**AMERICAN BAR ASSOCIATION**
**JOINT COMMISSION TO EVALUATE THE**
**MODEL CODE OF JUDICIAL CONDUCT**
**Summary of Minutes of Teleconference**
**May 25, 2005**

**Members Participating**
Mark I. Harrison, Chair
James Alfini
Loretta Argrett
Jan Baran
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
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Eileen B. Libby, Associate Ethics Counsel

**Reporters Participating**
Charles G. Geyh
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**Advisors Participating**
Hon. Carol B. Amon
Hon. Peter W. Bowie
Robert Cummins
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Dudley Oldham
Hon. Ellen Rosenblum
Seth Rosner
Hon. Randall T. Shepard
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The purpose of today's teleconference was to finish the review of proposed Canon 5 comment and to review proposed Canon 3.

*Canon 5 comment*

The Joint Commission first considered the following proposed language for Rule 5.01 cmt. 14:

> A judge's obligation to avoid prejudgment is well established (see Marshall v. Jerrico Inc. 446 US 238,242(1980)). In Republican Party of Minnesota v. White 536 US 765 (2002) the United States Supreme Court expressly held, under the First Amendment and in light of the voters' right to have information about an elective candidate's views, that state judicial ethics codes may not prohibit judicial candidates from announcing their views on disputed legal and political issues. Thus, Rule 5.01(m), which applies the relevant prohibitions of Rule 2.11 to all candidates for judicial

office, does not proscribe a candidate's public expression of personal views on disputed issues. To ensure that voters understand a judge's duty to uphold the Constitution and laws of (fill in state) where the law differs from the candidate's personal belief, however, candidates are encouraged to emphasize their duty to uphold the law regardless of their personal views.

Some speech restrictions are indispensable to maintaining the integrity, impartiality and independence of the judiciary and, as such, the state has a compelling interest in these limited restrictions. Thus, under this Rule it remains improper for a judicial candidate to make pledges promises or commitments regarding pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific propositions of law, that would reasonably lead to the conclusion that the candidate has prejudged a decision or ruling in cases within the scope of the pledge, promise or commitment. In order to fall within the proscription of this Rule, the statement by the candidate must pertain to matters likely to come before the court on which the candidate would serve, if elected. Statements by a candidate that would have this effect are inconsistent with the obligation of all judges to impartially* (consider including the definition of "impartial" as a footnote to this comment, even though it is included in the definition section) perform the adjudicative duties of office.]

Members also considered the following alternative:

Although candidates for judicial office are not prohibited from announcing their views on disputed legal and political issues, a judge's obligation to avoid prejudgment and partiality is well established. Accordingly, Rule 5.01(m), which extends the relevant prohibitions of Rule 2.11 to all candidates for judicial office, does not proscribe a candidate's public expression of personal views on disputed issues. To ensure that voters understand the unique nature of the judicial function, however, candidates are encouraged to emphasize their duty to uphold the law, regardless of whether the law differs from their own personal beliefs.

The state has a compelling interest in maintaining the integrity, impartiality and independence of the judiciary and in furtherance of that interest prohibits candidates for judicial office from making pledges, promises or commitments regarding the results to be reached in pending or impending cases, specific classes of cases, specific litigants or classes of litigants, or specific propositions of law. If a candidate were to make such pledges, promises or commitments, that would lead reasonable persons to conclude that the candidate has not kept an open mind and has prejudged a decision or ruling, which is inconsistent with impartial performance of the adjudicative duties of judicial office.

The Joint Commission will consider both the above proposals at a future meeting or teleconference. They decided it was preferable not to include references to case law in the Code. Such citations tend to "date" the Code, and can be dealt with in annotations or in Reporter's Notes.

Turning to proposed Rule 5.02(d), a majority favored the following language: "communicate with the public by speaking on their own behalf, or through any media, including, but not limited to, advertisements, websites, or campaign literature."

Although one member stated that Rule 5.02 cmt. 1 ("In partisan public elections for a judicial office, candidates are nominated by, affiliated with, or otherwise publicly identified or associated with a particular political organization. Typically, this association is maintained throughout the period of the public campaign, and includes use of political party or similar designations on campaign literature and on the ballot.") is should be deleted, the Joint Commission voted to retain it.. Members agreed with a suggestion to state "candidates may be nominated" instead of "candidates are nominated" in line 41.

