

**AMERICAN BAR ASSOCIATION  
JOINT COMMISSION TO EVALUATE THE  
MODEL CODE OF JUDICIAL CONDUCT  
Summary of Minutes of Teleconference  
May 31, 2005**

**Members Participating**

Mark I. Harrison, Chair  
Loretta Argrett  
Jan Baran  
Dianne Cleaver  
Thomas Fitzpatrick  
Donald B. Hilliker  
Hon. Margaret M. McKowen  
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

**Reporters Participating**

Charles G. Geyh  
W. William Hodes

**Advisors Participating**

Hon. Carol B. Amon  
Hon. Peter Bowie  
Marvin I. Karp  
M. Peter Moser  
Dudley Oldham  
Hon. Ellen Rosenblum  
Seth Rosner  
Hon. Randall T. Shepard  
Robert H. Tembeckjian

Members discussed immediate plans to post draft provisions to their website. Staff will finalize clean and redlined versions. The Chair described the agenda for today's teleconference and for the Chicago meeting. The Joint Commission will begin its review of proposed Canon 4 today, and in Chicago, the balance of Canon 4, the Preamble, the Terminology and the Application sections will be addressed. Also in Chicago, members will clean up any loose ends with regard to the other proposed Canons. In addition, Mr. Kuhlman will draft a cover memorandum over the Chair's name to accompany the posted drafts. The Chair asked staff to prepare an agenda for the Chicago meeting by tomorrow, June 1.

The Joint Commission turned its attention to "May 2005 Draft: Canon 4, Part 1, Rules 4.01-12" (May 31, 2004).

Members agreed with an advisor's language change so that proposed Rule 4.01 cmt. 3 will read, "[a]s a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the

administration of justice, including revision of substantive and procedural and improvement of the justice system.”

Members discussed whether proposed Rule 4.01 cmt. 4 (“As a private individual, a judge may also wish to engage in writing, speaking, teaching, or being otherwise active in regard to non-legal subjects. To the extent that such activity is not in conflict with any of the judges’ duties under this Code, it is permitted by this Rule.”) was redundant. They ultimately decided to restore the language, which the Canon 4 Working Group had recommended be deleted.

Regarding proposed Rule 4.02 cmt. 1 (“Judges must be mindful, however, that their appearance before governmental bodies remains subject to other provisions of this Code, such as Rule 2.11, governing public comment on pending and impending matters, and Rule 4.01(b), prohibiting judges from engaging in extra-judicial activities that cast reasonable doubt on the judge’s impartiality, integrity and independence”), members agreed with a suggestion to cross-reference Rules 2.11 and 3.02.

Members discussed the meaning of “well qualified to comment ” in proposed Rule 4.02 cmt. 1, “Appearances Before Governmental Bodies.” The Reporter will reexamine the language to determine if revision is in order. He also will reexamine “on matters concerning the law” in proposed Rule 4.02(a) (“A judge shall not appear at a public hearing before, or otherwise consult with, an executive or legislative body or official except on matters concerning the law, the legal system or the administration of justice”).

The Joint Commission voted in favor of deleting “who have presided over such matters in court” from proposed Rule 4.02 cmt. 1 (“Judges possess special expertise on matters of law, the legal system and the administration of justice, and may properly share that expertise with governmental bodies. In addition, judges may acquire information on issues before them that are not law-related but upon which they may be well qualified to comment from their unique vantage point as jurists who have presided over such matters in court.”).

There were no objections to changing proposed Rule 4.02 cmt. 2 to read, “[i]n general, it would be an unfair burden to prohibit judges from appearing before governmental bodies on matters that are likely to have direct effect upon them as private citizens, for example, zoning proposals that will affect their real property or proposals having to do with the availability of local health services. The judge must exercise care, however, not to lend the prestige of judicial office to advance general causes with respect to which the judge possesses no special judicial competence.”

With regard to proposed Rule 4.03 cmt. 1, members approved substituting the following language: “In deciding whether to accept extra-judicial assignments, a judge should consider whether such assignments might interfere with the performance of the judge’s judicial duties or impair the public perception of the judge’s impartiality and independence.” They further agreed to delete “[t]hus, a governmental commission that

requires excessive time commitment, or is embroiled in controversial subject matter, or whose members are limited to advocating for one side in a policy debate, would not be proper for judicial membership." Staff suggested citing to related provisions in the Code.

Members agreed with a recommendation that "[a] judge may, however, represent a country, state or locality on ceremonial occasions in connection with historical, educational or cultural activities" be moved from comment back to the black letter rule. The Joint Commission considered where to place "service on the board of a public educational institution, unless it were a law school would be prohibited under Section 4C(2) ), but service on the board of a public law school or any private educational institution would generally be permitted under Section 4C(3)." An advisor suggested that it be placed in proposed Rule 4.03 cmt. 2 rather than in proposed Canon 4.04 cmt. 13.

