AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Minutes of Meeting
March 19-20, 2005
The Westin River North
Chicago, IL

Members Participating
Mark I. Harrison, Chair
Loretta C. Argrett
Dianne Cleaver
Donald B. Hilliker
Hon. Cara Lee T. Neville
Hon. Harriet L. Turney (by telephone)
Hon. James A. Wynn

Staff Participating
George A. Kuhlman, Ethics Counsel
Eileen C. Gallagher, Justice Center Counsel
Eileen B. Libby, Associate Ethics Counsel
Nancy Slonim, ABA Media Relations

Reporters Participating
Charles G. Geyh
W. William Hodes

Advisors Participating
Hon. Peter W. Bowie (by telephone)
Robert P. Cummins
Marvin I. Karp
M. Peter Moser
Dudley Oldham
Hon. Ellen Rosenblum
Seth Rosner
Hon. Randall T. Shepard

The Joint Commission reviewed the Reporter's March 9, 2005, memorandum, "Possible Changes to Black Letter of Canon 5," which identified several issues the members might wish to reconsider before proposed Canon 5 and its comment are posted to the Joint Commission website.

The first of these issues concerned sitting judges publicly identifying their political party affiliation. The Joint Commission considered whether the state has a compelling interest in prohibiting such conduct. After discussion, the members decided not to add a prohibition against a sitting judge "publicly identifying himself or herself as a member of a political organization." Members decided to restrict such identification only with regard to candidates in non-partisan elections.

It was recommended that the proposed rules directly state that judicial candidates may be "identified with other candidates."

Members expressed different viewpoints regarding judges' attendance at political events and rallies. It was suggested that a comment be added admonishing judges who attend such events not to lend the prestige of their office and to consider whether their appearance would raise questions about their impartiality.

A member opined that the fact that the draft does not distinguish between judges' fundraising activities and personal political contributions raises constitutional concerns. It was suggested that the Joint Commission review *In re Raab*, 793 N.E.2d 1287 (N.Y. 2003), in which the court upheld New York's political activity canons, noting that they distinguish between a candidate's permitted activities in support of his own campaign and a judge's prohibited activities not directly related to the judge's reelection.

Members decided to add a "personal use" exception, which states: "A judge who is not currently a candidate for judicial office shall not, directly or indirectly purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office, except where the tickets are for the judge's personal use, and where the costs of the tickets are commensurate with the actual cost of the dinner or other event." Members acknowledged the difficulty of defining when someone becomes a "candidate."

Regarding the provision that states that "[a] candidate for judicial office, including a sitting judge, shall not, directly or indirectly knowingly make any false or misleading statement regarding any candidate for judicial office," members considered whether to use "recklessness" or "with reckless disregard for truth" instead of "knowingly."

Turning to the provision relating to permitted activity of candidates for judicial office in partisan public elections, members decided to state that candidates may "communicate with the public through any public media, including advertisements, websites, or campaign literature, and speak on his or her own behalf in any forum."

The Joint Commission considered the "publicly identify himself or herself as a member or candidate of a political organization" provision in the context of non-partisan elections. They discussed whether "political party" is too narrow and whether to use "political organization" instead. They considered the importance of drafting a Code that recognizes the efforts of states that have attempted to distance themselves from partisan elections by making all elections non-partisan. They also considered whether to group non-partisan and retention provisions together in the Code.

In the next draft, proposed Rule 5.04(a) will state that "[n]otwithstanding any restrictions set forth in Rule 5.02, a candidate for judicial office in a non-partisan public election may publicly identify himself or herself as a member of a political organization." The next draft of proposed Rule 5.02, will contain a subsection (e), which will state that "[e]xcept as permitted by Rule 5.03 (partisan public elections), Rule 5.04 (non-partisan public elections), Rule 5.05 (retention elections), and Rule 5.06 (appointment to judicial office), a candidate for judicial office, including a sitting judge, shall not, directly or indirectly seek or use endorsements from a political organization."

Members discussed the advantages and disadvantages of having separate Canon 5 provisions for every system of selection. They asked the Reporter to draft for their review parallel versions of Canon 5 for each category of judge, i.e., candidates for

judicial office in partisan public elections, candidates for judicial office in nonpartisan public elections, candidates for non-judicial office, etc.