The Canon 5 Working Group proposed the following revision of Rule 5.03 cmt 1:

> In non-partisan public elections for judicial office, candidates are not permitted to be nominated by-a particular political organization. Most of the restrictions on political activities set forth in Rule 5.01 continue to apply to candidates for judicial office running in non-partisan elections.

The members decided to use this language with the following revision. "[M]ay not accept nominations by a particular political organization" will be used in place of "are not permitted to be nominated by-a particular political organization.

Members considered accepted the following proposal regarding Rule 5.03: cmt. 2:

> This restriction extends to filling out questionnaires if the purpose of the questionnaire is for a political organization to decide whom to endorse in a non-partisan judicial election. Thus, a non-partisan candidate must not respond to a questionnaire submitted by a political organization, as defined in this Code, if the candidate knows or has reason to know the questionnaire will be used for this purpose.

"[F]or endorsement purposes" will be inserted into the first line. Members agreed that posting this language to the Joint Commission website is likely to generate public comment, which will be invaluable to the members when they reconsider this provision.

Members voted to retain proposed Rule 5.03 cmt. 3 ("Although candidates in non-partisan public elections for judicial office are prohibited from running on a ticket or slate associated with a political organization, individual candidates may group themselves into slates or other alliances in order to conduct their campaigns more effectively. For

purposes of Rule 5.03(d), candidates who have grouped themselves together in this fashion are considered to be running for a position on the same court if they are competing for a single judgeship, or if several judgeships on the same court are to be filled as a result of the election."). The members also voted to retain proposed 5.04 cmt 1 ("Candidates for judicial office who are subject to retention election are sometimes publicly supported or opposed by individuals or organizations, including political organizations. Retention election candidates are not permitted to seek endorsements from political organizations, however, or to use such endorsements to further their campaigns.").

Members voted to retain Rule 5.04 cmt 2 ("Candidates running in retention elections are by definition sitting as judges during the period of their candidacies. Moreover, opposition to a candidate for retention sometimes focuses on particular decisions that the candidate has made as a judge, or even on cases that are pending before the judge during the campaign period. In the course of their campaigns, therefore, retention election candidates should be especially mindful of their obligations not to make comments that might affect the outcome or impair the fairness of a proceeding and not to make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. See Rules 5.01(k) and 5.01(m)."), which the Working Group recommended be deleted.

Regarding proposed Rule 5.05(b) ("seek or use endorsements for the appointment from any individual or organization, including a political organization"), members considered a substantive point raised by the Working Group, which suggested substituting the addition of "other than a political organization" for "including" in line 22. Before voting, members discussed how endorsement works in the context of the judicial appointment process. It was observed that different jurisdictions have different procedures, making it difficult to devise a "one size fits all" rule. Members voted in favor of "other than a political organization." It will be necessary to revisit the proposed rule after the Joint Commission has had the opportunity to review public comment.

Members briefly considered whether proposed Rule 5.05,"Permitted Activities of Candidates for Appointive Judicial Office," is unduly restrictive. The matter will be discussed when the Joint Commission revisits the black letter rules.

The Canon 5 Working Group proposed deleting proposed Rule 5.05-cmts 1, 2, and 3. Following a brief discussion, members voted to retain Comment [1] ("Candidates for appointive judicial office have no need to raise or spend campaign funds. Accordingly, they are not only prohibited from personally soliciting or personally accepting such funds, see Rule 5.01(h), but they are also prohibited from establishing campaign committees for this purpose.").

Because previous revisions rendered proposed Rule 5.05 cmt. 2 ("Candidates for appointive judicial office may personally seek and accept support or endorsement from any individual or organization, including a political organization. Statements of support

or endorsement can be valuable to an appointing or confirming authority."), virtually identical to the black letter rule, members voted to delete it.

Members voted to retain proposed rule 5.05 cmt. 3 (“When seeking support or endorsement from others, or when communicating directly with an appointing or confirming authority, candidates for appointive judicial office must not make any pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of the office. See Rule 5.01, Comments [16]-[18]”). It was thought that the provision serves as an important reminder not to make pledges or promises in confirmation hearings. Members agreed that similar language should be included everywhere in the Code where appropriate.

