

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

Summary of Meeting Minutes

May 7-8, 2004

New York, N.Y.

Members Participating

Mark I. Harrison, Chair

Loretta C. Argrett

Jan Witold Baran

Dianne Cleaver

Thomas M. Fitzpatrick

Donald B. Hilliker

Hon. Cara Lee T. Neville

Hon. M. Margaret McKeown

Hon. Harriet L. Turney

Hon. James A. Wynn

Staff Participating

Eileen Gallagher, Justice Center Counsel

Jeanne P. Gray, CPR Director

George A. Kuhlman, Ethics Counsel

Eileen Libby, Assoc. Ethics Counsel (by telephone)

Advisors Participating

Hon. Carol Amon

Robert P. Cummins

Marvin L. Karp

Robert H. Tembeckjian

Hon. Ellen Rosenblum

Seth Rosner

Reporter Participating

Charles G. Geyh

Following the public hearing and lunch, the meeting began by the Chair asking the members for their reactions to the speakers. A member was unsure how community courts should work with regard to judges' ethical obligations. The Commission will study the matter further. It was suggested that a comment could be added referencing the fact that some jurisdictions authorize community and special courts by rule or statute. A member recommended that the Commission address the ethical ramifications of a judge assuming multiple roles, for example, acting in a judicial capacity and running a correctional facility.

Regarding judicial impairment, members discussed how to structure the intervention process to make it effective and how much information the referral service must accumulate before it goes forward. Members discussed how judges could be harassed by false accusations and whether the intervention process could be triggered by an anonymous call. They considered the approach taken in the ABA Standing Committee on Ethics and Professional Responsibility's two formal ethics opinions concerning lawyer impairment.

The Commission resumed their discussion of Article 4 where they left off at the last meeting. Article 4 was reorganized in order to group together civic and charitable activities and business and financial-related activities. A member expressed concern that a judge could sit on a board or participate in an organization that controls people or that sets policy. An advisor recommended that the Joint Commission develop a definition for "off the bench" activities. Another advisor pointed out that judges perform duties that go

far beyond “traditional” judicial duties. Accordingly, the terminology in the Code may be antiquated. Members discussed the distinction between official/unofficial off-the-bench activities and extrajudicial activities and which term they wanted to use in the revised Code. After discussion, they decided to use “extrajudicial” for the time being.

Regarding the discussion of civic or charitable activities in Rule 4.04, a member objected to the use of “non-profit” and “civic.” Members discussed judges sitting on hospital boards and boards of issues-oriented organizations that may engage in litigation. There was a suggestion that a reference to impartiality could be added to the Article 4.04 comment. The Reporter will adapt language from the equivalent federal provision.

The discussion next turned to the prohibition against fundraising and whether “related to this rule” was preferable to “for any purposes.” Members considered the ethical ramifications of judicial staff soliciting funds on their own time and concluded that there is nothing in the Code that prohibits staff from engaging in this type of activity.

An advisor asked whether the Joint Commission received comment regarding whether a judge ethically can participate as a “pancake flipper” at a charitable fundraising event, which touched off discussion regarding whether direct requests for financial support in exchange for goods or services to raise funds for charity should be prohibited. Another advisor argued in favor of eliminating the prohibition on the grounds that it is important for judges to be involved in civic and charitable activities. After considering the provision’s counterpart in the federal code, members discussed whether to delete Article 4.04(b)(1) or (3). They also considered whether to define personal solicitation of funds as “a direct request for financial support.”

A member suggested that it would be useful for the Joint Commission to examine federal legislative and executive branch rules on gifts and privately sponsored travel to conferences and seminars. It further was suggested that Article 4.04(b)(1) include “may assist in fundraising but not personally solicit funds” and that “planning” be deleted.

A member touched off discussion as to whether, for ethical purposes, there is a distinction between law-related activities and other events, including events where special interest groups may be presenting judges with awards. Members considered whether organizations such as the ACLU, the ABA, Legal Aid, NARAL, or NOW would be inappropriate event sponsors.

Members discussed the distinctions among planning, participating, and directly soliciting. A suggestion was made to relax the standard enough so that judges can participate in charitable and law school-related events and bar-related functions more freely. A member suggested that the proposed language cover situations where judges appear as performers at these types of events. Another member recommended clarification of Article 4.04 Comment [11] regarding judges serving on boards of public law schools.

