

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Minutes of Meeting
April 8-9, 2006**

Members Participating

Mark I. Harrison, Chair
James Alfini
Dianne Cleaver
Thomas M. Fitzpatrick
Donald B. Hilliker
Hon. Cara Lee T. Neville
Hon. Harriet Turney
Loretta Argrett
Hon. Margaret McKeown

Staff Participating

Jeanne P. Gray, CPR Director
George A. Kuhlman, Ethics Counsel
Peter Geraghty, Director, EthicsSearch
Kathryn Thompson, Research Counsel
Susan Michmerhuizen, Research Counsel
Marcia Kladder, CPR Program Director
Nancy Slonim, Media Relations

Reporters Participating

Charles G. Geyh
W. William Hodes

Advisors Participating

Hon. Carol Amon
Robert P. Cummins
Hon. Peter W. Bowie
Marvin L. Karp
M. Peter Moser
D. Dudley Oldham
Hon. Ellen F. Rosenblum
Seth Rosner
Hon. Randall T. Shepard
Robert H. Tembeckjian

The Joint Commission discussed proceedings before the House. They passed a motion to give the Chair the authority to act on the Commission's behalf during the Annual Meeting in Hawaii.

Canon 4

The Friday session was devoted to Canon 4. Members considered whether the most recent changes were substantive or merely structural. They delegated the drafting of the lead-in language for proposed Rule 4.01 to a style subcommittee.

There was a suggestion that proposed Rule 4.01(D) should be moved to Rule 4.04 and that it should state "[e]xcept for incidental use in connection with activities concerning the law, legal system and the administration of justice." Rule 4.01(E) was deleted.

Rule 4.01(F) was revised to state, "[s]hall not abuse or permit others to abuse." Rule 4.01(G) was moved to Rule 4.04. Rule 4.01(H) was deleted.

Turning to Rule 4.01 comment, members decided to delete the phrase, “[a]s a judicial officer learned in the law” that appears at the beginning of Comment [3]. The Reporter will blend Comments [1] and [3], and will delete Comment [2]. The first half of the new comment will contain alternative language taken from the March 6 draft.

Members decided to retain proposed Rule 4.02(B).

Some of the language in proposed Rule 4.02(C) had been suggested by the Conference of Chief Justices. A majority of Commission members initially were in favor of the following language: “When the judge is acting pro se in a matter involving the judge or the judge’s legal or pecuniary interests or in a fiduciary capacity. . . .” However, there was a suggestion to use “when acting pro se in a matter involving the judge or the judge’s interests,” meaning that members must revisit the matter at the next meeting. No changes were made to Comments [1] and [2].

No revisions were made to proposed Rule 4.03 and its comment other than to change the title to “Appointments to Governmental Positions.”

The comment to Rule 4.03 will remain as it was in the December 2005 draft.

The title of proposed Rule 4.04 was changed to “Participation in Educational, Civic or Charitable Activities.” The substance of Rules 4.04(A) and (B) was retained although their order was reversed. Proposed Rule 4.04(B)(3) will state “shall not engage in conduct that would appear to a reasonable person to be coercive under the circumstances.”

The Commission decided to add a comment or black letter provision to proposed Rule 4.04(B)(3) that would permit a judge to receive an award at an event that was not related to fundraising.

Regarding proposed Rule 4.04 comment, the Commission deleted Comments [6], [7], and [8]. Comment [4] was revised to allow judges to serve as ticket-takers or to perform similar functions at a charity event.

Proposed Rule 4.05 will state, “[a] judge shall not accept appointment to serve in a fiduciary position, such as executor, administrator, trustee, guardian, attorney in fact, or other personal representative, except for the estate, trust, or person of a member of the judge’s family, including a domestic partner, and then only if such service will not interfere with the proper performance of judicial duties.” “Fiduciary” will be defined in the Terminology section.

“In a fiduciary position” was inserted in proposed Rule 4.05(B). A style subcommittee will determine where “domestic partner” should be added throughout the Code. “Engaging in” was inserted in Rule 4.05(C). A reference to Rule 2.12 was added to Comment [2].

