SBM STATE BAR OF MICHIGAN

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February 23, 2011

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2005-11 – Proposed Amendments of Canon 4 and 5 of the Michigan Code of Judicial Conduct

Dear Clerk Davis:

At its January 21, 2011, meeting, the Board of Commissioners of the State Bar of Michigan voted to oppose the proposed amendments to Canons 4 and 5 of the Michigan Code of Judicial Conduct. Several concerns about both the existing and the proposed language were raised that I have been asked by the Board to convey as a part of communicating the Bar's position on the proposed changes.

The Bar believes in the importance of having clarity for both judges and lawyers about what types of activities judges may ethically participate in. Staff commentary to the Court's publication order acknowledges that the intention of the amendments is clarification of a judge's role in fundraising events. To some extent, accomplishing this is made difficult by existing language that is not intended to be altered by the proposed amendments. In addition, some of the proposed language is impractical and appears to place a compliance burden on individuals other than the judge, an obligation that seems misplaced in a set of ethical rules that pertains to judicial officers and not third parties.

An example of an internal inconsistency that is not solved by the proposed amendments is contained in the current Canon 5(B)(2), which would be redesignated as Canon 5(C) with adoption of the amendments. The proposed paragraph would continue to prohibit a judge from "us[ing] or permit[ting] the use of the prestige of office" for the solicitation of funds for an educational, religious, charitable, fraternal, or civil organization, while at the same time expanding the ways in which a judge could do exactly that – by speaking at, receiving an award, being featured on a program, or permitting his or her title to be used in connection with an event. The participation of a judge in any of the activities identified in the proposed language as permissible unavoidably implicates the prestige of the judge's office to solicit funds. It is precisely because of the prestige of the judicial office that a judge's participation in a fundraiser heightens others' interest and participation. The potential confusion created by enumerating some activities as ethical while retaining broader prohibitive language could prompt less judicial participation in charitable events as judges seek not to breach the broader proscriptive language.

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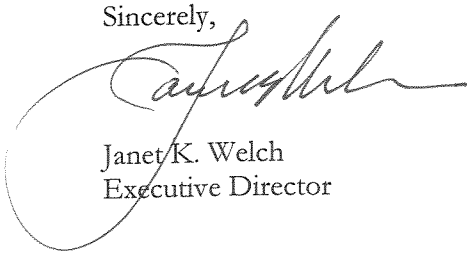
CORBIN R. DAVIS
CLERK SUPREME COURT

Equally confusing is the prohibition against "individually solicit[ing] funds" coupled with the new language in new Canon 5(C) permitting a judge's title to be used in connection with an event, which arguably constitutes an individual solicitation of funds.[1]

Adding to both Canon 4 and Canon 5, "To the extent practicable, a judge must be shielded from the identity of contributors and the amount of their contribution," serves only to complicate matters. First, there are a number of different ways in which charitable fundraising drives and events typically operate that would telegraph to a participating judge both the amount of contributions and the identity of contributors. Programs listing donors by categories related to the amount of a donation are one example. Identification of donors by means of reserved tables at an event, for which a published cost is circulated, is another. Not only is it unrealistic to expect a judge who is participating as a speaker, award recipient, or honored guest to be unaware of such things, the language places a responsibility on someone other than the judge to see that the rule is followed. "...A judge must be shielded" places the judge in a passive role, which arguably would make enforcement of the prohibition more difficult by perhaps creating a defense that it was not the judge but the event-planners who failed to appropriate shield the judge from identifying information. This sentence is even more unworkable in Canon 4(C) where existing language permits judicial participation in management and investment of the funds raised. It is difficult to envision how a judge who is "managing" the funds would not acquire knowledge of the identity of contributors and the amounts of checks being processed through that management.

To be clear, the Bar supports the concept that, with respect to educational, religious, charitable, fraternal, or civic organizations, and organizations or governmental agencies devoted to the improvement of the law, the legal systems, or the administration of justice, judges should be able to ethically speak at events, receive awards, and be featured on programs. But the patchwork of language that would result from enactment of the proposed amendments to Canons 4 and 5 set forth in ADM File No.2005-11 does not accomplish this without raising more questions than it answers.

Sincerely,



Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
W. Anthony Jenkins, President

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[1] This confusion could be alleviated by defining what is meant by individually soliciting funds as perhaps inperson or telephonic solicitation by a judge of an individual.