A member requested that the last sentence of Article 4.04 Comment [4] be deleted because it impossible to stay abreast of all of an organization's myriad policies. Another member asked whether the fact that the ABA files amicus briefs and lobbies for certain causes has an effect upon judges who are Association members.

The discussion turned to Article 4.12 and the inclusion of domestic partners in the definition of "family" and "household" and the need for consistent use of "family" throughout the revised Code. Members considered whether to adopt the definition of "family" in the Code of Conduct for Federal Judges. Members decided to delete Article 4.12 Comment [1]. A member asked if the proposed provision would permit a judge to write a textbook on evidence. Members discussed the policy behind Rule 4.12, which is to prevent judges from running businesses on the side and neglecting their judicial duties.

Regarding Article 4.13, the members considered whether judges can accept publications from those other than the publishers, including groups with specialized interests. Although judges may not be members of such organizations, information in their literature could be educational and useful. Members discussed whether there should be a threshold amount (or an open-ended blank space in parentheses to account for local conditions and inflation) for gifts that a judge may accept without violating the Code.

A member responded that it first is necessary to define "gift" and its exceptions. The Commission will examine new federal gift regulations and certain state provisions. A member asked whether expenses-paid attendance at a corporate sponsored judicial education seminar would be a "gift."

Members opined that comments to Rule 4.13 needed extensive revision. The Chair asked a member how the Code currently defines "gift" and suggest alternative approaches. An advisor raised the issue of "ordinary social hospitality," which touched off discussion regarding the meaning of "fairly commensurate" in Article 4.13(d). An advisor commented that holiday parties often present a problem under "ordinary social hospitality." A member stated that it would be useful to make a list of frequently occurring examples.

The Joint Commission turned its attention to Article 5 and the impact of *Minnesota v. White*. Judge Neville, who is from Minnesota, described developments regarding the Minnesota counterpart to Canon 5. Last August, the House of Delegates approved amendments to the Code necessitated by *White*. Members discussed whether further changes were in order. They agreed that clarifying the meaning of "political gathering" is of great importance. An advisor stated that the term is overly broad and unfairly excludes benign activities such as attending educational "coffees." The Reporter will perform research to determine how the term is defined by the states.

Other terms need further explication as well, including "political event" and "political candidate." An advisor from New York described its system, where there is a window period 90 days before and 120 days after an election in which a judge can engage in specified political activities. Members considered whether such a scheme could work

in the Code. A small majority of members voted in favored retaining the prohibition against attending political gatherings in Article 5.01(a)(4).

Members explored the ethical ramifications of judges attending national political party conventions. They discussed the advantages and disadvantages of breaking down Canon 5 by category. The Reporter will undertake this task.

The Commission debated the wisdom of regulating judges' political conduct, with some expressing the view that that it is imperative to preserve the current Code's proscriptions. Others favored a "minimalist" approach. They decided that it was important for them to study what the states have done in response to *White*.

Regarding a completely different matter, the Commission will consider possibly redrafting the Article 4.15 provision dealing with judges disqualifying themselves in any proceeding in which a judge's relatives have an economic interest.

Members engaged in vigorous debate concerning judges serving as uncompensated ADR neutrals for other courts. Members discussed courts issuing rules to permit such activities to be "authorized by law." A member expressed concern regarding the public's right to know that judges' services are being utilized by other courts and the need to clarify the term "private capacity."

It was acknowledged the in Rule 4.02, "except" needed clarification. Regarding Rule 4.01 Comment [4], a member asked why "civil" was not included in "improvement of criminal and juvenile justice." With regard to the gift provision, a member asked whether "accepting" a gift is equivalent to "giving," which led to a brief discussion of bribery and judges giving gifts to legislators.

The Chair discussed the upcoming schedule of meetings and hearings with the members and advisors. For the Commission's meeting in Naples, Florida, they will focus on Article 4 and a reorganized Article 5. The Chair stated that, when the proposed Code is sent to the House of Delegates, it will be accompanied by the Reporter's Notes and by an appendix describing all parties who offered comment. Members agreed that it was important to attract more members of the public to the public hearings. The members and advisors were asked to do as much as possible to identify groups that have the greatest interest in commenting on the Commission's work. Staff will develop a list of topics with which the Commission has struggled for inclusion in such a questionnaire or memorandum.