

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Minutes of Meeting, July 21-22, 2006
321 N. Clark Street, Chicago, IL**

Members Participating

Mark I. Harrison, Chair
James Alfini
Loretta C. Argrett
Jan W. Baran
Thomas M. Fitzpatrick
Donald B. Hilliker
Hon. Margaret McKeown (by telephone)
Hon. Cara Lee T. Neville
Hon. Harriet Turney

Reporters Participating

Charles G. Geyh
W. William Hodes

Staff Participating

Jeanne P. Gray, CPR Director
George A. Kuhlman, Ethics Counsel
Eileen B. Libby, Associate Ethics Counsel
Marcia Kladder, CPR Program Director
Nancy Slonim, Media Relations

Advisors Participating

Hon. Carol B. Amon (by telephone)
Hon. Peter W. Bowie
Marvin L. Karp
M. Peter Moser
D. Dudley Oldham (by telephone)
Hon. Ellen F. Rosenblum
Seth Rosner
Robert H. Tembeckjian

The meeting was devoted to discussion of proposed Canons 4 and 5. The Commission decided to revise proposed Rules 4.10 and 4.11 according to the structure of Canon 4(D)(5)(a) & (b) in the 1990 Code and to eliminate the definition of “gift” in Terminology. Rules 4.10 and 4.11 were retitled “Compensation for Extra-Judicial Activities,” and “Solicitation, Acceptance, and Reporting of Gifts, Loans, Bequests, Benefits, and Other Things of Value.”

Rule 4.10(B)(4) was revised to read, "commercial or financial opportunities and benefits, including special pricing and discounts and loans from a lending institution in its regular course of business, if the same opportunities and benefits are made available on the same terms to similarly situated persons who are not judges."

The provision relating to judges accepting publications was modified and moved to the non-reporting section, which will be proposed Rule 4.11(C) (“books, magazines, journals, audio-visual materials, and other resource materials supplied by publishers on a complimentary basis for official use.”)

The first subparagraph (Rule 4.11(D)(2)(a)) will state that a judge may accept invitations to the judge and the judge’s spouse, domestic partner, or guest to attend

without charge, “an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice.” Rule 4.11(D)(2)(b) will state, “an event associated with any of the judge’s educational, civic or charitable activities permitted by this Code, provided that the same invitation is offered to non-judges who are engaged in similar ways in the activity as is the judge.”

Rule 4.10(C)(4) was revised to read, "gifts, awards, or benefits associated with the business, profession, or other separate activity of a spouse, domestic partner, or other family member of a judge residing in the judge’s household, but that incidentally benefit the judge, provided that acceptance of the incidental benefit would not appear to a reasonable person to undermine the judge’s independence, integrity, and impartiality."

Rule 4.10(D)(3) was revised to read, "[n]otwithstanding any other provision of this Rule, a judge shall not solicit or accept gifts, loans, bequests, benefits or other things of value if the source is a lawyer or party or other person who has an interest in a case pending or impending before the judge, or if such solicitation or acceptance would appear to a reasonable person to undermine the judge’s independence, integrity, and impartiality."

Proposed Rules 4.10(E) and (F) also were revised. Subparagraph (E) pertains to judges reporting acceptance of certain gifts if their value, alone or in the aggregate with other items received from the same source in the same calendar year exceeds an amount to be determined by the adopting jurisdiction. Paragraph (F) will state, “[a] judge shall urge a spouse, a domestic partner, or members of the judge’s family residing in the judge’s household not to solicit or accept gifts or other things of value that the judge himself or herself is prohibited from soliciting or accepting.”

Proposed Rule 4.12(A) will state, "[u]nless otherwise prohibited by law, including Rules 4.01 and 4.11, a judge may accept reimbursement of necessary and reasonable expenses for travel, food, lodging, or other incidental expenses, or a waiver or partial waiver of fees or charges for registration, tuition and similar items, from sources other than the judge’s employing entity, if they are associated with the judge’s participation in extra-judicial activities permitted by this Code." Proposed Rule 4.12(B) will state, "[r]eimbursement of expenses for necessary travel, food, lodging or other incidental expenses shall be limited to the actual costs reasonably incurred by the judge and, where appropriate to the occasion, by the judge’s spouse, domestic partner, or guest."

Members decided to delete the last sentence in Rule 4.11 Comment [2] (“The judge should, for example, consider whether the sponsor or the funding source of the activity is currently appearing or likely to appear before the judge in a matter, thus possibly requiring disqualification of the judge.”)

They also decided to move Rule 4.11 Comment [3] (“A judge also should not attend educational activities sponsored by organizations with which the judge may not properly be associated, such as organizations that practice invidious discrimination; to do

so would violate Rule 1.01 if the judge's attendance might be perceived as manifesting approval of the organization's policies.")