Proposed Rule 4.06 was modified to state “[a] judge shall not act as an arbitrator or mediator or perform other judicial functions apart from the judge’s official duties unless expressly authorized by law to do so.” Its comment was slightly modified.

In Comment [1] to proposed Rule 4.07, “misuse” was deleted.

Proposed Rule 4.08 will begin, “[s]ubject to the limitations set out in Rule 4.09, a....” Comment [1] was substantially revised to include language stating that it "would be improper for a judge to spend so much time on business activities that the duties of judicial office are neglected. Similarly, it would be improper for a judge to use his or her official title (or to appear in judicial robes) in business advertising, or to conduct his or her financial affairs in such a way that disqualification is frequently required."

No substantive changes were made to proposed Rule 4.09.

The Commission substantially revised proposed Rule 4.10, which relates to judges’ acceptance of gifts.

Scope

The Commission began its Saturday session with consideration of the Scope section. They added “[j]udges should aspire at all times to conduct that enhances the greatest possible confidence in their independence and impartiality” to the last sentence.

The second sentence of [1] was revised to read “[t]he Canons state overarching principles of judicial ethics. Although the Canons are cast in mandatory terms, they are not binding; it is only the Rules that establish binding or enforceable standards of conduct.” The third sentence in [3] will state that “[c]omments neither add to nor subtract from the binding obligations and express permissions set forth in the Rules.”

The first sentence of [5] will state “[t]he Canons and Rules are rules of reason.” The second sentence in [6] shall begin "Whether disciplinary action is appropriate...." Paragraph [7] was revised to state “[t]he Code is not designed or intended as a basis for imposing civil liability or instituting criminal prosecution. Neither is it intended to serve as the basis for litigants to seek collateral remedies against each other or to obtain tactical advantages in proceedings before a court.”

Terminology

The Commission decided to replace “denotes” with “means” everywhere the former appears throughout the Terminology section.

Regarding the definition of "candidate for judicial office," the Commission revised the first sentence to state that "'[c]andidate for judicial office' means any person, including a sitting judge, who is seeking selection for or retention in judicial office by

election or appointment." Although some were opposed to setting limits within the context of definitions, the Joint Commission provisionally added "[a] person does not become a candidate earlier than one year prior to the date of the election or appointment whereby the person seeks to obtain judicial office" to the end of the definition of "candidate for judicial office." A final decision regarding the language was deferred until discussion of Canon 5, which will occur prior to the Annual Meeting.

The definition of "de minimis" was revised to state, "'[d]e minimis,' in the context of interests pertaining to disqualification of a judge, means an insignificant interest that could not raise a reasonable question as to the judge's impartiality."

Deciding that "conjugal relations" should not be a prerequisite for domestic partnership, the Commission defined "domestic partner" as "a person with whom another person maintains a household and an intimate relationship, other than a person to whom he or she is legally married."

The last line of the definition of "economic interest" was revised to state, "[t]he fact that securities might be held by an educational, charitable, fraternal, or civic organization in whose service the judge or the judge's spouse, domestic partner, parent, or child may serve as a director, officer, advisor, or other participant does not thereby give the judge an economic interest in the securities held by such an organization."

Members discussed whether the definition of "impending matter" needed further elaboration, ultimately deciding upon "'[i]mpending matter' is a matter that is anticipated imminently or in the near future but not yet commenced."

The Commission considered whether competence generally is understood to be an aspect of "integrity" and thus included in the definition. They decided to defer their discussion until their review of Canon 1.

The definition of "personally solicit" will state "'[p]ersonally solicit' [as used throughout Canon 5] means a direct request made by a judge or a judicial candidate for financial support or in-kind services, whether made by letter, telephone or any other means of communication." Members considered deleting "[as used throughout Canon 5]."

The Commission deleted "but does not extend to a judge's or judicial candidate's receipt and handling of funds or goods donated or offered for fundraising purposes unrelated to judicial campaigns" with the thought that the phrase would be more appropriately covered in comment.

The Commission voted to omit the definition of "spouse" from Terminology.

Application

Members decided to insert “administrative law judge” into the black letter rule. The revised introductory paragraph now reads, “[a]nyone, whether or not a lawyer, who performs judicial functions, such as a justice of the peace, magistrate, court commissioner, special master, hearing officer, administrative law judge, or referee, is a judge within the meaning of this Code.”

