

October 15, 2003

COMMENTS OF
HALT, INC. *AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM*
AND COMMUNITY RIGHTS COUNSEL
TO ABA JOINT COMMISSION TO EVALUATE MODEL CODE OF JUDICIAL CONDUCT
IN SUPPORT OF FINANCIAL DISCLOSURE, PUBLIC ACCESS, CERTIFICATION AND
PRIVATE SEMINAR LIMITATION AMENDMENTS

Pursuant to the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct's request of October 3, 2003, HALT, Inc. and Community Rights Counsel hereby submit comments in support of amendments on financial disclosure, required certification and limitations on multi-day seminars.

Although the current Model Code of Judicial Conduct broadly addresses conflicts of interest and gift receipt restrictions, HALT and CRC urge the Joint Commission to provide more specific guidance. In particular, we recommend that the Commission revise the Canons to include four specific judicial duties:

- (1) a requirement to keep comprehensive recusal lists and to file full and complete financial disclosure reports;
- (2) an obligation to file those reports and lists in locations that are publicly accessible;
- (3) a duty to complete a certification form that requires a judge to carefully analyze her financial holdings in relationship to the cases over which the judge presides; and
- (4) a requirement to refrain from attending multi-day seminars funded by foundations, corporations or individuals with an interest in the subject matter or outcome of a case over which a judge presides.

As a nonprofit, nonpartisan public interest group dedicated to helping all Americans handle their legal affairs more simply, affordably and equitably, HALT has a strong interest in ensuring that the Model Code of Judicial Conduct reflects real judicial accountability and clear, specific ethical standards. Through the efforts of its Judicial Integrity Project, HALT has provided information and materials to members of the House Ways and Means Committee and the Senate Judiciary Committee on issues related to financial disclosure and multi-day judicial seminars.

Community Rights Counsel (CRC) is a public interest law firm that defends laws that make communities healthier, more livable and socially just. In July, 2000, CRC issued a comprehensive report, entitled *Nothing for Free: How Private Judicial Seminars are Undermining Environmental Protections and Breaking the Public's Trust*, which exposed a remarkable correlation between judicial attendance at privately funded multi-day seminars and judicial rulings in cases involving parties and subject matter involved in those seminars. CRC's report has formed the basis for articles and editorials in newspapers including the *New York Times*, *Washington Post* and *Chicago Tribune*. In addition, CRC has conducted research that has identified numerous stock conflicts by federal appellate judges.

In the 13 years that have passed since the last revision of the Model Code, the issues of financial disclosure, public access to disclosure reports, certification and privately funded multi-day seminars have emerged as the most pressing concerns of judicial reform. Just six months ago, Senator Patrick Leahy received assurances that the United States Judicial Conference would take a look at problems related to these issues.

The ethical questions raised by these practices have led to calls for reform from across the political spectrum. At the end of the last congressional term, the Senate Judiciary Committee carefully examined these issues. Attorney General and former Senator John Ashcroft (R-MO) as well as Senator Charles Grassley (R-IA) have been outspoken advocates for judicial certification. Across the political aisle, Senators Patrick Leahy (D-VT) and Russell Feingold (D-WI) have spoken out against the judicial concealment of financial records and attendance at privately funded seminars. The Honorable Abner J. Mikva, former Chief Judge of the U.S. Court of Appeals for the D.C. Circuit and Counsel to the President, has repeatedly urged the judiciary to implement reforms in these areas. The bipartisan efforts toward multi-day seminar limitations, financial disclosure and certification demonstrate the objective need for these reforms.

We urge the Joint Commission to carefully consider these issues and amend the Canons and Commentary to reflect these modern concerns. As Judge Mikva stressed in his foreword to CRC's report, *Nothing for Free*, "For the system to work as it should, the judges must *be perceived* to be honest, to be without bias, to have no tilt in the case that is being heard." We believe that the following amendments to the Model Code will help promote federal and state judicial systems that are not only perceived to be unbiased but that also actually engender public trust and respect.

I. The Duty to Prepare Recusal Lists and Disclose Full and Complete Information about a Judge's Financial Holdings

The third and fourth Canons should be revised to specifically require judges to keep recusal lists and prepare full annual financial disclosure forms.