There was a suggestion to bifurcate proposed Rule 4.03 cmt. 2 language by placing the first half in proposed Rule 4.04, which deals with nongovernmental service. An advisor suggested adding a comment to proposed Rule 4.02 Comment stating "[w]ith respect to service on the board of a public educational institution, see proposed Rule 4.04 cmt. 13." A member attempted to distinguish between service on governmental and non-governmental bodies. Members approved a suggestion to state in proposed Rule 4.03 cmt. 2 that "service on the board of a public educational institution, therefore, unless it were a law school, would be prohibited under this Rule."

Turning to proposed Rule 4.04, the Joint Commission voted to reinstate "[a] judge may serve as an officer, director, trustee or nonlegal advisor of an organization or governmental agency devoted to the improvement of the law, the legal system or the administration of justice or of an educational, religious, charitable, fraternal or civic organization not conducted for profit." They concluded that the reinstated language will not require that the Rule's title be changed. The use of "educational, religious, charitable, fraternal, and civic organization" should be consistent.

With regard to "[t]his Rule permits service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit" in proposed Rule 4.04 cmt. 13, members decided to retain "not conducted for profit," despite the fact that there are for-profit law schools.

Members decided against a recommendation that "close friends" be added to proposed Rule 4.04(2)(i) ("personally solicit funds from members of the judge's family, or other judges over whom the judge does not exercise supervisory or appellate authority").

The Joint Commission approved a suggestion to replace "should be" with "is" in proposed Rule 4.04 cmt. 1: "A judge should be permitted to participate in civic, fraternal or charitable activities for the benefit of the community of which the judge is a part,

provided that such participation does not take inappropriate advantage of the judge's judicial position, or otherwise interfere with the performance of the judge's judicial duties. " They also approved the following language for proposed Rule 4.04 cmt. 2: "Judges may solicit attorneys to participate in pro bono programs so long as the judge does not misuse the prestige of the office and does not solicit lawyers to accept particular cases that could come before the judge or the court on which the judge sits."

Members considered various replacements for proposed Rule 4.04 cmt. 3, including "[w]hen a judge solicits funds for an organization, there is often a risk that the solicitee will feel obligated to respond favorably because of the judge's position or political influence;" "[w]hen a judge solicits funds for an organization, there is often a risk that the person solicited will feel obligated to respond favorably because of the judge's position of influence;" and "[w]ere a judge to solicit funds, would create a risk that the person solicited will feel obligated to respond favorably because of the judge's position of influence." The Reporter will draft a comment containing a general prohibition and a separate comment that deals with the exception currently in Comment [3].

Using the example of a judge selling his or her child's Girl Scout cookies over the telephone, the Joint Commission discussed how to define "de minimis." Members analyzed whether they were using "de minimis" in more than one way, followed by a proposal to delete proposed Rule 4.04 cmt. 4 ("[d]e minimis solicitation includes insignificant, incidental, or behind-the-scenes activities that do not use the judge's name or title and where the judge's role is no more active or visible than that of other participants.").

Also regarding proposed Rule 4.04 cmt. 3, members considered a suggestion to delete "in person, in writing or by telephone" from "[f]or that reason, a judge is not permitted to solicit funds in person in writing or by telephone, on an other than de minimis basis unless the person being solicited is another judge over whom the judge exercises no appellate or supervisory control." There were no objections to a suggestion to add "or a member of the judge's family" to the remainder of the comment.

Proposed Rule 4.04(a)(1)(ii)(1) ("A judge shall not personally solicit funds for the organization on an other than de minimis basis.") was deleted.

Members briefly considered the differences between proposed Rule 4.04(a)(2)(iii) ("appear at, participate in, and permit the judge's title to be used in connection with an event of an organization devoted to the improvement of law, the legal system, or the administration of justice, even though the event may serve a fundraising purpose") and the comparable provision covering federal judges. The Reporter suggested reexamining this provision as well as Rule 4.04(a)(2)(iv) ("make recommendations to public and private fund-granting organizations on projects and programs and activities concerning the law, the legal system or the administration of justice") for the next draft.