The first footnote was revised to state that each jurisdiction "should consider the characteristics of particular administrative law judge positions in adopting, adapting, applying and enforcing the Code for administrative law judges. See, e.g., Model Code of Judicial Conduct for Federal Administrative Law Judges, endorsed by the National Conference of Administrative Law Judges in February 1989."

“Court rules” will be substituted for “local rules” throughout the comment. “And” will be substituted for “or” in the fourth line.

In “Applicability of This Code,” Comment [2], the second line will read "[f]or example, judges may be authorized and even encouraged to communicate directly with social workers, probation officers and others outside the context of their usual judicial role as an independent decision maker of issues of fact and law."

In “Retired Judges Subject To Recall,” “for service” was added to the black letter.

Regarding the comment to “Continuing Part-Time Judge,” the Commission agreed that the language should track the use of the term “informed consent” as set out in the Model Rules of Professional Conduct.

Rules I(D)(2) and I(E)(2) and Comment [1] to “Periodic Part Time Judge” were deleted in acknowledgement that the Code does not reach conduct of lawyers directly; the situation described will arise under and be decided by the Model Rules of Professional Conduct. On the same theory that Comment [1] under “Periodic Part-time Judge” was deleted, Comment [2] under “Pro Tempore Part-Time Judge” also was deleted.

Canon 1

In the header, “uphold” was replaced with “uphold and promote.”

Revised Comment [1] now reads, “[a]n independent judiciary is indispensable to our justice system. A judge should comply with the high standards of judicial conduct and act in a manner free from self interest or bias to promote the independence, integrity and impartiality of the judiciary and to foster public confidence in the administration of justice.”

Comment [2] now reads, “[j]udges should participate in activities that promote ethical conduct among judges and lawyers. Judges should also implement and enforce codes of conduct, support professionalism within the judiciary and the legal profession, and promote access to justice for all.”

Regarding Rule 1.01, which concerns impropriety and its appearance, the Commission deleted “competence” and “examples of actual improprieties” from Comment [2] and added “[b]ecause it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code.” Comment [2] now reads, “[t]he test for impropriety is whether the conduct compromises the ability of the judge to carry out judicial responsibilities with independence, integrity and impartiality. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. The test for an appearance of impropriety is whether the conduct of the judge would be perceived by a reasonable person with knowledge of the circumstances to impair the judge’s ability to carry out judicial responsibilities with independence, integrity and impartiality.”

Rule 1.03, “Compliance With The Law,” was revised to state, “[a] judge shall respect and comply with the law, including the provisions of this Code.” Its comment was moved to the black letter rule.

Canon 2

The Commission deleted “fairly” from the header and “[i]n general” as an introductory phrase before Rule 2.01. “Fairly” was added to the end of Rule 2.02 (“A judge shall uphold and apply the law, and decide all cases impartially and fairly.”)

Rule 2.02 Comment [1] now states, “[w]hen applying and interpreting the law, a judge may on occasion make a good faith mistake of fact or law. An error of this kind does not violate this Rule. Intentional disregard of the law, however, may constitute a violation of this Rule. ”

The first sentence of Rule 2.02 Comment [2] was revised to state, “[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded, and must not show bias against or favoritism toward anyone.”

A majority voted in favor of removing the phrase “and shall not engage in harassment” from Rule 2.02(A), reasoning that this prohibition is covered in subparagraph (B). The proposed addition of “political affiliation” to subparagraph (B) was likewise approved. The Commissioners agreed to keep the “laundry list” identifying the various types of bias and prejudice.

Turning to Rule 2.03, “Bias and Harassment,” subparagraph (B) was revised to state, “[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias, prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation and shall not permit staff, court officials, and others subject to the judge’s

direction and control to do so. This does not preclude legitimate references to those factors when relevant to an issue in the proceeding."

Rule 2.03(C) was revised to state, "[a] judge shall require lawyers in proceedings before the judge to refrain from manifesting bias, prejudice, or engaging in harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, against parties, witnesses, counsel, or others. This does not preclude legitimate advocacy when these or other similar factors are issues in the proceeding."