After discussing the “pledges and promises” clause in the context of public perceptions, members decided to leave intact what will be proposed Rule 5.02(d) in the next draft ("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 the office."). It was recommended that “rule in a particular way” be used in this provision.

A majority voted in favor of deleting "a candidate for judicial office in a retention election may publicly endorse or publicly oppose other candidates for a position on the same court for which the candidate is running" from proposed Rule 5.05(d). They discussed “opposition” in the context of retention elections and whether allowing judges on a retention slate to endorse each other is disruptive to the process.

In the course of discussing what the proposed rules permit candidates for judicial office in non-partisan public elections and retention elections to do, members voted in favor of allowing such candidates to attend presidential candidate rallies. It was recommended that the Joint Commission add comment language admonishing candidates for judicial office in non-partisan public elections and retention elections to heed the “pledges and promises” provisions.

The Joint Commission discussed whether the proposed rules have the effect of treating candidates for appointive judicial office differently from candidates for judicial office in non-partisan public elections. Members analyzed the extent to which partisanship influences the appointment process. They also considered whether to limit endorsements to organizations that regularly endorse judicial candidates.

Members discussed whether to permit candidates for appointive judicial office to seek support or endorsement for the appointment from any individual or organization. Members discussed whether the existing language passes constitutional muster under *Minnesota v. White*.

The Joint Commission considered whether to add language to the disqualification provision admonishing judges who seek endorsement from certain groups that they should be mindful that their actions could result in disqualification.

The Joint Commission decided that language that was added to the Code pursuant to recommendations from the ABA Task Force on Lawyer's Political Contributions belonged in comment rather than in the black letter rule. Members considered whether there should be a provision that addresses solicitation of non-financial support.

Members considered the extent to which judges should be able to speak publicly about other judges on the same court, particularly those who are under attack, and about judges running for the same judicial office.

Prior to this meeting, the Joint Commission was divided into teams to review each Canon in light of public comments received. The Joint Commission started the Sunday session with consideration of a report from the Canon 1 team. They began with discussion of the appearance of impropriety standard. The Canon 1 team agreed with the majority of public comments urging the Joint Commission to adopt a standard that expressly prohibits both impropriety and the appearance of impropriety.

The Joint Commission discussed whether the appearance of impropriety standard should be in the Canon or black letter rule or in both, and potential problems of enforceability. It was observed that the Code should not be viewed only as embodying enforceable rules, but also should be seen as a document prompting self-study. Members considered whether adding an enforceable appearance of impropriety standard could have unforeseen effects, such as allowing judges to "plead down" from more serious offenses.

A majority of members seemed to favor an enforceable appearance of impropriety standard. There was sentiment to defer discussion of the exact wording of the Canon until after the rules and comments are closer to their final form. It was suggested that the Joint Commission examine Model Rule 8.4(a) of the ABA Model Rules of Professional Conduct for lawyers, which makes it a violation to violate any one of the Model Rules. It also was suggested that the Joint Commission consider revising the Judicial Code Preamble to state that judges should "personally observe high standards of conduct embodied in this Code."

The Reporters will review the Canon titles to determine whether they are expressions of policy as opposed to enforceable rules. Members considered whether "competence" should be considered a factor when determining violations of the appearance of impropriety standard.

Turning to the Canon 3 team, members discussed a proposal to revise the Canon with respect to the prohibition against using judicial letterhead for judges' personal business to make it less restrictive.

Members discussed the "invidious discrimination" references in proposed Rule 3.03, which generated a great deal of public comment. They considered the merits of a proposal that judges be prohibited from being members of organizations that practice invidious discrimination on the basis of race, ethnicity, gender, sexual orientation and other grounds or to allow exceptions for organizations like the military and the Boy Scouts. Following further discussion, there was sentiment in favor of not using explicit exceptions.

The Joint Commission examined the advantages and disadvantages of using the "invidious discrimination" standard as opposed to the "unlawful" standard.

Members discussed whether a publisher should be able to praise a judge's "judicial accomplishments." They ultimately decided to use current Canon 2B comment,

which allows a judge to have control over advertising. The provision will read, "[i]n contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office."

The Joint Commission's next teleconference will be on April 13, at which time it will review revisions to proposed Rules 5.01 and 5.02, as well as the parallel versions of Canon 5. The next in-person meeting will be in June at the ABA Conference on Professional Responsibility in Chicago.