

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT**

Summary of Meeting Minutes

February 6-7, 2004

San Antonio, Texas

Members Participating

Mark I. Harrison, Chair
James Alfini
Loretta C. Argrett
Jan Witold Baran
Dianne Cleaver
Thomas M. Fitzpatrick
Donald B. Hilliker
Hon. M. Margaret McKeown
Hon. Cara Lee T. Neville (Fri.)
Hon. Harriet L. Turney
Hon. James A. Wynn

Reporter Participating

Charles G. Geyh

Staff Participating

Jeanne P. Gray, CPR Director
Eileen Gallagher, Justice Center Counsel
George A. Kuhlman, Ethics Counsel
Eileen B. Libby, Associate Ethics Counsel
Nancy Slonim, ABA Media Relations

Advisors Participating

Hon. Carol Amon
Hon. Peter W. Bowie
Robert P. Cummins
Marvin I. Karp
M. Peter Moser (Fri.)
Dudley Oldham (Fri.)
Hon. Ellen Rosenblum
Robert H. Tembeckjian
Seth Rosner

Following the open hearing, members discussed their reactions to the morning's testimony and the importance of revising the Code to guarantee due process. The group discussed whether to use "should" as opposed to "shall" throughout the Code and the difficulty of drawing bright lines regarding judicial election campaign fundraising.

Regarding the testimony concerning impaired judges, members discussed whether, in the interest of public protection, it is preferable that a report concerning an impaired judge be addressed to a judicial disciplinary agency as opposed to a lawyers'/judges' assistance program.

The Reporter explained the most recent revisions to the 1990 Model Code as reflected in his January 14, 2004.

Members discussed which title to use for Article 2.01. They further decided that the article should state that "[t]he judicial duties of a judge shall take precedence over all the judge's other activities." Regarding the Comment, a member expressed concern over the use of "us" and "valuable."

Under "Adjudication," Article 2.02, "The Duty to Decide," it was decided to use "shall" instead of "should." Members discussed whether to insert "[f]airly and impartially" after "[a] judge shall" at the beginning of the article. In the Comment, the

words “and” and “unpleasant” were deleted from the last sentence. Members decided to use “controversial” instead.

The Commission discussed the differences between recusal and disqualification, whether it is necessary to use both terms in the black letter, or relegate “recusal” to the comment. They renamed the heading to Article 2.03 and revised the rule. It was suggested that language should be inserted in Article 2.03 referencing the problem of the impaired judge.

The Commission added a new provision, “Impartiality and Fairness.” After discussion, they decided to set out the two terms in separate rules.

Comment [2] from Article 2.03 was moved to become the comment to Article 2.04. It was suggested that, in light of the changing role of judges, it would be wise to address in the black letter judicial participation in settlement discussions. Under Comment [1] to the subsection entitled “Diligence,” the last sentence was edited. Under Article 2.05, a new Comment [3] was added regarding judges debriefing jurors.

“Sexual” was deleted from Comment [1] under “Bias and Discrimination.” In Comment [2], the members deleted “on any basis” and “judicial bias” and revised the last line. They discussed the origins of “facial expression and body language.” Suggestions were made to cross-reference the provision dealing with appearance of impropriety and to state that a judge must avoid prejudice on his or her own and be sensitive to prejudice by others.

Article 2.07, “Ensuring Access to Justice,” was renamed “Ensuring Right to be Heard,” and its comment revised. In the context of Article 2.08, members discussed “consent of the parties” and problems associated with a judge who is going to hear a case engaging in settlement negotiations with parties. The members made several changes to Article 2.08’s black letter rule and its comment.

Members considered the practice of judges consulting information sources outside the record. They also considered permissible ex parte communications, for example, communications with special masters and court-appointed experts with whom judges consult regarding specialized subjects.

Members discussed whether early mediation evaluation situations should be addressed by a separate rule and whether modern practice permits a judge, with consent of the parties, to meet with both sides separately. Members also considered an unrelated subject, where to place a provision relating to judges’ service on bar association committees.

Regarding Article 2.09, members considered the problem of special access. For example, law firms that may have cases on a certain judge’s docket might host that judge at a continuing legal education lunch for associates at the firm. Accordingly, the Commission rewrote subparagraph (c) and revised the first sentence in Comment [2].

In the context of Article 2.10, members discussed judges speaking at law firms and at continuing legal education programs.

Following extended discussion concerning the inability of judges, under the current Code, to respond to unfair attacks concerning their judicial performance, members revised Comment [2]. They considered deleting subparagraph (3) from Article 2.11. A recommendation was made to expand “household” to include domestic partners and to make clear that subparagraph (3) does not apply to a judge’s spouse’s fiduciary relationship. Another suggestion was that subparagraph (c) be moved to Comment and that a provision be added to state that the Code does not permit conduct that is prohibited by federal or other law. It was recommended that “commits, or” be deleted. from subparagraph (6).

Members agreed that it would be helpful to compare the Code with other judicial codes, especially the Code of Conduct governing federal judges.

Regarding Article 2.11 (c), members discussed whether disqualified judges should disclose on the record the basis of their disqualification. The members discussed whether a judge whose impartiality might be questioned but who has not engaged in conduct necessitating recusal or disqualification still should make disclosures to the parties. They also agreed to consider revising language referring to bias against parties to include bias against others.

Regarding Comment [4], members opined that the comment required greater clarity and that it be moved to the black letter rule. The Commission will examine the federal disqualification statute in order to determine if any of its provisions are suitable for inclusion in the revised Code.

Turning to Article 2.13, members discussed the use of “fidelity,” and whether a separate reference to “staff” was necessary. The Commission also revised Articles 2.14 and 2.15.

Members discussed reordering sentences in Article 2.16 and Article 2.17. They considered whether language proposed by the ABA Standing Committee on Lawyer Assistance Programs could be inserted in this section of the Code.

The Commission will resume its discussion when it next meets in at the Hotel Monaco in San Francisco, California on March 26-27. Before adjourning, the Commission discussed its upcoming timetable and the enactment process. The Chair suggested, and the members agreed, to take every opportunity to meet in person in order for the Commission to produce a timely, high-quality, comprehensive draft that will be well-received. In this regard, the members acknowledged the importance of properly vetting the proposed draft Code by allowing all interested entities sufficient time to offer their comments and suggestions. All media inquiries concerning the Judicial Code

revision project should be routed through ABA Media Relations and Joint Commission Chair Harrison.