"Or prejudice" was inserted in Comments [1] and [2]. The latter was revised to state "[e]xamples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggesting a connection between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expression and body language can convey to parties or lawyers in the proceeding, jurors, the media, and others an appearance of bias. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased."

"It is essential to judicial independence, impartiality, and maintaining the public's confidence in the justice system that judges do not create a perception that their decision could be colored by such influences" was deleted from Rule 2.04 Comment [1].

"And fairly" was inserted in Rule 2.06 so that it now reads, "[a] judge shall diligently and fairly perform all of his or her judicial duties, disposing of all judicial matters promptly and efficiently."

Subparagraph (4) of Rule 2.07 Comment [2] was revised to state, "whether the parties participate with their counsel in settlement discussions." Subparagraph (5) was revised to state, "whether one or more parties are unrepresented by counsel." "[T]hemselves or only their counsel will be involved in settlement discussions" was deleted.

"To ensure that judges remain available to fulfill their judicial duties, a judge must conduct his or her extrajudicial activities so as to minimize the risk of conflicts that would result in frequent disqualification. See Canon 4" was moved from "Responsibility to Decide" to Rule 2.01 comment.

Rule 2.09(B) was revised to read, "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of court staff, court officials, and others subject to the judge's direction and control."

Rule 2.09 Comment [3] was revised to read, "[a] judge may express appreciation to jurors for their service to the judicial system and the community. A judge who is not

otherwise prohibited by law from doing so may meet with jurors who choose to remain after trial, but should use caution in any substantive discussion of the case.” The Commission deleted “[a]t such a meeting, a judge should not, for example, suggest or imply agreement or disagreement with the verdict, reveal matters that were not received into evidence, discuss the rulings on objections made at trial, or review any proceedings that took place outside the presence of the jury.”

Regarding Rule 2.10(A)(1)(c), it was agreed to adapt language from the 1990 Code: “a judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives advance notice to the parties of the person to be consulted and the substance of the advice to be solicited, and affords the parties a reasonable opportunity to respond to the notice and the advice received.”

Rule 2.10(B) was revised to state, “[a] judge shall not independently investigate facts in a case, and shall consider only the evidence presented and any facts that may properly be judicially noticed.”

The Joint Commission deleted “[c]ertain ex parte communications are permitted by this Rule to facilitate scheduling and other administrative purposes and to accommodate emergencies. A judge must disclose to all parties, in a manner that ensures notice, all ex parte communications described in paragraph (A)(1) regarding a proceeding pending or impending before the judge” from Rule 2.10 comment.

New Comment [7] to Rule 2.10 states, “[j]udges may consult ethics advisory committees, outside counsel or legal experts concerning the judge’s compliance with this Code. Such consultations are not subject to the restrictions of Part A(1)(c).” Comment [8] (“An appropriate and often desirable method of obtaining the advice of a disinterested expert on legal issues is to invite the expert to file a brief *amicus curiae*.”) was deleted.

Most of Rule 2.11, “Judicial Statement on Pending and Future Cases,” was substantially revised. It was suggested that the rules worded as prohibitory and the rules phrased as directives should be grouped together.

Rule 2.11(A) was revised to state, “[a] judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any non-public statement that might substantially interfere with a fair trial or hearing.”

Rules 2.11(B), (C), and (E) contain new language. Rule 2.11(B) states, “[a] judge shall not, with respect to cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”

Rule 2.11(C) states, “[a] judge shall require abstention on the part of court staff, court officials, and others under the judge’s direction and control, from statements that would be prohibited to the judge by paragraphs (A) and (B) above.”

Rule 2.11(E) states, "[s]ubject to the requirements of paragraph A, a judge may respond directly or through a third party to allegations in the media or elsewhere concerning the judge's conduct in a matter."

No changes were made to Rule 2.11(D).

The Commission revised Rule 2.12(A)(2)(a), part of the "Disqualification" rule, to state, "[the judge should disqualify himself or herself where] the judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is: a party to the proceeding, or an officer, director, general partner, managing member, or trustee of a party."

The definition of "economic interest," which is used in subparagraph (3) of the Comment may require redrafting.

