

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Minutes of Teleconference
November 29, 2005**

Members Participating

Mark I. Harrison, Chair
Thomas M. Fitzpatrick
Donald B. Hilliker
Hon. Cara Lee T. Neville
Hon. Harriet Turney
Hon. James A. Wynn

Staff Participating

Jeanne P. Gray, CPR Director
George A. Kuhlman, Ethics Counsel
Eileen B. Libby, Associate Ethics Counsel
Marcia Kladder, CPR Program Director
Nancy Slonim, Media Relations

Reporters Participating

Charles G. Geyh

Advisors Participating

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

The Joint Commission reviewed the November 17, 2005, draft Preamble, Scope, and Terminology. After discussion, members decided that the 1990 Preamble language will be retained. They agreed that a separate Scope section was appropriate.

Members reinstated language that had been deleted from the redraft. The first deletion (“The Canons state overarching principles of judicial ethics. Although the Canons are cast in mandatory terms, it is the Rules that establish enforceable standards of conduct.”) was reinstated and will begin the second paragraph. “As noted in the Preamble” was deleted. “Compliance with the Rules inevitably results in adherence to these principles, ensuring the respect for our judiciary that sustains our system of democratic government under the rule of law” also was deleted.

Also in the Scope section, a majority voted in favor of deleting “minimum” before “standards.” “Enforceable” will be used instead.

The revised second paragraph will read,

The Canons state overarching principles of judicial ethics. Although the Canons are cast in mandatory terms, it is the Rules that establish enforceable standards of conduct. Where the Rules use the terms “shall” or “shall not,” they establish mandatory standards to which judges and

candidates for judicial office will be held. Enforcement of these standards is effected through appropriate disciplinary procedures. Where a Rule uses permissive terms, such as “may,” the matter being addressed is committed to the personal and professional discretion of the judge or candidate in question.

The Joint Commission decided to begin the third paragraph of the Scope section by stating that the Comments that accompany the Rules serve two functions, first to provide guidance with respect to the purpose, meaning, and proper application of the Rules, and second, to identify aspirational goals for judges. The reference to aspirational goals will be the first sentence of the fourth paragraph in the Scope section. Language referencing the fact that the comments contain explanatory material and provide examples of permitted or prohibited conduct also will be added.

A revised version of the next deleted paragraph was reinstated. It will read,

The Canons and Rules are rules of reason. They should be applied consistent with constitutional requirements, statutes, other court rules and decisional law and in the context of all relevant circumstances. The Code is to be interpreted so as not to impinge on the essential independence of judges in making judicial decisions.

The revised Preamble and Scope will be reviewed to ensure that text belongs in the proper section.

Members decided to delete “[i]t is not intended, however, that every transgression will result in disciplinary action,” which appears in the last paragraph of the current Preamble. It was replaced with a revised version:

Although the text of each Rule is binding and enforceable, it is not contemplated that every transgression will result in disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable and reasoned application of the text and should depend on such factors as the seriousness of the transgression, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system.

The replacement text will be placed in the sixth paragraph in Scope. Members decided not to add a reference to the ABA Model Rules of Disciplinary Enforcement. “Enforceable” will remain for the present.

The last paragraph was retained with the exception of “[e]ach of these uses subverts the true purposes of this Code.”

Turning to the proposed Terminology, the Joint Commission decided to retain asterisks throughout the Code to indicate terms defined in Terminology. The first sentence of Terminology will read, “[t]erms defined below are noted with an asterisk (*) the first time they appear in any Rule.” Members deleted “[i]n addition, the Sections where terms appear are referenced after the explanation of each term.”

Regarding the definition of “candidate,” at the October 15, 2005, meeting, members discussed whether the Code should include a window period limiting the time one is a judicial candidate. At that time, it was suggested that language be added stating that a campaign committee shall not solicit or accept contributions for a candidate’s current campaign more than one year prior to a scheduled election, nor more than 90 days after the last election in which the candidate participated. The definition of “candidate” will be revised to include a similar time limitation.

Members considered the example of an individual who has not yet made an announcement of his or her candidacy, but who has been publicly identified as a candidate.

Because of the difficulty of determining what constitutes a “civic” or “charitable” organization, the Joint Commission decided not to define these terms in the Terminology section.

Members approved the definition of “contribution.” The comma after “contributions” in the first line was deleted. “[T]hat are of benefit to the recipient” was deleted.

The definition of “domestic partner” was approved.

It was suggested that the definition of “gift” in Terminology and the use of the term in Canon 4 be reviewed for consistency.

Members rejected alternatives to “matter” in the definition of “impending matter,” including “legal case or controversy.” Most felt that it the term was commonly understood.

The Joint Commission decided that it was unnecessary to define “spouse.”

Staff and the Reporters will revise the Scope, Preamble, and Terminology to reflect today’s discussion. After an expeditious review, the documents will be circulated to the entire Joint Commission for review. The final draft will be available for review and comment at <http://www.abanet.org/judicialethics/finaldraftreport.org>.