Five years ago, the *Kansas City Star* conducted a detailed analysis of financial disclosure reports filed by federal judges in courthouses across the country and found gross improprieties. Specifically, the *Star* reported: “Federal judges from the Kansas City area issued more than 200 court orders while holding an interest in a litigant. They set hearings, granted motions, threw out legal claims and even conducted a jury trial” (“Stocks and ethics collide in courtroom,” April 4, 1998).

When told of the judges’ investments, litigants grew understandably furious. “It makes me feel like I’ve been violated,” litigant Ed Wallace told the *Star* after hearing that the judge in his lawsuit against the Chrysler Corporation bought Chrysler stock in the midst of the case. Darrell Taylor, who suffered severe injuries in a traffic accident, pursued a \$1 million lawsuit against an insurance company, without knowing that the judge presiding over his case owned stock in the company’s holding corporation.

Unfortunately, the practices documented by the *Kansas City Star* persist. Just two months ago, the *Washington Post* reported that a Wyoming judge overturned a rule barring road construction, logging and energy exploration in nearly 60 million acres of remote national forests at a time when he held stock and royalty interests in 15 different oil and gas company concerns worth \$400,000 to \$1.1 million (“Judge is accused of stake in ruling,” August 6, 2003). Parties appearing before judges are entitled to have ready access to judges’ financial information so they can preserve their right to unbiased decision-making by requesting recusal.

Yet the current Model Code does not demand full disclosure. Section 3E of the third Canon requires only that a judge “keep informed” about his personal financial interests and “make a reasonable effort to keep informed” of the personal financial interests of the judge’s spouse and minor children. Section I of the fourth Canon provides, “Disclosure of a judge’s income, debt, investments or other assets is required only to the extent provided in this Canon and in Sections 3E and 3F, or as otherwise required by law.”

This rule does not provide for full and complete disclosure of a judge’s financial interests. The only mention of disclosure in the fourth Canon is in Section H, which provides that a judge must “report the date, place and nature of any activity for which the judge received compensation, and the name of the payor and the amount of compensation so received.” This provision explicitly excludes compensation or income of a spouse attributed to the judge by operation of a community property law. In addition, Section H only applies to compensation received from participation in “extra-judicial activities.” “Extra-judicial activities” is an ambiguous term, not defined in the Terminology section of the Code, and should be clarified to specifically include income derived from investments.

We urge the Joint Commission to increase the Code’s protection for litigants from improper bias by replacing the “knows” language in Canon 3E(1)(C) with a “knows or

should know” rule. This will require judges to conduct a thorough analysis of their financial holdings and regularly question whether recusal is necessary in each case. The addition of the “should know” requirement achieves a proper balance, as it guarantees that a judge will not face discipline in instances where her economic interest is only marginal, yet it appropriately places the burden on the judge to carefully scrutinize her holdings given that she is the individual with the best access to this information. This is in keeping with other imputed knowledge requirements such as those that apply in statutes of limitation nationwide.

We also urge replacement of the current language of Canon 3, Section E(2) with the following provision:

A judge shall keep and continuously update a list of the judge’s personal and fiduciary economic interests and of the personal economic interests of the judge’s spouse and minor children residing in the judge’s household.

Finally, we believe that the current language of Canon 4, Section I should be replaced with the following provision:

A judge shall annually file a full and complete statement [of] the source, type, and amount or value of income, gifts and reimbursements received by the judge during the preceding calendar year. This statement shall also include the source and type of income, gifts and reimbursements received by the judge’s spouse and minor children residing in the judge’s household.

With these amendments, the Canons would require full and complete disclosure of financial conflicts of interest.

II. The Duty to File Financial Disclosure Reports and Recusal Lists in Locations where the Public has Meaningful Access

Financial disclosure is meaningless if the public has no practical means of accessing information in financial disclosure reports and recusal lists. Numerous litigants have informed us that they have reason to believe that they are appearing before judges with financial conflicts of interest but they have no means of verifying their suspicions because the judges’ reports and recusal lists are inaccessible.

