

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Meeting Minutes
March 25-26, 2004
San Francisco, California**

Members Participating

Mark I. Harrison, Chair
James Alfini
Loretta C. Argrett
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

Reporter Participating

Charles G. Geyh

Staff Participating

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

Advisors Participating

Hon. Carol Amon
Hon. Peter W. Bowie
Robert P. Cummins
Robert H. Tembeckjian
Hon. Ellen Rosenblum
Seth Rosner

After discussing the schedule of upcoming meetings, members next examined a proposed rule dealing with judges who interject themselves into the settlement process in a manner that may be interpreted as coercive, and judges who encourage parties to engage in settlement discussion but sanction them if they do not engage in the process “in good faith.” Members discussed the differences between engaging in mediation and encouraging settlement. Certain members expressed reservations about judges lending their prestige to what traditionally has been a private, voluntary practice or one governed by court rules. Other members suggested that alternative dispute resolution was not as prominent a tool as it is now when the Model Code was revised in 1990 and that the Model Code should be modernized to accommodate the practice.

Members discussed the pros and cons of including a provision regarding impairment. The Reporter stated that he would draft appropriate language using an actual knowledge standard. Because the members were undecided as to the use of “should” or “shall,” his draft will contain both terms for the present.

The Commission next considered proposed Rule 2.11. Members discussed whether to include language expanding the definition of “spouse” to include “a domestic partner or other person with whom an individual maintains a shared household and conjugal relations.” They also considered whether subparagraphs 2.11(a)(2)(iii) and (a)(3) are redundant and whether they should be collapsed. They examined the similarities and differences between the “more than de minimis interest that could be substantially affected by the proceeding” and the “economic interest in the subject matter in controversy or in a party to the proceeding.”

Regarding Article 3, members discussed whether a judge is precluded from offering testimony before a certifying body on behalf of a lawyer, and whether offering such testimony is tantamount to being a character witness or writing a reference letter. They also discussed ethical concerns regarding use of official stationery. Turning to Rule 3.02, they discussed the meaning of “character witness.”

Members discussed the adequacy of the current provision prohibiting membership in discriminatory organizations. It was suggested that “ethnicity or sexual orientation” be inserted after “religion,” and that a comment based upon the Massachusetts Code of Judicial Conduct Canon 2(c) be added. Members will review a law review article and comment on the subject.

The members discussed whether judges should be disciplined for misconduct that occurs during non-essential, off-bench duties.

Members considered whether to combine Rules 4.01 and 4.02, and whether they should be moved to another part of the Code or to comment. It was suggested that “off the bench activities” be used in place of “extrajudicial.” They also discussed the differences between “duties” and “activities.” The Commission considered whether the extra-judicial/avocational activities provisions belong in black letter or in comment and whether to use “should” or “shall.” There was sentiment in favor of calling Rule 4.01 “Extrajudicial Activities in General,” and moving the substance of Rule 4.02 to comment.

It was suggested that, for a future hearing or roundtable, it would be useful to include lawyers who defend judges in disciplinary matters.

After an extended discussion, during which various proposals were made to either delete or expand Rule 4.03, an advisor suggested adding "or on other matters that might reasonably be considered to merit the attention and comment of the judge as a judge" after "a matter of personal interest."

Members discussed the organization of Article 4. A member suggested that Rule 4.04 be revised in the “federal style,” i.e., “may ... except.” An advisor suggested that the members add language that would allow judges to comment on matters needing the special expertise of a judge, for example, juvenile court judges commenting on child welfare programs. There was a suggestion that the last sentence of Comment [2] be modified to state “[j]udges should not accept governmental appointments that are likely to interfere with the impartiality, effectiveness, and independence of the judiciary.”

It was suggested that family definitions in Rule 4.05 might need modification.

Regarding Rule 4.06, members discussed judges serving as mediators in other jurisdictions, and whether they should add language to permit judges to cross jurisdictional lines to mediate cases. A member suggested adding a provision stating that the practice is not prohibited if permitted by other law. The Chair asked if there was case

law where a federal judge had to recuse himself or herself because of prior involvement in a state court proceeding involving the same matter. It was suggested that the practice is one that should be left to federal court policy and that judges should devote themselves full-time to their regular judicial duties.

A staff member suggested that Rules 4.09, 4.10, and possibly 4.12 might be combined.

The Reporter will revise Articles 1 and 2 and circulate them via the listserv within two weeks of this meeting to afford the members one week to offer comment. Staff will review the redrafted provisions before they are sent to the members. The Commission will discuss the redraft at its April 19 teleconference.

The Chair indicated that, at the New York meeting, the Joint Commission will resume its discussion of Article 4.