The Commission revised Rule 2.12(A)(2)(5) to state, ""[the judge should disqualify himself or herself where] the judge, while a judge or a candidate for judicial office, has made a public statement, other than in a prior court proceeding, judicial decision or opinion, that commits, or appears to commit, the judge to reach a particular result or rule in a particular way in the proceeding or controversy...."

"By decisional law" was deleted from Rule 2.12 Comment [3]. Comment [6] ("Fiduciary" includes such relationships as executor, administrator, trustee, and guardian.") was deleted in its entirety. The beginning of the first sentence of Comment [7] was revised to read, "[f]or ease of reference, the definition of 'Economic interest' in Terminology is reproduced here: 'Economic interest' means ownership of more than a de minimis legal or equitable interest.... "

"[I]n such an organization for the purpose of this Rule" was deleted from the last sentence of Comment [7].

Rule 2.14, "Supervision of Staff" was revised to read, "[a] judge shall require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code." The Commission agreed that references to "*court* staff and *court* officials" should be used consistently throughout the proposed Code, as suggested by the Philadelphia Bar Association.

The Commission deleted the first sentence of Rule 2.14 Comment [1] ("Staff and court officials deal regularly with lawyers, parties, and the public on behalf of the judge") and all of Comment [3] ("Staff separately should be subject to similar and compatible rules of conduct.")

Rule 2.16(B) was modified to read, "[a] judge shall not appoint a lawyer to a position if the judge either knows that the lawyer, or the lawyer's spouse or domestic

partner, has contributed more than [\$] within the prior [] years to the judge's election campaign, or learns of such a contribution by means of a timely motion by a party or other person properly interested in the matter...."

The Commissioners combined Rules 2.17, 2.18, and 2.20. The title of Rule 2.17 was changed to "Responding To Judicial And Lawyer Misconduct." Rule 2.17 now reads, "[a] judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority." Rule 2.17(D) now reads, "[a] judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action."

In Comment [1], "affirmative" was changed to "appropriate." Comment [2] now reads, "[a]ppropriate action in response to information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct may include, but is not limited to, communicating directly with the lawyer who may have committed the violation, or reporting the violation to the appropriate authority or other agency or body."

In Rule 2.19, "Disability and Impairment," the Commission removed "corrective" in describing the type of action a judge must take in order to conform the usage to other parts of the proposed Code.

CANON 3

The title of Rule 3.01 was changed to "Abusing the Prestige of Judicial Office." The Rule shall state, "[a] judge shall not abuse the prestige of judicial office to advance the personal or economic interests of the judge or others, or allow others to do so."

The Commission deleted Comment [2], substituting "[a] judge may provide a reference or recommendation for an individual based on the judge's personal knowledge. The judge may use official letterhead so long as the judge indicates that the reference is personal and not the view of the court and so long as there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office."

Comment [3] ("A judge must not initiate the communication of information to a sentencing judge or a probation or corrections officer, but may provide to such persons information for the record in response to a formal request.") was deleted.

Regarding Rule 3.02, "Testifying As A Character Witness," members discussed judges sending letters regarding lawyer disciplinary hearings and whether such letters could constitute testimony. Pursuant to this point, the Rule was revised to state, "[a] judge shall not testify as a character witness, or otherwise vouch for the character of a person in a legal proceeding, except when properly summoned."

The second sentence of Rule 3.04(B) was changed to "[a] judge's attendance at an event in a facility of a group that he or she is not permitted to join as a member under this Rule is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization."

Members considered whether Rule 3.04 Comment [2] provided adequate guidance regarding membership in certain organizations such as the Boy Scouts, military organizations and some religious organizations such as the Knights of Columbus. Pursuant to this discussion, the last sentence of the Comment was changed to "[a]bsent such factors, an organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity or sexual orientation persons who would otherwise be admitted to membership."

Comment [3] now states, "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule."

Comment [4] now states, "[t]his Rule does not apply to service in the armed forces of the United States."

Status of Project

The Commission agreed that it was unlikely that a final report could be ready for the House in August. Instead, the Commission would work towards filing its report for consideration at the 2007 Midyear Meeting.