

**AMERICAN BAR ASSOCIATION  
JOINT COMMISSION TO EVALUATE THE  
MODEL CODE OF JUDICIAL CONDUCT  
Summary of Teleconference Minutes  
October 26, 2005**

**Members Participating**

Mark I. Harrison, Chair  
Loretta Argrett  
Jan Baran  
Dianne Cleaver  
Thomas Fitzpatrick  
Donald Hilliker  
Hon. M. Margaret McKeown  
Hon. Cara Lee T. Neville  
Hon. James A. Wynn

**Staff Participating**

Jeanne P. Gray, CPR Director  
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Eileen B. Libby, Associate Ethics Counsel  
Marcia Kladder, CPR Program Director  
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**Reporters Participating**

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**Advisors Participating**

Hon. Carol B. Amon  
W. William Hodes  
Hon. Peter Bowie  
Marvin L. Karp  
Hon. Randall T. Shepard

The Joint Commission began with proposed Rule 4.04, "Participation in Civic or Charitable Activities," in the September 29, 2005, "Concordance of Canon 4 Comments." Regarding subparagraphs (A) and (B), members decided to make "civic" and "charitable" defined terms. Rule 4.04(B)(1)(b) was revised to read "personally solicit funds or in-kind contributions for the organization." "Contributions" also will be defined.

Members examined proposed Rule 4.04(B)(2)(c), which concerns judges' participation in events sponsored by organizations devoted to the improvement of law, the legal system, or the administration of justice, and the use of judges' titles in connection with those events. They discussed whether there is a supportable distinction between receiving an award presented for community service with a non-law-related organization, and one for work with a law-related organization when both events "serve a fundraising purpose" A majority favored including language that would permit judges to accept public testimonials or awards as long as accepting them does not involve a fundraising role.

The Joint Commission considered Committee on Codes of Conduct Advisory Opinion No. 46, "Acceptance by Judges of Public Testimonials or Awards," which permits judges to accept public testimonials or awards.

The Joint Commission discussed the American Judicature Society's ("AJS") proposal to add several subparagraphs to proposed Rule 4.04(B)(1), the first of which stated that a judge shall not "be a speaker, guest of honor, or other featured participant at an organization's fund-raising event, except for an organization devoted to the improvement of the law, the legal system, or the administration of justice." Members decided that the provision was not needed.

In proposed Rule 4.04(B)(2)(c), "reward" was changed to "award."

Members favored AJS's proposed Rule 4.04(B)(2)(g), which "encourage[s] attorneys to participate generally in pro bono efforts, including referring to a list of pro bono programs."

Members decided not to include AJS's third proposal, which stated that judges shall not "order a contribution to a charity as part of a sentence." The provision does not appear to implicate judicial ethics.

There were no objections to the inclusion of "planning" in proposed Rule 4.04(B)(2)(b) ("assist the organization in planning fundraising and participate in the management and investment of the organization's funds").

A majority were in favor of retaining the exception in proposed Rule 4.04(B)(2)(c) ("appear at, receive a reward or other recognition at, participate in, and permit the judge's title to be used in connection with an event of an organization devoted to the improvement of law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose"). The Reporter will re-examine proposed Rule 4.04(B)(2)(c) before the Joint Commission considers it again.

Regarding two other provisions suggested by AJS, members decided not to add new subparagraph (e) under proposed Rule 4.04(B)(2), which stated that judges may "sign a general membership solicitation mailing." They examined subparagraph (f), which states that judges may "be involved in member recruitment for an organization devoted to the improvement of law, the legal system, or the administration of justice, even though the membership dues or fees may be used to support the objectives of the organization." Members discussed judges' recruiting activities on behalf of organizations like the Inns of Court.

The Joint Commission agreed to delete proposed Rule 4.04(B)(2)(h) ("donate to an organization's fund-raising activity"). Regarding Rule 4.04(B)(2)(i) ("participate in de minimis fund-raising activities"), they decided to remove its substance from the black letter rule and to explain in comment that the ban on fundraising does not apply to de minimis fundraising.

Turning to proposed Rule 4.04(C), which states that a judge may serve "as an officer, director, trustee, or non-legal advisor of an organization or governmental entity devoted to the improvement of the law, the legal system or the administration of justice

or of an educational, religious, charitable, fraternal or civic organization not conducted for profit....," members were reminded that "charitable" and "civic" will be defined terms in the Terminology section. The references to other types of organization will be deleted wherever they appear in the Code.

With regard to the comment to proposed Rule 4.04, members considered language suggested by the Standing Committee on Pro Bono and Public Service that would further clarify a judge's role in encouraging pro bono service. Members decided not to add to the black letter rule a provision stating that judges may recruit lawyers to do pro bono work. A comment stating that judges may train lawyers to do such work is not objectionable.