Federal legislation underscores the importance of public access to financial disclosure reports. Under the Ethics in Government Act, 5 U.S.C. § 101 et seq., officials in all three branches of the federal government are required to file reports that include a “full and complete statement [of] the source, type, and amount or value of income” received during the preceding calendar year. Under section 103 of the Act, reports submitted by members of the executive branch must be filed with the Director of the Office of Government Ethics; those completed by members of Congress are to be filed

with the Secretary of the Senate and the Clerk of the House of Representatives; and reports issued by federal judges and their employees must be filed with the Judicial Conference. *See* 5 U.S.C. § 103. The Act provides that these reports shall be available to the public, but each branch is charged with setting its own policies with regard to supplying the information to the public.

The House of Representatives, for example, makes congressional financial reports readily available. The Web site for the Office of the Clerk of the House, <http://clerkweb.house.gov/pd/financial.php>, clearly explains the process by which a person can obtain information about a member's financial holdings. Individuals who wish to review reports simply send a request form to the Legislative Resource Center at the House or contact the Center at the provided telephone number. The form need not be notarized and the requesting individual need only reimburse the Center for the report copying fee. An individual may copy reports at the Legislative Recourse Center or the Center will send the report to the Secretary of State for the jurisdiction in which the requesting individual resides.

After years of resistance, the Judicial Conference has now made the process for obtaining the financial reports of a federal judge, once shrouded in mystery, more convenient. For years, the judiciary shielded these reports from the public with an array of bureaucratic hurdles. According to a 1998 article from the *Kansas City Star*, if an individual was somehow able to find out how to request a copy of a report, the individual had to have her request notarized, pay a fee and then travel to Washington, D.C. to the Administrative Office of the U.S. Courts to copy the information ("Judge discloses holdings," April 14, 1998). Today, forms no longer need to be notarized and the Administrative Office of the Courts will mail reports to requesting individuals. However, it is still difficult to obtain information about the process for requesting reports on the Web sites for the Administrative Office of the Courts and the Judicial Conference; these offices claim that the request form is available on these Web sites, but our search of the sites led us to no information on financial disclosure reports.

The federal judiciary is not alone in placing obstacles in the way of public access to financial disclosure reports. Many states, including Connecticut, the District of Columbia and Maine, still allow some part of the disclosure to remain closed to the public. Connecticut law, for example, requires two separate reports to be filed, one for judges and one for the judge's spouses and dependents. The report for the family members is required to be confidential. *See* Conn. Gen. Stat. Ann. § 51-46a. In the District of Columbia, information on a judge's officerships, directorships and partnerships in business, professional organizations and charities is made public, but all other information about his income and investments is kept confidential. *See* D.C. Code § 11-1530(b)(1). If a judge in Maine receives permission from the Chief Justice to omit certain financial information, the public may not inspect that information or even the judge's request letter. *See* Maine Code of Judicial Conduct Canon 6C.

The Joint Commission's establishment of clear access requirements would encourage these states and others to join the vast majority of jurisdictions that recognize the need for meaningful public access to judicial financial reports and recusal lists. Isolated incidents where public disclosures have allegedly been misused against judges do not justify a wholesale abandonment of the principles of sunshine. In fact, there is no indication that any judge has ever suffered any actual injury as a result of public disclosure.

We urge the Joint Commission to clarify that financial disclosure reports and recusal lists must be made available in the office of the clerk of the court where the judge serves. Understandably, those who have the strongest interest in reviewing a judge's financial holdings are litigants appearing or expecting to appear before the judge. By housing these reports at the clerk's office for the court where the judge serves, we can make certain that interested parties are able to exercise their right to review a judge's financial holdings and determine whether a conflict of interest or potential conflict of interest exists.

The Canons recognize the importance of ensuring that the public has access to financial disclosure reports. However, they only address public access in the context of reports documenting income derived from extra-judicial activities. Canon 4, Section H, which covers reports related to compensation received for extra-judicial activities, requires that reports must be made at least annually and filed as public documents in the office of the clerk of the court. There is no principled reason why this same requirement should not apply to *all* financial disclosure reports

Therefore, we urge the Joint Commission to add the following language to the commentary of Canon 3, Section E(2):

A copy of this list should be filed in the office of the clerk for the court in which the judge serves, where there is full public access to this list.

