



An Organization Of

AMERICANS FOR LEGAL REFORM

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**COMMENTS FROM
HALT – AN ORGANIZATION OF AMERICANS FOR LEGAL REFORM
TO THE ABA JOINT COMMISSION TO EVALUATE
THE MODEL CODE OF JUDICIAL CONDUCT
RE: PROPOSED GIFT RULES 4:13 – 4:16**

Pursuant to a request from the American Bar Association’s Joint Commission to Evaluate the Model Code of Judicial Conduct, HALT – *An Organization of Americans for Legal Reform* hereby submits comments analyzing revisions to the Model Code’s gift-related rules. On October 15, 2003, HALT, a nonprofit, nonpartisan organization dedicated to increasing accountability in the civil justice system, submitted joint comments with Community Rights Counsel, urging the Commission to adopt amendments on financial disclosure and limitations on multi-day seminars. On December 5, 2003, HALT testified before the Commission and recommended that the ABA clarify and strengthen its rules related to gift receipt and reporting.

HALT is pleased that the Commission has recently issued recommendations that provide more specific guidance on the kinds of gifts judges may accept and the circumstances and methods in which they must report such receipts. The Commission has sought public comment on the following issues: (1) the Commission’s proposed dollar limits establishing thresholds for permissible and reportable gifts; (2) a proposed quarterly reporting requirement; and (3) the exception for invitations to “widely attended events.”

We urge the Commission to use the rules for federal officials as a baseline standard to determine the appropriate dollar limit thresholds for permissible and reportable gifts. In addition, we encourage the Commission to proceed with rules that would require quarterly reporting of gifts, compensation, reimbursements and waivers of charges that judges receive. In particular, we strongly support the Commission’s requirement that clerk’s offices and court Web sites make this critical information available to the public. Finally, HALT urges the Commission to limit judge’s receipt of invitations to “widely attended events” and activities “devoted to the improvement of the law, the legal system or the administration of justice” to events valued at less than \$500. We also believe that judges should report attendance at any events valued at more than \$250 as a regular component of their quarterly financial disclosures.

At a minimum, the ABA's rules should parallel the requirements in place for federal officials. The Commission's proposed dollar limits satisfy this standard, with one exception; they allow judges to accept up to \$150 in gifts from the same source in a calendar year, while federal rules permit officials to accept only \$100 cumulatively. As it has done with its other dollar limit proposals, we urge the Commission to use the federal requirement as a baseline standard.

HALT strongly supports the Commission's proposed quarterly reporting rule because it will ensure that litigants have access to up-to-date, critical information about a judge's financial interests. In addition, HALT congratulates the Commission on taking a further step to ensure public access by requiring that reports be made available at the clerk's office in the court in which the judge serves as well as on court Web sites.

Finally, HALT urges the Commission to limit receipt and require reporting of attendance at "widely attended events." Attendance at dinners, receptions, conferences and seminars sponsored by corporations and special interest groups leads to the appearance of impropriety, particularly when those groups later appear before an attending judge. The Commission should limit attendance to events valued at \$500 or less, and should adopt the same reporting obligations to these events as the Commission applies to all other gifts.

In addition, we disagree with the Code's continued exception for invitations to "any activity devoted to the improvement of the law, the legal system or the administration of justice" because we believe that this language permits judges to attend any kind of privately sponsored event, so long as it could theoretically fall under the overly broad rubric of "the law, the legal system or the administration of justice." Attendance at these private events casts doubt upon a judge's ability to maintain impartiality and should, therefore, be limited to events valued at \$500 or less. In addition, disclosure of attendance at these seminars should be part of a judge's quarterly reporting obligations.¹

¹ In commenting on the Commission's proposed exception for invitations to "widely attended events," we note that on August 16, 2004, the Judicial Conference's Committee on Codes of Conduct issued a revised version of Advisory Opinion 67 (AO67). The revised opinion, which comprises the judiciary's own guidance on the propriety of accepting seminar gifts, represents a major step backward. As this Commission knows, AO67 limits the scope of inquiry to funding earmarked specifically for the seminar in question, rather than requiring judges to consider the funder's broader interests. In addition, AO67 limits a judge's inquiry to knowledge of funders who provide a "substantial portion of the cost" without defining the term "substantial." Further, the new standard limits the prohibition on seminar attendance to situations where the topics of the seminar are "directly related" to the litigation. Finally, the new standard omits any obligation to disclose the value of seminar gifts. As the Commission evaluates public comment on its proposed gift rules, HALT strongly urges the Commission to avoid taking this reckless path.

I. At a Minimum, the Commission Should Amend the Model Code to Include Dollar Limits that Mirror Those Required under Federal Law.

