

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Minutes of Teleconference
May 12, 2005**

Members Participating

Mark I. Harrison, Chair
James Alfini
Donald B. Hilliker
Hon. Margaret M. McKeown
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
Debra Taylor, CPR Paralegal

Reporters Participating

Charles G. Geyh
W. William Hodes

Advisors Participating

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

The minutes of the April 28 teleconference were approved as submitted.

The purpose of the teleconference was to discuss proposed Rules 2.08 through 2.15 as well as portions of Canon 5.

Proposed Canon 2

At the Salt Lake City meeting, members of the ABA Dispute Resolution Section testified that judges should not conduct settlement conferences or mediation in cases in which they will serve as adjudicators on the merits. In light of the testimony, members discussed whether to modify proposed Rule 2.08 and its comment. They also considered language inspired by Committee on Codes of Conduct Advisory Opinion No. 95, "Judges Acting in a Settlement Capacity." The Joint Commission will consider its alternatives at a future meeting.

Regarding proposed Rule 2.09(a), the Joint Commission considered whether it would be inadvisable to restrict judges' access to the Internet or other electronic databases in connection with particular cases when such activities are only for the purpose of obtaining background reference material.

Proposed Rule 2.09(a)(2) was revised to read "[a] judge may solicit a disinterested expert on the law in a proceeding before the judge if, before the information or opinions are obtained, the judge gives notice to the parties of the person to be

consulted and the substance of the information or opinions sought, and affords the parties reasonable opportunity to respond.”

The substance of proposed Rule 2.10, “External Influences on Judicial Conduct,” will be moved forward to appear after proposed Rule 2.06, “Diligence.” In proposed Rule 2.10 cmt. 1, “the media” will appear after “the public,” to read “[a]n independent judiciary requires that judges decide cases according to law and facts of the case without regard to whether the law or the litigants are popular or unpopular with the public, the media, government officials, or the judge’s own friends or family.”

With regard to proposed Rule 2.10 cmt. 2, “thus giving rise to an appearance of impropriety” was stricken and “decision-making” was changed to “decisions” so that the provision will read, “[c]onfidence in the judiciary is eroded if judicial decision-making is perceived to be subject to inappropriate outside influences (see Rule 1.021 through 1.03). It is essential to judicial independence, impartiality and maintaining the public’s confidence in the justice system that judges do not create a perception that their decisions could be colored by such influences.”

In proposed Rule 2.11 cmt. 2, “matter” will be used rather than “proceeding.” The Joint Commission decided to delete “from public comment” from “[t]he judge shall require similar abstention from public comment on the part of others subject to the judge’s direction and control.”

The last sentence of proposed Rule 2.11 cmt. 3 (“The conduct of lawyers relating to trial publicity is governed by Rule 3.6 of the ABA Model Rules of Professional Conduct.”), which was in the 1990 Code, was deleted. The last clause in proposed Rule 2.11 cmt. 4, “provided that any such response meets the requirements of 2.11(a) and (b),” was edited to apply to the whole comment.

Proposed Rule 2.12(a) was revised to read, “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to circumstances where:”. No changes were made to proposed Rule 2.12(a)(2).

The Joint Commission decided to restore deleted language from proposed Rule 2.12(a)(2)(iii), so that it shall read, “known by the judge to have more than a de minimis interest that could be substantially affected by the proceeding.”

It was suggested that proposed Rule 2.12(a)(2)(v) could be improved and that “previously presided as a judge over the proceeding in the same or another court” be used in its place. Proposed Rule 2.12(a)(5) (“a person who presided as a judge before whom the proceeding was heard or tried in another court; the judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit the judge with respect to an issue in the proceeding or the controversy in the proceeding”) will be reworded and moved to proposed Rule 2.12(a)(6).

Members considered whether proposed Rule 2.12(a)(6)(iv), which states “within the preceding [three] years, was associated in the private practice of law with any law firm or lawyer currently representing any party in the controversy or that represented any party to the controversy while the judge was an attorney engaged in the private practice of law,” goes too far. A member opined that the provision was impractical and that its suggested time limitation was artificial. Another member suggested deleting everything starting with the disjunctive “or.” The Joint Commission voted eight to two to retain the provision without change.