An advisor suggested deleting “whose members are balanced in representing all parties in litigation” from proposed Rule 4.04 cmt. 6 (“Notwithstanding the foregoing limitations, no comparable risk of coercion arises when a judge who is an officer of such an organization sends a general membership solicitation mailing over the judge’s signature. In addition, lawyer and judicial organizations with diverse memberships, whose members are balanced in representing all parties in litigation, often include judges in their leadership. Judges may be involved in member recruitment for such organizations even though the dues or fees associated with membership may be used, in part, as fundraising to support the objectives of those organizations.”). His suggestion prompted discussion regarding alternatives to the comment, and whether “diverse” should be used. Two of the advisors will confer over language on June 1 and will report back to the members at the Chicago meeting. Another advisor cautioned that the language should not prohibit membership in such groups as the Women’s Bar Association.

Members approved the deletion of "as judges" from proposed Rule 4.04 cmt. 7 (“Judges are an integral part of the legal community and may participate as judges in the activities of organizations within the legal community without inappropriately lending the prestige of office to those activities, even when they serve a fundraising purpose. Therefore, a judge may, for example, accept an invitation to speak at or be recognized or honored at an event hosted by a legal organization, law school, or other entity devoted to improving the law, the legal system or the administration of justice, even if such an event raises funds for the benefit of the sponsoring organization”).

The Joint Commission also approved a revision of proposed Rule 4.04 cmt. 10 to read: “[i]n this and other Rules in Canon 4, the phrase "subject to the requirements of this Code" is intended to remind judges that the use of permissive language in various Rules of the Code does not relieve a judge from the other requirements of the Code that apply to the specific conduct. As an example, a judge permitted by this Rule to serve on the board of a fraternal institution may be prohibited from such service by Rules 3.03 or 4.01 if the institution practices invidious discrimination or if service on the board otherwise casts reasonable doubt on the judge’s capacity to act impartially as a judge.”

As discussed previously, proposed Rule 4.03 cmt. 2 and proposed Rule 4.04 cmt. 13 will cross-reference each other. Members voted in favor the following language change: “This Rule, not Rule 4.03 governs a judge’s service in a nongovernmental position. This Rule permits service by a judge with organizations devoted to the improvement of the law, the legal system or the administration of justice and with educational, religious, charitable, fraternal or civic organizations not conducted for profit. Service on the board of a public educational institution, unless it is a law school, would be prohibited under, but service on the board of a public law school or any private educational institution would generally be permitted under this Rule.”

Recalling the March 2004 hearing testimony from federal judges urging the Joint Commission to revise the Model Code to allow judges to perform extra-judicial alternative dispute resolution work, members examined proposed Rule 4.06, “Service as Arbitrator or Mediator.” They discussed whether the proposed language was

underinclusive, and whether it covered situations mentioned in the hearing testimony, including non-court-related mediation of school, church or other community disputes. Sentiment was expressed that the proposed language does not adequately express the Joint Commission's intent. Members and the Reporter were asked to consider several alternatives for discussion in Chicago. These included permitting judges to engage in paid or non-paid private mediation if authorized by law. The Chair requested that members propose specific language.

Members agreed with an advisor that the substance of proposed Rule 4.07, "Testifying as a Character Witness," should be moved to Canon 3.

Members considered whether there was a conflict between proposed Rule 4.05, "Appointments to Fiduciary Positions," and proposed Rule 4.08, "Practice of Law." An advisor responded that the provisions are in the current Code and are well understood as referring to administrative as opposed to legal activities. Members voted to leave the provision alone.

A member questioned the use of "other governmental bodies" in proposed Rule 4.08 cmt. 1 ("This prohibition refers to the practice of law in a representative capacity and not in a pro se capacity. A judge may act for himself or herself in all legal matters, including matters involving litigation and matters involving appearances before or other dealings with legislative and other governmental bodies."). There was a suggestion to place a period after "litigation." Following further discussion, members decided to make no changes to the comment.

An advisor suggested that proposed Rule 4.08 cmt. 2 ("The Code allows a judge to give legal advice to and draft legal documents for members of the judge's family, so long as the judge receives no compensation. A judge must not, however, act as an advocate or negotiator for a member of the judge's family in a legal matter.") permits activities not permitted by the black letter rule and is somewhat confusing. He further suggested that the comment be revised to distinguish between the two types of conduct described therein. The Reporter will attempt to rewrite the provision for the Friday meeting.

As to proposed Rule 4.09 cmt. 1 ("When a judge acquires in a judicial capacity information, such as material contained in filings with the court, that is not yet generally known, the judge must not use the information for private gain"), an advisor recommended deleting "that is not yet generally known." He stated that anything filed is a matter of public record; thus, it is ambiguous as to when the information may be used. Members considered deleting "as material contained in filings with the court," but ultimately decided to leave the comment as is.

Before concluding the teleconference, the Chair clarified that the schedule for the June 3-4 hearing and business meeting.