

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Teleconference Minutes
April 13, 2005**

Members Participating

Mark I. Harrison, Chair
Loretta Argrett
Dianne Cleaver
Thomas Fitzpatrick
Donald B. Hilliker
Hon. Cara Lee T. Neville
Hon. Harriet L. Turney
Hon. James A. Wynn

Staff Participating

Jeanne P. Gray, CPR Director
George A. Kuhlman, Ethics Counsel
Eileen C. Gallagher, Justice Center Counsel
Eileen B. Libby, Associate Ethics Counsel
Nancy Slonim, ABA Media Relations

Reporters Participating

W. William Hodes

Advisors Participating

Hon. Carol B. Amon
Hon. Peter W. Bowie
Robert Cummins
Marvin I. Karp
Dudley Oldham
Hon. Ellen Rosenblum
Robert H. Tembeckjian

The subject of today's teleconference was the April 3 Canon 5 draft, "Post-Chicago II Draft." Members decided that, because the Canon 5 Working Group has not had sufficient opportunity to review the draft, it should not be posted to the Joint Commission's website until after the Joint Commission has met in Chicago in June. On April 6, the Reporter circulated four parallel versions of Canon 5 for each selection system. For now, they are designated Canons 5, 6, 7, and 8. The Chair indicated that, prior to the Chicago meeting in June, members should decide whether to follow this approach.

Members discussed timing and scheduling issues. It is expected that work on the Preamble, Terminology, and Application provisions can be completed in June and reported upon in the Joint Commission's Informational Report to the House of Delegates for the 2005 Annual Meeting. It is hoped that the revised Code could be put before the House for a vote at the 2006 Midyear Meeting.

The Chair briefly summarized some of the key decisions made at the March 19-20 meeting in Chicago. Turning to the "Post-Chicago II Draft," members discussed the fact that there may be judges who are not "incumbent," but who are "sitting."

Members expressed favorable comments regarding proposed Rule 5.01. The Reporter briefly explained revisions that were made in response to members' comments

at the Chicago meeting. The draft sets forth two versions of Rule 5.01(m). The first stated “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.” The second stated “make pledges or promises that are inconsistent with the impartial performance of the adjudicative duties of judicial office.” A majority voted in favor of the first alternative. Several members viewed the second alternative as overly broad.

The Joint Commission discussed their e-mail exchange concerning recent Canon 5 litigation, including *No. Dakota Family Alliance, Inc., et al. v. Bader*, in which a federal court held that Canon 5A(3)(d)(i) and (ii), the “pledges and promises clause” and the “commit clause” of the No. Dakota Judicial Code, are unconstitutional in the wake of *Republican Party of Minnesota v. White*. In their e-mails, the members considered the impact of this and other decisions upon their continued work.

Members next turned their attention to proposed Rule 5.01(k) (“make any comment that might reasonably be expected to affect the outcome or impair the fairness of a proceeding while it is pending or impending in any court”) and proposed Rule 5.01(l) (“manifest bias or prejudice, based upon a person’s race, gender religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status”). These provisions were in proposed Rule 5.02 before Rules 5.01 and 5.02 were merged.

An advisor suggested that proposed Rules 5.01(k) and (l) be clarified by adding “make any comment in the course of advancing his or her candidacy” after “comment” in (k), and after “prejudice” in (l). Members discussed the meaning of “affect the outcome of a proceeding.”

Members expressed concerns regarding proposed Rule 5.01(e), which states that a judge or judicial candidate shall not “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 or candidate’s personal use, and where the costs of the tickets are commensurate with the actual cost of the dinner or other event.” A member questioned the use of “commensurate.” The Chair directed the Canon 5 Working Group to reexamine the provision.

Turning to proposed Rule 5.01 cmt. 1, the Chair suggested that it be rewritten to state: “In order to advance the state’s compelling interest in maintaining the integrity, independence, and impartiality of the judiciary, thus enhancing public confidence in the justice system, Rule 5.01 imposes certain restrictions on the political and campaign activities of all candidates for judicial office, including non-judges and sitting judges seeking reelection or retention, or election or appointment to a different judicial office.”

It was decided to defer making final language changes until the Canon 5 Working Group has had time to consider all suggestions. This includes an extensive April 12 memorandum from the ABA Standing Committee on Ethics and Professional

Responsibility containing its comments and suggestions regarding the proposed rules. A member warned that all suggestions must be evaluated in light of the First Amendment.

The phrase “improper political influence,” which appears in Rule 5.01 cmt. 2, touched off a lengthy discussion regarding whether the influence of politics on judges is inherently harmful. A member suggested that proposed Rule 5.04 cmt. 3 (“The overall thrust of Canon 5 of this Code is to separate the judiciary and candidates for judicial office from purely political activity, to the extent possible. Thus, it is appropriate to prohibit currently active members of the judiciary to enter an electoral contest that is overtly political in nature.”) be moved to proposed Rule 5.01 cmt. 1. Members discussed whether the change would make the proposed rule more susceptible to constitutional challenge. Members considered how the proposed Rule 5.04 cmt. 3 language would work in a highly partisan state and whether it comports with reality.

A member recommended that, at some point, the Joint Commission engage in a “philosophical” discussion regarding Canon 5 and its purpose and intent. The member inquired whether the Joint Commission’s goal should be to remove political activity to the extent that it can be done constitutionally. For the Chicago meeting, the Chair asked the Canon 5 Working Group to consider the suggestion to move Rule 5.04 cmt. 3 language to proposed Rule 5.01 cmt. 1 and to develop appropriate “philosophical” language.

The Canon 5 Working Group was urged to make good use of the intervening time between now and the next meeting and to engage in a continuing dialogue with the other members on the Joint Commission’s listserv. The Chair will send out an e-mail requesting that members convey their comments about the current draft to the entire Joint Commission. He expects the Working Group to confer once or twice in order to produce concrete recommendations for the June meeting. It is hoped that in Chicago, the Joint Commission can devote most of its time to topics other than Canon 5.

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