and thinking about getting rid of it, but I do think you need a substitute, and, further, deponent speaketh not.

CHAIRMAN HARRISON: Peter?

JUDGE BOWIE: Well, I just wanted to jump in because I've been one of the vocal people in

this area for what, as I conceive of it, is a very tiny area. What our concern, what our focus has been on has been the notion of discipline of a judge for something that somebody after the fact says there's an appearance of impropriety as quite distinct from recusal for instance.

And so my question to you, When you talk about the categories of appearance, whether it's of incompetence or appearance of some -- some other appearance, what's the remedy you envision in that context? Because the context in which we've grappled with this, although the press has yet to see this, has been the idea of discipline, qua discipline, and indeed it's the language ordinarily that's in the commentary which has given rise to "You're weakening the rule." And all this kind of stuff was aimed only at tie it to something else.

J.J. Gas was here with us and talked about sort

of the problem, the philosophical problem of saying,

"Well, there's an appearance of impropriety that arises from the fact that you didn't do something laid out in Canon 3. But of course, if that's so, if you didn't do something in Canon 3, you don't need appearance as a predicate for doing something about it," and so he says it sort of creates an irony in that kind of sense.

So I'd be interested to hear where you go with this in terms of the concept of remedy because I, for one, have always been of the view that appearance of impropriety is an essential component of the code particularly for disqualification -- recusal/disqualification. The real concern for me has been with the notion of discipline unless we can provide judges with some kinds of standards about an "appearance of impropriety because."

MR. FOX: Well, I assumed, just because I'd spent so much time working on the model rules and focusing or trying to bring everybody back to focusing on the fact that those were rules of discipline, that what I was talking about is that a judge could be disciplined independently of having engaged in conduct that was in fact biased -- for

25 engaging in conduct that gave the appearance of bias.

I mean I take as my text Justice Scalia's trip where he can argue that there was nothing improper about it but he cannot argue that it does not give the appearance of bias. It gives the appearance of bias, in my opinion, and I thought that he should be disciplined for that. Should he have recused himself? Well, I would think so, too. But I focused on the discipline part of it: that you could say to a judge that a judge could be disciplined for having engaged in conduct that, when it was looked at under the bright glare or whatever, could be viewed as having violated the appearance of something and that that's an independent violation.

COMMISSIONER BARAN: And you don't see that as a bill-of-attainder --

MR. FOX: No, no.

COMMISSIONER BARAN: -- kind of issue of somebody deciding after the fact that this set of

circumstances gives rise to the appearance of impropriety?

MR. FOX: No, no more than -- I don't think it's a bill of attainder. I think it may be subject to interpretation as to what is and what is not an improper appearance, but I think that's something that can be developed. I don't think it's a bill of

attainder simply because you set a standard and then you have to interpret it through case law, through cases. But no, I mean that doesn't bother me at all.

I'm sorry.

CHAIRMAN HARRISON: Judge Amon?

JUDGE AMON: One thing I was concerned about, Mr. Fox, you said you could see a circumstance where the person wouldn't have to disqualify but would be disciplined?

MR. FOX: No, no, no.

JUDGE AMON: Discipline seems to be more harsh than disqualification.

MR. FOX: I didn't -- I'm sorry. I didn't say that.

What I said was as I viewed the code, I was coming at it from a discipline point of view. I can't imagine that somebody was not disqualified and then was --

JUDGE AMON: Oh. Maybe I misunderstood --

MR. FOX: I'm sorry.

JUDGE AMON: -- what you were saying.

MR. FOX: I must have misspoke.

Mr. TEMBECKJIAN: Well, I'm not sure if this would be fitting here, but is your concern more

with the word "appearance" or with the word "impropriety"?

MR. FOX: I don't have any trouble with appearance. It's impropriety that I have trouble with. And I do think it's a fundamental question that you will answer -- and, you know, I come down on

it one way, but I think reasonable people certainly could differ -- which is whether you're going to have anything in here that makes it disciplinable to have engaged in conduct that was simply the appearance; and I'm submitting that you should.

But I'm not saying that -- You know, I could understand where reasonable pe- -- But I think you shouldn't have appearance in the code unless it's an independent basis for discipline. The judge could come in and say, "I was totally unbiased. This didn't affect --" you know, Justice Scalia, "It didn't affect me at all that I spent all that time in the duck blind."

And yet if he -- and let's assume we could give him a truth test and say yes, he wasn't biased in this matter. I still think he engaged in conduct that I would hope a code could capture, which was, It gave the appearance of bias.

MR. TEMBECKJIAN: If I could follow up

on that, the examples that you give, bias, partiality or impartiality, those words as well as those concepts are already in the code, Canon 2-A, 2-B, 2-C, 2-D. Impropriety appears only in the title to the canon. Is Canon 2 in your view, which prohibits a judge from engaging in the appearance of impropriety, any more or less definable than the title of Canon 5 which says a judge should avoid inappropriate political activity?

The reason I ask is because in my experience as counsel to a judicial disciplinary body, no one is charged with violating the title of the canon. The charges in a disciplinary setting are always keyed to a specific subsection of the canon so that no judge is ever charged alone with the appearance of impropriety. It is always the appearance of impropriety in that Canon 2-A, the judge failed to comply with the law; Canon 2-B, the judge let a personal relationship influence judicial conduct or judgment.

Shouldn't we be separating what is applied, which is the specific subsections of the canon, from the actual title, which is not a disciplinary as much

as an auditory or conduct-related aspirational goal? Isn't there room for both?

MR. FOX: Well, first, let me say nobody should be disciplined for what's in the title. I mean, you know, I always thought captions and headings are not part of this agreement.

MR. TEMBECKJIAN: Right.

MR. FOX: They're only there to help interpretation; right.

So I think -- I mean, you know, as a rule drafter or sometime-rule drafter or pretend-to-be rule drafter, I would suggest that nobody should ever be charged with violating the title if it isn't also captured in haec verba in the text.

MR. TEMBECKJIAN: I would agree with that.

MR. FOX: Second, I take it as correct that what you're saying is appearance -- and you know far better than I -- appearance of impropriety is a tag-

along. And I am asking the Commission to think about whether appearance, whatever it may be -- "appearance of blank" should not be in the text, be something that if a judge engages in it would be disciplinable even if the judge did not do anything else wrong, and then decide what the categories are of appearances, making them sufficiently detailed that a judge would be on warning beforehand. What would a reasonable

judge determine was the effect of being in the duck blind? What would a reasonable judge determine was the effect of the appearance at X? Going to a conference, whatever it is.

And I think that if you then capture the standards we expect judges to meet, objectively, then you can say -- or not say, but I would say you should say -- the appearance of that is an independent violation.

CHAIRMAN HARRISON: You think that if we were to combine the appearance with the basic components

of the code -- impartiality, integrity and honesty -- that would obviate the due-process problems that are typically associated with appearance of impropriety since people don't necessarily agree on what is impropriety?

MR. FOX: That's my point, that was my point: that if you can come up with a standard that is something like bias, an appearance of bias, we ought to be able to define that. That doesn't get to me to be a bill of attainder. You should be able to say, "Well, wait a minute. There ought to be an objective standard that such-and-such conduct gives the appearance of bias," even if it does not -- even if it did not in fact create actual bias.