

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Minutes of Teleconference
May 18, 2005**

Members Participating

Mark I. Harrison, Chair
James Alfini
Loretta Argrett
Jan Baran
Thomas Fitzpatrick
Donald B. Hilliker
Hon. Margaret M. McKeown
Hon. Cara Lee T. Neville
Hon. Harriet L. Turney
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
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Hon. Carol B. Amon
Robert Cummins
Marvin I. Karp
M. Peter Moser
Hon. Ellen Rosenblum
Seth Rosner
Hon. Randall T. Shepard

Before continuing its examination of the proposed Canon 5 comment in the Reporter's May 16, 2005, "Last Pre-Posting Draft," the Joint Commission considered the following language for proposed Rule 5.01(e) regarding "purchasing" or "receiving" tickets:

[a judge or a candidate for judicial office shall not, directly or indirectly] purchase or receive tickets for dinners or other events sponsored by a political organization or a candidate for public office, unless the tickets are for the judge or candidate's personal use and the cost of the tickets does not appear to be significantly in excess of the value of goods and services to be received by the judge at the dinner or other event.

Members discussed whether the substance of the proposed language was covered by the gift provisions. There was a suggestion to publish the provision on the Joint Commission website without the word "receive." After further discussion, they agreed not to include the phrase "or receive" and to revise the last sentence to state "and the cost of the tickets does not appear to exceed significantly the value of the goods and services to be received by the judge at the dinner or other event."

Turning to the proposed Rule 5.01 comments, members referred both to the Reporter's draft as well as to recommendations from the Canon 5 Working Group. The version of proposed Rule 5.01 cmt. 1 that appears in the May 16 draft had been suggested by the Working Group. It states:

The state has a compelling interest in maintaining the integrity, independence, and impartiality of the judiciary, thus enhancing public confidence in the justice system. In furtherance of this interest, judges and candidates for judicial office should be free from political influence, taking into account the various methods of selecting judges, and constitutional provisions governing free speech and expressive association. 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. In all events, a candidate for judicial office should maintain the dignity appropriate to judicial office during the period of candidacy.

The Joint Commission decided to delete the second sentence as well as "during the period of candidacy."

Members voted in favor of retaining Comment [2] as drafted. It states:

A successful candidate for judicial office may be subject to discipline under this Code for violation of any of the Rules set forth in Canon 5, even if the candidate was not a judge during the period of candidacy. For the same violations, an unsuccessful candidate who was a lawyer may be subject to discipline instead under the [name of jurisdiction] Rules of Professional Conduct, Rule [8.2(b)].

Regarding proposed Rule 5.01 cmt. 3 ("When a non-judge becomes a candidate for judicial office, Rule 5.01 attaches immediately. Thus, for example, if an officer of a 'political organization' as defined in the Terminology section becomes a candidate for judicial office, the candidate must immediately resign the office in order to comply with Rule 5.01(a). Because government offices or agencies are not 'political organizations,' however, a public officer or employee is not required to resign upon becoming a candidate for judicial office."), the Joint Commission voted in favor of the Working Group's recommendation that the first line of Comment [3] be retained and attached to the end of Comment [2] and that the last line of Comment [3] be deleted.

Members voted in favor of retaining proposed Rule 5.01 cmt. 4 ("Many of the restrictions imposed by Rule 5.01 apply only with respect to 'political organizations.' Sitting judges should be mindful, however, that engagement with other organizations might be improper under a different Rule. For example, if an organization frequently litigates in the courts, or has matters pending or impending in the court on which the judge sits, one or more of the following Rules might apply: Rule 2.11 (Judicial Statements on Pending and Future Cases), Rule 2.12 (Disqualification), and Rule 4.04

(Civic or Charitable Activities).”) with revisions. It was thought that the comment was unclear as to whether it includes candidates who currently are lawyers who will become judges in the future. Members decided that this concern could be addressed by deleting “[s]itting judges should be mindful, however,” and changing the lead sentence to “[e]ngagement with other organizations might be improper under a different Rule.”

Proposed Rule 5.01 cmt. 5 was revised to read, “[p]ublic confidence in the independence and impartiality of the judiciary is eroded if judges or candidates for judicial office are perceived to be subject to political influence. Accordingly, sitting judges as well as all candidates for judicial office are prohibited by Rule 5.01(a) from assuming a leadership role in a political organization. Judges or candidates may register to vote as a member of a political party.”

A majority voted in favor of retaining Rule 5.01 cmt. 6 in its present form and location. It states the following:

Rules 5.01(b) and 5.01(c) prohibit judges and candidates for judicial office from making speeches on behalf of political organizations or publicly endorsing or opposing candidates for public office. These provisions do not prohibit candidates from campaigning on their own behalf, however, or from endorsing or opposing candidates for a position on the same court for which they are running. See Rules 5.02(d) and 5.02(e), Rules 5.03(b) and 5.03(d), and Rules 5.04(b) and 5.04(d).”

The Joint Commission agreed with a Working Group recommendation to add “Rule 5.01(c) does not prohibit a judge or judicial candidate from privately expressing his or her views on judicial candidates or other candidates for public office” to Comment [6].