In a number of instances, the Commission has created dollar limits establishing thresholds for permissible and reportable gifts. While some of the caps reflect those required by federal law, others diverge from the federal structure. In the interest of fairness, uniformity and clarity, HALT urges the Commission to adopt, at a minimum, the dollar limits establishing thresholds for federal officials.

In proposed Rule 4.13(a)(7), the Commission has carved out an exception for individual gifts valued at \$50 or less and series of gifts from the same source whose value in the aggregate does not exceed \$150 or less. Members of Congress may also accept individual gifts valued at \$50 or less, but they can not accept gifts from a single source of up to \$100 per year. See, e.g., H. Res. 9, 106 Cong. Rec. H209 (January 6, 1999). We believe that the ABA's model rules should mirror these dollar limits. Therefore, we support the \$50 individual gift cap and we recommend that the aggregate gift cap be reduced to \$100, as House and Senate rules provide.

In proposed rule 4.13(b), the Commission proposes that judges publicly report gifts that alone or in the aggregate with other gifts from the same source in the same calendar year exceed \$250. The federal Ethics in Government Act also requires reporting when a gift alone or in the aggregate exceeds the \$250 limit. See 5 U.S.C. § 102(a)(2)(A). Therefore, in this instance, we support the Commission's new requirement.

In proposed rule 4.14(b), the Commission proposes that judges publicly disclose any reimbursement or waiver of charges that they receive for travel-related expenses, when the reimbursement or waiver alone or in the aggregate with other costs reimbursed from the same source in the same calendar year exceeds \$100. As stated, the rules for local judges should reflect, at a minimum, the standards in place for federal judges. The Ethics in Government Act requires reporting of the source and a brief description (including a travel itinerary, dates, and nature of expenses provided) of reimbursements received from any source aggregating more than \$250. HALT congratulates the Commission for advancing beyond the federal requirements and broadening the reporting obligations of state judges. In an era that embraces principles of sunshine and transparency, broad disclosure goes far to strengthen the integrity of statewide judiciaries.

HALT urges this Commission to proceed with applying all dollar limit thresholds that correspond to, or improve upon, those required under federal law.

II. The Commission Should Adopt a Quarterly Reporting Rule and Require Courts to Publicize this Information in Clerk's Offices and on Court Web Sites.

To ensure that the public is made aware of the gifts, compensation and reimbursements that judges receive, the Commission has proposed a quarterly reporting requirement. Specifically, rule 4.16 provides:

A judge shall report the date, place and nature of any activity for which the judge received compensation, reimbursement, or waiver of charges The judge's report shall be made at least quarterly and shall be filed as a public document in the office of the clerk of the court on which the judge serves or other office designated by law, and when technically feasible, posted on the website of that court or office.

Under the previous rules, judges were required to annually file financial reports. In filing this information only once a year, the public was unable to receive updated, current data. The problem with this is readily apparent: if a judge received reimbursement for attending an event hosted by ABC Corporation in January, 2003, that information would not be available to an individual suing ABC Corp. today. Year-old information will rarely assist a litigant in determining the impartiality of the judge presiding over her case.

A quarterly reporting requirement, however, would allow litigants and potential litigants to make better-informed determinations because the information at their disposal would be more current. HALT strongly supports the Commission's proposed quarterly reporting requirement.

We also support the Commission's dedication to ensuring that the public is made aware of the reports filed by judges. As we informed the Commission through our written comments last year, financial disclosure is meaningless if the public has no practical means of accessing information in financial disclosure reports and recusal lists. Over the years, 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.

Therefore, we support the Commission's proposal that judges file their reports in the office of the clerk of the court on which the judge serves. The clerk's office is the most convenient forum for public access to judges' reports. 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.

In addition, proposed rule 4.16 requires that courts post the financial reports of judges on their Web sites. We strongly support this proposal. In an era in which the public increasingly relies on the internet as its primary source of information, it is essential that courts make this critical information available on their Web sites. Indeed, we encourage the Commission to omit the "where technically feasible" language from the rule. Almost every court in the nation hosts a Web site, and there is no reason why a quarterly posting of portable document format ("pdf") documents containing this information would *not* be technically feasible.

HALT urges the Commission to proceed with its proposed quarterly reporting rule as well as a requirement that the public have convenient access to those reports in the clerk's office for the court in which the judge serves as well as on the court's Web site.

III. The Model Code Should Limit Receipt and Require Reporting of Invitations to "Widely Attended Events" and "Activities Devoted to the Improvement of the Law, the Legal System or the Administration of Justice."

Finally, the Commission has asked for public comment on the issue of whether invitations to "widely attended events" should be included among the "gifts" a judge may accept. While judges should not be prohibited from attending these events, the amount of reimbursement that judges may receive, as well as their reporting obligations, should be specified in the Code.