Regarding the Comment [1] to proposed Rule 2.12, members were amenable to a suggestion to define “reasonable person” in the Code’s Terminology section. They considered whether to use the definition in the federal code, which states “with knowledge of all the relevant circumstances.” Members will choose the best alternative when they address the Terminology provisions.

Proposed Rule 2.12 cmt. 2 will be combined with proposed Rule 2.12 cmt. 6 because they are related. “Real” was struck from “[a] judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.”

A majority voted against adding language to proposed Rule 2.12 cmt. 5 that related to judges disqualifying themselves when persons within the third degree of relationship to the judge are partners in a firm representing a party to the proceeding, regardless of whether they are labeled “income partners,” “equity partners,” etc.

“High” was deleted from proposed Rule 2.14 cmt. 1 (“The first contact that members of the public have with the judicial system is often with court staff. It is therefore especially important that judges ensure that the conduct of personnel subject to their direction and control is consistent with the high standards of conduct embodied in this code.”).

The Joint Commission decided to reword proposed Rule 2.15 cmt. 1 to state “[p]ublic confidence in the courts depends on timely justice, free of unnecessary delays.” They also agreed with the Ethics Committee’s suggestion that Rule 2.15 would better reflect the duties identified in Rule 2.06 if they tracked each other.

Before turning to discussion of proposed Canon 5, the Chair requested that the Reporter revise proposed Canon 2 to reflect recommendations made during today’s teleconference.

Proposed Canon 5 (black letter)

For purposes of this discussion, the Joint Commission had drafts from the Reporter and from the Canon 5 Working Group. Working from the Reporter’s draft for discussion of the black letter rules, it was concluded that, with regard to “political

organization,” the term will be amended in the Terminology section definition by adding “except for a candidate for judicial office’s own campaign committee, as authorized by Rule 5.06.” A single sentence footnote should be added to direct readers’ attention to this fact so that the exemption does not have to appear every time “political organization” is used.

Regarding Rule 5.01(b), members voted to retain the existing language, “make speeches on behalf of a political organization.”

In Rule 5.01(c), members decided to delete “[including a] [other than a] judicial office” from “publicly endorse or oppose a candidate for any public office, [including a] [other than a] judicial office.” “[P]ay an assessment to, or make a contribution to” will be retained in proposed Rule 5.01 (d).

Members discussed whether it was necessary to retain proposed Rule 5.01(e), which prohibits judges from purchasing “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 price paid for the tickets does not include a contribution to the political organization or candidate.” They considered a suggestion to strike everything after “public office.”

“Personally” was inserted before “solicit or accept campaign contributions” in proposed Rule 5.01(h).

Proposed Canon 5 (Comment)

Turning to proposed Rule 5.01 cmt. 1, members approved the Working Group’s recommended language, in particular, its inclusion of “free from political influence.”

Regarding proposed Rule 5.01 cmt.2, members decided to follow the Working Group’s recommendation to move the following language from Comment [2] to Comment [1] and delete Comment [2]: “In order to advance the state’s compelling interest, Rule 5.01 imposes certain restrictions on the political and campaign activities of all sitting judges and all candidates for judicial office.”

The Working Group recommended that, in proposed Rule 5.01 cmt. 3, the first sentence should be deleted and the second sentence be moved to the end of Comment [1] with “however” deleted. The Reporter favored the retention of “[i]n all events, however, a candidate for judicial office should maintain the dignity appropriate to judicial office during the period of candidacy.”

The Joint Commission’s next teleconference will be on Wednesday, May 18 at 4:00 p.m. CST. The Reporter, with staff assistance, will devise a concordance for the members to consider during the call. In addition to alternative provisions, the concordance will contain the Reporter’s recommendations and rationale and will indicate

whether the provision has been the subject of a previous vote. The concordance will facilitate a vote on each of the proposed comments.