"[P]articipate in events to recognize lawyers who do pro bono work" also will be added to comment. The Joint Commission rejected the suggestion to add "consider special procedural or scheduling accommodations for lawyers who are volunteering their services" in that the provision does not implicate judicial ethics. Regarding the Standing Committee on Pro Bono and Public Service's last suggestion, "act in an advisory capacity for pro bono programs," the Joint Commission observed that the subject-matter already is covered by proposed Rule 4.04(C).

Regarding proposed Rule 4.04(C) cmt. 3, which states that judges' participation in fundraising is subject to certain restrictions, members agreed with the deletion of all but the first two lines and the revision of line two to state "[a]ccordingly, a judge's participation in fundraising is subject to the restrictions specified in this Rule."

In examining proposed Rule 4.04(C) cmt. 4 ("De minimis fundraising activities include insignificant, incidental, or behind-the-scenes activities that do not use the judge's name or title and situations where the judge's role is no more active or visible than that of other participants"), members considered whether a general definition of "de minimis" was needed. They sought alternative language, including "it is permissible for a judge to...." or "permissible fundraising activities include...." There were no objections to the use of "behind-the-scenes activities."

Members decided to delete proposed Rule 4.04(C) cmt. 5 ("Solicitation of memberships for an organization could reasonably be perceived as coercive if a judge solicits memberships from other judges over whom the judge exercises supervisory or appellate authority, or from lawyers or parties or their affiliates who are likely to appear before the court on which the judge serves") because it conflicts with other Code provisions. Proposed Rule 4.04(C) cmts. 6 and 7 were deleted.

The first sentence in proposed Rule 4.04(C) cmt. 8 was revised so that it reads "[i]dentification of a judge's position in an organization on letterhead used for fundraising or membership solicitation does not violate Rule 4.04 provided that the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial designation. In addition, a judge must make reasonable efforts to ensure that the judge's staff, court

officials and others subject to the judge's direction and control do not solicit funds on the judge's behalf for any purpose, charitable or otherwise."

Members discussed comments regarding proposed Rule 4.04(C) cmt. 9 ("This Rule does not prohibit a judge from serving in a governmental position associated with the improvement of the law, the legal system or the administration of justice; see Rule 4.03"). They discussed the distinction between judges serving in positions for private organizations and for public institutions. After further consideration, members decided to delete the comment.

The Joint Commission deleted proposed Rule 4.04(C) cmt. 10 as unnecessary ("The use of permissive language in this and other Rules in Canon 4, such as the phrase 'subject to the requirements of this Code' does not mean that a judge is relieved from the other requirements of the Code that apply to the specific conduct. For example, a judge permitted by this Rule to serve on the board of a fraternal organization may nevertheless be prohibited from such service by Rules 3.03 or 4.01 if the organization practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge's capacity to act impartially as a judge").

Proposed Rule 4.04(C) cmt. 11 will be modified to include "civic" and "charitable."

Proposed Rule 4.04(C) cmt 13 was deleted ("This Rule, not Rule 4.03 governs a judge's service in a nongovernmental position").

The Joint Commission next considered four AJS proposals, the first stating "[t]o prevent the prestige of the judge's office from being used in fund-raising, a judge must inform all organizations in which the judge is involved of the limitations on the judge's participation in fund-raising and the use of the judge's name, require those organizations to comply with the provisions of this rule, and review and approve the content of materials used in fund-raising that include the judge's name." Members decided to delete everything after "name." It was recommended that "misused" be substituted for "used." "Should inform" will be substituted for "must inform."

Members decided to delete the second proposed comment ("To prevent the prestige of office judge's office from being used in fund-raising, a judge should not serve as an honorary member of a committee where the sole purpose is to allow committee members' names to be used on an invitation to solicit attendance at a fund-raising event and should not allow his or her title to be used in an image campaign for a charitable organization"). They also agreed to delete the third proposed comment ("A judge must not require a defendant to contribute to a charity as part of a sentence even if no specific charity is identified and even if the defendant has agreed to the requirement as part of a plea bargain").

Members spoke approvingly of the substance of the fourth proposed comment ("Even for law-related organizations, a judge must consider whether the membership and

purpose of the organization or the nature of event would conflict with the judge's obligation to refrain from activities that reflect adversely upon a judge's impartiality, integrity, and independence. For example, it may be inappropriate for a judge to speak at a fund-raising event for a bar association comprised of lawyers that primarily represent a particular class of clients or an organization that has taken a public stand on issues to be litigated in a case before the court on which the judge sits or to accept an award that honors the judge for decisions the judge has made in a particular case or cases").

“[C]omprised of lawyers that” was changed to “comprised of lawyers who.”  
“[O]r to accept an award” was deleted. The Reporter will modify the proposed comment, particularly with regard to the references to “class of clients” and categories of sponsoring organizations.

The Joint Commission's next teleconference will be on Thursday, November 3. Its next in-person meeting will be in Chicago on November 18-19.