Proposed rule 4.13(a) provides:

A judge shall not solicit or accept . . . a gift from anyone except that a judge may accept . . . (3) an invitation to the judge and the judge's spouse or guest to attend without charge a widely attended event or a bar-related function or any activity devoted to the improvement of the law, the legal system or the administration of justice.

The Code's Terminology section defines "widely attended event" as a "convention, conference, symposium, forum, panel, discussion, dinner, viewing, reception or similar event at which more than 25 persons are expected to attend."

By including an exception for invitations to "widely attended events," the Commission is permitting judges to attend a broad range of prestigious and exciting events sponsored by groups that stand to profit from the judge's decisions. While rule 4.13(a)(7) provides that a judge may not accept a gift from an individual "whose interests are likely to come before the judge, in the foreseeable future," the standard is vague. Even if this

Commission adopted a specific timeframe, in many circumstances, it is understandably difficult for a judge to predict the litigants who will later appear before her. If a judge accepts a special interest group's invitation to an all-expense-paid conference in Hawaii, attended by more than 25 persons, and the group litigates a matter before the judge a year later, this certainly raises the appearance of impropriety.

Further, if the "widely attended event" gift is valued at \$250 or less, the proposed reporting rules do not require that the judge disclose the gift. Under this structure, a corporation could give a judge a ticket to the Superbowl, so long as that ticket was priced at less than \$251—and the public would never learn of this special gift. If this Commission permits judges to accept invitations to glamorous events sponsored by corporations and special interest groups that could potentially appear before the judge, the public has a right to know this information. Individuals suing or being sued by these corporations and special interest groups certainly have a right to determine whether the judge's attendance at the event interferes with the judge's impartiality.

For these reasons, HALT urges the Commission to amend the definition of "widely attended events" in rule 4.13. We do not propose that judges be prohibited from attending all "widely attended events." Instead, we recommend that the Commission define a "widely attended event" to include only those events valued at \$500 or less. In other words, judges would continue to be permitted to attend dinners, receptions, conferences and seminars sponsored by corporations and special interest groups, so long as they were attended by at least 25 persons and valued at \$500 or less. Specifically, this Commission should revise the definition to read:

'Widely attended event' means a convention, conference, symposium, forum, panel, discussion, dinner, viewing, reception or similar event valued at \$500 or less, at which more than 25 persons are expected to attend.

In addition, we propose that the \$250 reporting threshold, provided in rule 4.13(b), apply to attendance at "widely attended events." In other words, if the event's value exceeds \$250, but is less than the \$500 ceiling, a judge may attend the event, but he must report it as part of his quarterly reporting responsibilities. There is no reason why attendance at these events should be omitted from the judge's regular disclosures.

These recommendations strike an important balance. They do not place a draconian ban on privately sponsored events and even allow for reimbursement up to \$500, yet they also ensure 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.

In addition, as we testified before the Commission last year, the exception for compensation received for attending "any activity devoted to the improvement of the law,

the legal system or the administration of justice” continues to represent 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 an organization that features partisan lectures on property rights and market forces could be considered related to the “legal system.” Under the exception clause of proposed Rule 4.13, 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.

HALT urges the Commission to apply the \$500 gift receipt restriction to attendance at “any activity devoted to the improvement of the law, the legal system or the administration of justice.” In addition, we hope that the Commission will apply the \$250 reporting threshold to attendance at these seminars.²

This simple disclosure requirement does not place an excessive burden on judges, but it does help to ensure that litigants receive a complete and accurate understanding of a judge’s background so that they can determine for themselves whether they are appearing before an impartial judiciary.

Conclusion

HALT respectfully requests that the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct amend the proposed gift rules to reflect modern concerns over judicial conflicts of interest.

HALT urges the Commission to apply the Ethics in Government Act dollar limit thresholds for permissible and reportable gifts. Further, we hope the Commission will go forward with model rules that will require judges to file quarterly reports of gifts,

² To clarify the new rules, we recommend adding the following explanation in the Commentary section that accompanies Rule 4.13:

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.

compensation, reimbursements and waivers of charges that they receive. We strongly support the Commission's requirement that clerk's offices and court Web sites make this critical information available to the public. Finally, HALT urges the Commission to limit judge's receipt of invitations to "widely attended events" and activities "devoted to the improvement of the law, the legal system or the administration of justice" to events valued at less than \$500. We believe that judges should report attendance at any events valued at more than \$250 as a regular component of her quarterly financial disclosures.

By adopting federal standards for dollar limit thresholds, requiring quarterly reporting in publicly accessible forums and rejecting exceptions that pose gaping loopholes in the Canons, this Commission can instill the Model Code of Judicial Conduct with guidelines that help restore public confidence in the impartiality of statewide judiciaries.

Respectfully submitted,

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