We also urge the Joint Commission to add the following language to the commentary of Canon 4, Section I:

A copy of the annual financial disclosure statement should be filed in the office of the clerk for the court in which the judge serves, where there is full public access to this statement.

This amendment to the Model Code clarifies the process of financial disclosure and fulfills the purpose behind the strengthened disclosure rule we propose.

III. The Duty to Certify that the Judge did not Perform any Adjudicatory Function in a Proceeding that could Potentially Affect a Judge's Financial Interests

Just as Congress has recently passed legislation requiring corporate chief executives to certify that their reports to the Securities and Exchange Commission are accurate, judges should be required to certify that they have not handled matters in which they or their families held a financial interest.

For many years, federal judges were required to sign the following certification:

In compliance with the provisions of 28 U.S.C. § 455 and of Advisory Opinion No. 57 of the Advisory Committee on Judicial Activities, and to the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by the report in which I, my spouse, or my minor or dependent children had a financial interest, as defined in Canon 3C(3)c, in the outcome of such litigation.

However, this certification was deleted from financial disclosure forms beginning with the forms filed for the calendar year of 1999. In response to this unjustified move, Senator Grassley stated:

Maneuvers that are designed to undermine the greatest possible disclosure of information only breed cynicism. Public officials, including the federal judiciary, need to do everything possible to build public trust, rather than chip away at it.

Certification provides a necessary second safeguard, in addition to the financial disclosure reporting requirement, to ensure that a judge does not have any disqualifying financial interests in the cases over which she presides. It requires a judge to take a step beyond simply enumerating her economic holdings, by carefully analyzing the bearing those holdings have had on the decisions she has made during the past year.

The current Canons do not provide for certification. The closest they come to encouraging a judge's careful analysis of her financial holdings is stated in the commentary to Canon 4, Section D, Part 1:

A judge must avoid financial and business dealings that involve the judge in frequent transactions or continuing business relationships with parties likely to become either before the judge personally or before other judges on the judge's court. In addition, a judge should discourage members of the judge's family from engaging in dealings that would reasonably appear to exploit the judge's judicial position.

The Model Code should be revised to require something beyond mere “avoidance” of a conflict of interest. The Joint Commission should revise the Canons to require the proactive step of certification.

Canon 3, Section E, Part 2, which provides, “A judge shall keep informed about the judge’s personal and fiduciary economic interests,” should be amended to include the following language:

Within 60 days of the end of each calendar year, a judge shall file with the clerk of the judge’s court a certification that the judge did not perform any adjudicatory function in any litigation during the prior calendar year in which the judge or the judge’s spouse, parent or child wherever residing, or any other member of the judge’s family residing in the judge’s household, had a financial interest in the outcome of such litigation.

This amendment to the Model Code will place a second important check on judges to make certain that they are not only divulging their financial interests, but also taking the necessary step of ensuring that those interests have no bearing on the cases over which they preside.

IV. The Duty to Avoid Attending Privately Funded Multi-Day Seminars that Create the Appearance of Impropriety

The problem of special interests using expense-paid trips to lavish settings in a thinly-veiled attempt to lobby judges has been well documented. Ethics experts, judges, public interest groups and more than 30 editorial boards from across the political spectrum have strongly criticized these programs.

CRC’s report, *Nothing for Free*, found that between 1992 and 1998, some 230 federal judges – more than a quarter of the federal judiciary – traveled to resort locations at the expense of private interests with a stake in federal litigation. Sponsors of these trips included the Foundation for Research on Economics and the Environment (FREE), the Law and Economics Center and the Liberty Fund, all groups with a vested economic interest in relaxation of environmental regulations. During these expense-paid vacations, judges attended legal seminars making the case for curbing federal regulatory authority in favor of a free-market approach to matters like protecting the environment. CRC’s report demonstrates that the “educational” seminars had an impact on judicial decision-making. Ten of the decade’s most significant rulings cutting back on environmental protections were written by judges who attended these seminars, often while the cases were pending in court.