Turning to proposed Rule 5.01 cmt. 8 (“Political organizations and candidates running for public office often use dinners or other public events as fund-raising devices. Judges and candidates for judicial office may generally attend such events, but are prohibited by Rule 5.01(e) from participating in their fund-raising aspect. At the same time, it would be improper for tickets to be provided without cost; compare Rule 4.13. Thus, judges and candidates for judicial office who wish to attend such events should purchase a maximum of two tickets for personal use, at a per-ticket price that the event sponsor estimates will amortize the cost of the event.”), members agreed to strike everything after “fund-raising aspect.” They will continue to work on the comment to clarify whether it refers solely to events or to events that include contributions.

The Working Group voted to retain proposed Rule 5.01 cmt. 9 (“Whether or not an event sponsored by a political organization or a candidate for public office is a fund-raising event, sitting judges should be mindful that in some circumstances attendance could reasonably be perceived as lending the prestige of judicial office to advance the interests of others; see Rule 3.01. Under such circumstances, the judge should not attend the event.”).

Regarding proposed Rule 5.01 cmt. 10, the Joint Commission voted in favor of the following language: "Candidates for judicial office are prohibited from identifying themselves as candidates of a particular political organization and from seeking or using political organization endorsements except when running in a partisan public election."

The Joint Commission decided that proposed Rule 5.01 cmt. 11 should read as follows: "[a]lthough candidates for judicial office are prohibited from personally soliciting or personally accepting campaign contributions for their own campaigns, see Rule 5.01(h), candidates running in partisan, non-partisan or retention elections are permitted to form campaign committees for the purpose of soliciting and accepting contributions, subject to the regulations contained in Rule 5.06 and [insert applicable provisions of law]."

Members voted in favor of the following language for Comment [12]: "[c]andidates for judicial office are permitted to solicit public support and to seek or use endorsements from individuals or organizations (other than political organizations). See Rule 5.01(g)."

Regarding proposed Rule 5.01 cmt. 13 ("Candidates for judicial office are sometimes the subject of unfair or unjust allegations made by an opposing candidate, a third party, or the media. For example, false or misleading statements may be made regarding the identity, present position, experience, qualifications, or judicial rulings of a candidate. In other situations, false or unjust allegations may be made that bear upon a candidate's integrity or fitness for judicial office. To mitigate the effects of these attacks, and to avoid escalation of the situation, a candidate for judicial office is permitted to make a measured and dignified public response, but only if the response does not itself violate Rule 5.01(j)."), members considered the Working Group's recommendation to restore the black letter rule regarding responding to criticism. The proposed comment will be kept in its present form and location for the present. The Joint Commission will state in the explanatory memo accompanying the draft that is posted on the website that the members are considering restoring the provision to the black letter rule.

Members voted to delete Rule 5.01 cmt. 15 ("If a candidate makes disparaging remarks about individuals or groups of individuals, or otherwise manifests prejudice against them, that would create the perception that the candidate, if successful in gaining or retaining judicial office, would not treat parties appearing before the court with impartiality. The state's interest in enhancing public confidence in the judicial system is therefore advanced by prohibiting such remarks during a campaign for judicial office; see Rule 5.01(l).")

The Joint Commission will continue to refine proposed Rule 5.01 cmt. 16 ("Thus, while candidates are free to state their own personal views on disputed legal or political issues during a campaign for judicial office, they must not make specific undertakings to reach particular results with respect to issues or matters that might come before them, without regard to the evidence or arguments that might be presented. That kind of

prejudgment and bias would indicate that the candidate has not maintained an open mind, which is the hallmark of impartiality as defined in the Terminology section.”).

A majority voted to retain the May 16 version of proposed Rule 5.01 cmt. 17 (“Candidates for judicial office often receive questionnaires or requests for interviews from the media and from issue advocacy or other community organizations, seeking to learn their views on disputed or controversial legal or political issues. Rule 5.01(m) does not generally prohibit candidates from responding to this kind of inquiry, but candidates should proceed with caution if they choose to respond. Depending on the wording of the questions and the format provided for answering, a candidate’s responses might constitute pledges, promises or commitments to perform the adjudicative duties of office other than in an impartial way. In order to avoid violating Rule 5.01(m), therefore, candidates who choose to respond should make clear their commitment to keeping an open mind while on the bench, regardless of their own personal views.”)

An alternative version of Comment [19] was approved (“A candidate for judicial office should encourage members of the candidate’s family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate; should discourage employees and other court personnel from doing on the candidate’s behalf what the candidate is prohibited from doing under the Rules of this Canon; and should not authorize or knowingly permit any other person, other than members of the candidate’s campaign committee, to do for the candidate what the candidate is prohibited from doing under the Rules of this Canon.”).

Before concluding the teleconference, members discussed the use of questionnaires with regard to non-partisan candidates.

The Joint Commission’s next teleconference will be on May 25, at which time it expects to complete its review of Canon 5. Following review of Canon 5, the Joint Commission will proceed with a Canon 4, the Preamble, and the Application section.