

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Teleconference Minutes
April 28, 2005**

Members Participating

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

Staff Participating

Jeanne P. Gray, CPR Director
George A. Kuhlman, Ethics Counsel
Eileen C. Gallagher, Justice Center Counsel
Eileen B. Libby, Associate Ethics Counsel

Reporters Participating

Charles G. Geyh
W. William Hodes

Advisors Participating

Hon. Peter W. Bowie
Marvin I. Karp
Dudley Oldham
Hon. Ellen Rosenblum
Seth Rosner

The Joint Commission discussed proposed Canons 1 and 2. Much of their discussion was informed by public comment and from comments circulated by members and advisors prior to today's teleconference. The Chair stated that members' and advisors' comments must be received forty-eight hours prior to all scheduled teleconferences.

The Reporter led the members through his April 15, 2005, Canon 1 draft. After discussion, members agreed to dispense with Canon captions throughout the revised Code. They also decided to use "Rule" before each rule number and to use the term "Comment" instead of "Commentary."

Prior to today's teleconference, an advisor circulated a memorandum regarding matters discussed at today's teleconference. In the memorandum, the advisor expressed concern regarding the merging of current Canon 1 and 2. Pursuant to advisor's suggestion that the revision takes focus away from the integrity and independence of the judiciary, the Joint Commission decided that the proposed Canon should read, "[a] judge shall uphold the integrity and independence and impartiality of the judiciary and shall avoid impropriety and the appearance of impropriety in all the judge's activities."

Regarding proposed Rule 1.01, which states that "[a] judge shall observe the high standards of judicial conduct embodied in these Rules," members considered a suggestion to change its caption to "Compliance with the Model Code of Judicial Conduct" from

“Observing Standards of Judicial Conduct.” They discussed whether the rule was so obvious as to be unnecessary. A majority favored retaining the language, which many felt established the proper tone for the rest of the Code. The word “high” was deleted.

The Joint Commission decided to delete proposed Rule 1.01 cmt. 2.

Turning to proposed Rule 1.01 cmt. 3, which states that “[i]n addition to complying with the high standards of judicial conduct, a judge is encouraged to participate in activities that promote ethical conduct generally among judges and lawyers, including efforts to study, develop, maintain, implement and enforce codes of conduct, encourage pro bono representation, and support professionalism within the judiciary and the legal profession,” members discussed whether the reference to encouraging pro bono representation was misplaced. Pursuant to a vote, language after the words “judges and lawyer” was deleted and “promote access to justice for all” was added. The word “high” before “standards” also was deleted. It was suggested that the comment use “judges should” instead of “a judge is encouraged.” A member of the subcommittee reviewing proposed Canon 4 said her group will consider whether to move the reference to encouraging pro bono activities to Canon 4.

The Reporter briefly explained the legislative history of proposed Rule 1.02, which states that “[a] judge shall act at all times in a manner that promotes public confidence in the integrity, independence and impartiality of the judiciary so as to avoid impropriety and the appearance of impropriety.” He stated that the proposed draft restores the “act at all times” clause of current Canon 2B, and that it links the “act at all times” clause to the appearance of impropriety. By making the appearance of impropriety a part of the rule itself, its status as an enforceable rule is clearer. Members considered whether the “appearance of impropriety” standard should be specifically enforceable on its own as a separate rule, thus eliminating the “so as to” language in the proposed rule.

In line 23 of proposed Rule 1.02 cmt. 1, “just” was changed to “judge.” Regarding the same comment, the members decided to delete “irresponsible from “[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges.”

An advisor’s memorandum suggested that proposed Rule 1.02 cmt. 2 should contain an expanded test for appearance of impropriety, such as the one that appears in the Code of Conduct for United States Judges. Ultimately, the Joint Commission decided not to use the federal code language. For the next draft, the Reporter will add back to proposed Rule 1.02 cmt. 2 the first sentence of deleted Comment [7], which states “[i]mpropriety occurs when the conduct compromises the ability of the judge to carry out judicial responsibilities with integrity, impartiality and competence.” It will replace the first sentence of proposed Rule 1.02 cmt. 2, which states that “[a]ctual improprieties under this Rule include violations of law, court rules, or other specific provisions of this Code.” An advisor reminded the Joint Commission to include “independence” in the list, “integrity, impartiality and competence.”