In a foreword to the CRC study, Judge Mikva stressed the need to avoid even an appearance of impropriety. As he emphasized, steps to protect judicial integrity “all

become meaningless when private interests are allowed to wine and dine judges at fancy resorts under the pretext of ‘educating’ them about complicated issues.”

Similarly, Senator Feingold recently stated:

The appearance created by these seminars is not consistent with the image of an impartial judiciary. One-sided seminars given in wealthy resorts funded by wealthy corporate interests to ‘educate’ our judges in a particular view of the law cannot help but undermine public confidence in the decisions that judges who attend the seminars ultimately make.

In addition, the *Washington Post* explained the corrosive effect of such practices (“A Blot on Judicial Ethics,” July 28, 2000):

The point is not that the judges are corrupt or that they should forswear discussion with academics – including ideological ones. But judges should not be put, or put themselves, in positions in which objectivity can be reasonably questioned.

Finally, the *New York Times* points out that the current system of rules is ineffective (“A Threat to Judicial Ethics,” September 15, 2000):

Judges should have the ethical compass to resist these one-sided ‘educational’ seminars. But in the absence of judicial self-restraint, Chief Justice Rehnquist should be leading the United States Judicial Conference, the governing body for all federal judges, to crack down on such junkets.

While most recent criticism has centered on the federal judiciary’s attendance at privately funded seminars, this is clearly no less a problem at the state judicial level. The Joint Commission should amend the Model Code to provide specific guidance for state judges about the kinds of activities for which they may receive compensation.

Section D, Part 5 of the fourth Canon currently provides:

A judge shall not accept, and shall urge members of the judge’s family residing in the judge’s household not to accept, a gift, bequest, favor or loan from anyone except for: (a) a gift incident to a public testimonial, books, tapes and other resource materials supplied by publishers on a complimentary basis for official use, or an *invitation to the judge and the judge’s spouse or guest to attend a bar-related function or an activity devoted to the improvement of the law, the legal system or the administration of justice.*” [emphasis supplied]

The exception regarding compensation received for attending a “bar-related function” or “an activity devoted to the improvement of the law, the legal system or the administration of justice” represents a gaping loophole that largely eviscerates the Canon’s prophylactic provisions. The exception could be interpreted to cover seminars funded by corporations and special interest groups so long as the activities are tangentially related or even under the guise of being related to the “legal system.”

For example, a dude ranch vacation sponsored by the FREE organization that features partisan lectures on property rights and market forces could be considered related to the “legal system.” Under the current exception clause of Canon 4D(5), judges would be permitted to accept gifts given during that activity, not to mention first-class travel and hotel accommodations. When judges accept thousands of dollars in the form of lavish meals and vacations from private foundations, corporations and other special interests, their perception of impartiality is severely damaged.

We recommend that the Joint Commission clarify the true intention of the gift prohibition by adding the following language after the last sentence in Canon 4, Section D: “Judges shall not accept gifts that have an aggregate value in excess of \$500 in association with privately-continuing legal education programs for judges.”

We also propose adding the following explanation in the Commentary of Section D of the fourth Canon:

In recent years, corporations and other interested parties have started hosting or funding expense-paid continuing legal educational programs for judges in order to advance a particular perspective on the law or specific legal issues. Participation in these events inevitably creates the appearance of a conflict of interest. The program fees and materials, travel, food, and lodging expenses associated with such programs are gifts to the judge.

These amendments to the Model Code achieve an important balance. It does not place a flat ban on biased seminars and even allows for private funding of judicial education so long as the funding does not exceed \$500, yet it also ensures that judges avoid creating the appearance of a conflict of interest by accepting expensive gifts and lavish vacations from groups that stand to benefit from their future rulings.

Conclusion

HALT and CRC respectfully request that the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct amend the current Canons to reflect modern concerns over judicial conflicts of interest.

We urge the Joint Commission to provide for full and complete financial disclosure, convenient public access to judicial financial reports, requirements that judges

certify that their economic interests do not conflict with the cases over which they preside, and prohibitions on receiving excessive gifts and vacations from private corporations and special interest groups.

In making these important amendments, the Joint Commission can instill the Canons with guidelines that help restore public confidence in the impartiality and integrity of statewide judiciaries.

Respectfully submitted,

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