The Joint Commission voted in favor of the following proposal for Rule 5.06 cmt. 1:

> This Rule sets up a mechanism for those judicial candidates who must run for elective office to raise campaign funds through a campaign committee. No judicial candidates may personally solicit or personally accept campaign contributions. (see Rule 5.01(h)) The committee is, thus, the only way for judicial candidates to properly raise and accept campaign funds (other than those states that provide for public financing of judicial campaigns). In addition to soliciting and accepting campaign contributions, campaign committees manage the expenditure of the funds and generally conduct the campaign. Although some states have procedures that do not require the candidate to know the identities and/or amounts of contributors and contributions, the candidate is, nevertheless, ultimately responsible for the actions of the candidate's committee, including compliance with this Code and with the requirements of the laws of the jurisdiction in which the election occurs. Among the candidate's responsibilities is to ensure that the committee solicits and accepts only such contributions as are reasonable in amount and otherwise appropriate under the circumstances. For example, it would not be appropriate for a lawyer or litigant with cases currently pending or impending before a judge-candidate to be solicited for a contribution to the judge's campaign for re-election or for higher judicial office.

Members also approved Comment [2] ("Campaign committees established by candidates for judicial office not only solicit and accept campaign contributions, but manage the expenditure of campaign funds and generally conduct the campaign. Candidates, however, are ultimately responsible for the actions of their campaign committees, including compliance with this Code and with the requirements of election law and other applicable law.").

The members voted in favor of the following proposed Rule 5.06 cmt. 3 language: “Although lawyers and others who might appear before a successful candidate for judicial office are permitted to make campaign contributions, candidates should instruct

their campaign committees to be especially cautious with respect to contributions from such contributors, lest these contributions give rise to grounds for disqualification."

The Joint Commission will discuss alternatives to 5.07 and its comment at a future meeting.

In light of their objective of getting a discussion draft to the House of Delegates in February 2006, members discussed their timeline with regard to revisiting previously discussed provisions.

Members voted in favor of the following language to replace Rule 5.7 Comments [1], [2], and [3]:

> Other than judicial campaigns, most, if not all, campaigns for elective public office involve the candidates making various pledges, promises and/or commitments as to positions the candidate would take and ways the candidate would act if elected to the position. While appropriate to non-judicial campaigns, this manner of campaigning is inconsistent with the role of a sitting judge who must remain fair and impartial to all who come before the judge. The combination of the potential for abuse of the judicial office and the political promises that the judge would be compelled to make in the course of campaigning for non-judicial public elective office dictates that a judge who wishes to run for such office must resign upon becoming a candidate. On the other hand, because it does not involve a public election campaign, a judge who wishes to become a candidate for a non-judicial public appointive office need not resign from judicial office in order to be considered for appointment.

*Canon 3*

A majority voted in favor of retaining "affairs" in the caption. The Reporter stated that the caption to proposed Rule 3.01**, "**Using the Judicial Office for Personal Purposes," does not adequately describe the underlying rule and should be deleted. He recommended that proposed Rule 3.01 ("A judge shall not allow his or her financial, political or other personal interests or relationships to influence his or her judicial conduct or judgment nor shall a judge lend the prestige of judicial office, or allow others to do so, to advance the personal interests of the judge or others.") deals with two separate problems and should be broken down into two separate rules. Comments would be divided, and the new rule, designated as proposed Rule 3.02, would be given a caption. Members voted in favor of the recommendation.

At a later time, members will consider alternatives to the use of "his or her" and "himself or herself."

Members voted in favor of the suggestion to substitute "it is improper" instead of "it would be improper in the first line of proposed Rule 3.01 cmt. cmt 2, which currently states "[i]t would be improper for a judge to use or attempt to use his or her office to gain

personal advantage or deferential treatment of any kind." Members decided not to substitute "position" for "office" in "lending the prestige of office."

The Joint Commission voted in favor of a proposal that, with regard to Rule 3.01 cmt. 3, "sufficient control" be added to "[i]n contracts for publication of a judge's writings, the judge should retain control over the advertising to avoid exploitation of the judge's office."

Members voted in favor of a suggestion to restore language previously deleted from Rule 3.01 cmt. 3 ("Such prohibited conduct includes, but is not limited to, allowing the publisher to praise the judge's judicial accomplishments or, when the work is unrelated to the law, to emphasize the judge's position.").