The Joint Commission discussed the relationship between impropriety and appearance of impropriety.

Turning to proposed Canon 2, an advisor stated that there were inconsistencies between proposed Rule 2.01, “Giving Precedence to the Duties of Judicial Office,” and its comment. The advisor recommended that the comment state that “the defining feature of their judicial responsibilities, according to prescribed laws.” The Reporter agreed with the proposed change. He would substitute “a” for “the” before “defining feature.”

Regarding proposed Rule 2.02, an advisor suggested adding “or other applicable law” to proposed Rule 2.02, which states “[a] judge shall hear and decide matters assigned to the judge except those in which disqualification is required under Canon 2.”

Everything after “necessary” was stricken from proposed Rule 2.02 cmt 1, which states “[a] fundamental obligation of the judicial office is to be available to decide the matters that come before the judge. To protect the rights of litigants and preserve public confidence in the integrity, independence and impartiality of the judiciary, there will be times when disqualification is necessary, and when the provisions of the Canons or other law point to disqualification, then disqualification must follow. On the other hand, unwarranted recusal may bring public disfavor to the bench and to the judge personally. The dignity of the bench, the judge’s respect for fulfillment of judicial duties and a proper concern for the judge’s colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or distasteful issues.”

A member touched off discussion regarding the differences between disqualification and recusal and the need for their consistent use throughout the revised Code. It was suggested that the Reporter’s Notes state that the terms have been used interchangeably. “Recusal” could be defined in the Terminology section.

Proposed Rule 2.02 cmt 2, was revised to read “[a] judge’s obligation not to hear or decide matters in which disqualification is required, applies regardless of whether a motion to disqualify has been filed.”

In proposed Rule 2.03 cmt 2, which states “[w]hen applying and upholding the law in the course of judicial decision-making, a judge may on occasion make a mistake of fact or law. An error of this kind does not violate this rule. Willful disregard of the law, however, may in appropriate circumstances constitute misconduct by the judge,” “interpreting” will be used instead of “upholding.” Members considered changing “constitute misconduct by the judge” to “constitute a violation of this Rule.”

Members accepted an advisor’s recommendation that proposed Rule 2.04 cmt.1 state “[t]o ensure impartiality and fairness to all parties, a judge must be objective and open-minded and must not demonstrate favoritism toward anyone.” As to proposed Rule

2.04 cmt. 2, the advisor suggested the following language: “While a judge’s background and judicial philosophy may influence the way in which the judge analyzes a legal issue, a judge must interpret, uphold and apply the law without regard to whether the judge

Members discussed the differences between “impartial” and “unfair.” They considered how to comply with proposed Rule (a)(1)(ii), which states that a judge must make provision to notify “all other parties” of the substance of ex parte communications and allow an opportunity to respond. Members agreed with a suggestion to state that a judge may communicate ex parte when circumstances require for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits, provided that the judge “makes provision by delegation or otherwise promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.”

Regarding proposed Rule 2.09(a)(2), which states “[a] judge may obtain information and opinions from a disinterested expert in a proceeding before the judge if, before the record is closed, the judge gives notice to the parties of the person consulted and the substance of the advice obtained, and affords the parties reasonable opportunity to respond,” members decided to reinsert “on the law” after “disinterested expert,” and to add “before the information or opinions are obtained.”

Members agreed to delete proposed Rule 2.09 cmt. 6, which states “[a] judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.” They considered a suggestion from the Ethics Committee that language be added to provide that a judge is permitted to seek independent counsel as to the judge’s ethical duties in the conduct of a proceeding, without revealing such contact to the parties. Further discussion of this complex issue was tabled.

In proposed Rule 2.09 cmt. 7, which states “[a] judge may consult with other judges on pending matters, but should avoid ex parte discussions of a case with other judges who have previously been disqualified from hearing the matter,” “should” was changed to “must.”

Remittal provisions were inadvertently deleted from the draft under consideration and will appear in the next draft.

Before the meeting adjourned, members discussed the timetable for putting proposed Canon 5 on the Commission website.