Regarding proposed Rule 3.01 cmt 4 ("This rule does not apply to a judge's use of his or her name in endorsements of himself or herself, or of other judicial candidates as permitted in Canon 5. Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to those official inquiries concerning the professional merit of a person being considered for a judgeship."), an advisor suggested adding "or other campaign activities instead of "endorsement."

Members voted in favor of the following revision of Rule 3.01 cmt. 4: "This rule does not apply to a judge's use of his or her name in connection with campaign activities as permitted in Canon 5."

Proposed Rule 3.01 cmt. 5 states as follows:

> A judge may provide a reference or a recommendation for an individual based upon the judge's personal knowledge. When a judge is personally aware of facts or circumstances that would facilitate an accurate assessment of the individual under consideration, a judge may properly communicate that knowledge, and his or her opinions based thereon, to those responsible for making decisions concerning the applicant. The judge's awareness may be based, for example, on a longstanding and intimate knowledge of the person or special knowledge derived from some relationship, such as that with a law clerk or long-time family friend. In any case, in considering whether it is appropriate to write the recommendation on official or personal letterhead, the judge should carefully consider whether the recommendation or endorsement might reasonably be perceived as exerting pressure by reason of his or her judicial office, or lending the prestige of office, and should avoid any action that could be so understood".

Members examined the use of "and intimate" and "a longstanding and intimate," ultimately deciding in favor of "special knowledge derived from some relationship." They voted in favor of deleting "or lending the prestige of office."

An advisor disagreed with the deletion of the provision in comment to current Canon 2B relating to a judge not initiating "the communication of information to a sentencing judge or a probation or corrections officer but may provide to such persons information for the record n response to a formal request."

Members discussed the use of "must" in comments.

An advisor proposed that Rule 3.02 be revised so that judges may not be disciplined for unintentionally disclosing information.

Regarding proposed rule 3.02 cmt. 1 ("In the course of performing their judicial duties, judges may acquire information of commercial or other value that is otherwise unavailable to the public. Judges must not reveal or use such information for personal gain or for any purpose unrelated to their judicial duties."), it was suggested that "information of commercial or other value" was too limiting. Alternatives were suggested, including deleting everything after "acquire information," or deleting the comment altogether. The Joint Commission will revisit the comment at a future meeting.

There was a recommendation to insert "would give rise to perceptions that the judge is biased against persons who are part of certain groups" in the second line of proposed Rule 3.03 cmt 1 ("A judge's membership in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Whether an organization's practices are invidiously discriminatory is often a complex question. An organization is generally said to discriminate invidiously if it arbitrarily and irrationally excludes from membership on the basis of race, religion, gender, national origin, ethnicity or sexual orientation those individuals who would otherwise be admitted, and the exclusion is not reasonably related to a legitimate purpose. Rule 3.03 does not prohibit a judge's membership in any organization dedicated to the preservation of religious, ethnic or legitimate cultural values of common interest to its members.").

As between revising the provision or leaving it as it, members were equally divided. Accordingly, the provision will be left as is for the present. A majority voted to delete "irrationally."

"Such" was deleted from proposed Rule 3.03 cmt 3 ("Whether a judge's use of the benefits and facilities of a discriminatory organization is significant depends on whether the frequency or nature of that use is sufficient to create the impression that the judge approves of the organization and its practices. Accordingly, a judge must not arrange a meeting, regularly attend events at, or regularly use other benefits and facilities of such an organization that the judge knows practices invidious discrimination on the basis of race, gender, religion, national origin, ethnicity or sexual orientation in its membership or other policies").

Members voted in favor of the following language for Rule 3.03 cmt. 4: "When a judge learns that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Rule 3.03 or under Canon 1 under Rule 1.01, the judge shall immediately resign." Members examined the rationale for the current language, which states that, in lieu of resigning, judges must make immediate efforts to have the organization discontinue its invidiously discriminatory practices. Following the vote, it was suggested that an alternative to "preclude" be sought and the references to rules be eliminated. The Joint Commission will examine the duty of inquiry as it relates to this provision at a future meeting.

The Joint Commission's next teleconference is on Tuesday, May 31, at which time it is expected that members will review Canon 4, the Preamble, Terminology, and the Application provision. Proposed Canon 5 will be placed on the Joint Commission website by May 27.