Rule 4.11 will be further modified to allow judges to accept gifts that arise in a purely personal context.

"Law" in the Terminology section will be redefined to include "subject to this Code."

Proposed Rule 4.12(B) was revised to state, "[c]ompensation for extra-judicial activities shall be limited to a reasonable amount." Proposed Rules A and B were merged. Proposed Rule 4.12(C) was revised to state, "[a] judge who accepts compensation for extra-judicial activities pursuant to this Rule shall publicly report such compensation as provided for in Rule 4.13." Comment [1] will be revised to contain references to judges accepting honoraria, or teaching or speaking fees.

Turning to proposed Rule 4.13, "Reporting of Gifts, Compensation, Reimbursement of Expenses, and Waiver of Fees or Charges," members decided to delete "unless otherwise provided by law" from the first sentence so that it shall read, "[a] judge shall report the acceptance of gifts required by Rule 4.10 to be reported, and the date, place, and nature of any extrajudicial activity for which the judge received compensation, reimbursement of expenses, or waiver, including partial waiver, of fees or charges, the name of the payor or waivor, and the amount of compensation, reimbursement, or waiver received."

Proposed Rule 4.13 Comment [1] was deleted.

Overnight, the Reporter revised the draft to reflect the ongoing discussion. It was designated the July 21 draft. In Rule 4.10, "Compensation for Extra-Judicial Activities," of the July 21 draft, the first sentence of subparagraph (A) was revised to read, "[a] judge may accept compensation for extra-judicial activities permitted by law, unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."

In proposed Rule 4.11, "Solicitation, Acceptance, and Reporting of Gifts, Loans, Bequests, Benefits, and Other Things of Value," subparagraph (A) ("A judge shall not solicit or accept gifts, loans, bequests, benefits and other things of value from any person or organization, except as provided for in this Rule") will be patterned after the exceptions in the statute pertaining to federal judges. Additional categories will be added to the list in proposed Rule 4.11(C)(2) ("gifts from friends, relatives or other persons, who, if they had an interest in a case or appeared in a case pending or impending before the judge as a lawyer, would in any event require disqualification of the judge under Rule 2.12.")

The Commission examined an alternative version of Canon 5. It suggested that the partisan, non-partisan, or retention public election provisions be collapsed, and that

proposed Rules 5.03, “Political and Campaign Activities of Candidates for Judicial Office in Non-Partisan Public Elections,” and 5.04, “Political and Campaign Activities of Candidates for Judicial Office in Retention Elections,” be deleted. Revised Rule 5.02, will be entitled “Political and Campaign Activities of Candidates for Judicial Office in Public Elections.”

Proposed rule 5.03, “Political and Campaign Activities of Candidates for Judicial Office in Non-Partisan Public Elections,” subparagraph (A) was redrafted to state, “[candidates for judicial office in a non-partisan public election] may seek or use in a campaign endorsements from any individual or organization, other than a political organization.”

Proposed Rule 5.01(B) will be moved to the first section of proposed Rule 5.02. The Commission accepted new language in proposed Rule 5.01(A)(0), “shall not become a candidate more than [1 year] prior to the first applicable primary election, caucus, or general or retention election, as the case may be.”

A majority were in favor of retaining “may attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office,” and reinserting it in proposed Rule 5.01(A).

The discussion next turned to judges making political contributions and whether the Commission should adopt language addressing this issue from the 1990 Code. After discussion, members decided to retain “or a candidate for public office” in proposed Rules 5.02(D) and 5.01(A)(4). The Commission decided to retain “shall not publicly identify himself or herself as a candidate of a political organization.”

Proposed Rule 5.02(B) was revised to state, “[e]xcept as prohibited by law, and not more than [1 year] prior to the first applicable primary election, caucus, or general or retention election, as the case may be, a candidate for judicial office....”

The following language will be deleted from the Rule and placed in Rule 5.10 Comment [14]: “shall not, 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 judicial office; provided, however, that a judge or candidate for judicial office may publicly state or announce his or her views on legal, political, or other issues.”

Proposed Rule 5.01(A) was revised to state, “[e]xcept as permitted by law, or by Rules 5.02-5.04, a judge or a candidate for judicial office shall not publicly endorse or oppose a candidate for any public office.” Proposed Rule 5.02(H) was revised to state, “may publicly endorse or oppose candidates in their own race, or for a position on the same court for which they are running.”

Regarding proposed Rule 5.04, “Campaign Committees,” there was a recommendation to place brackets in subparagraphs (C) and (E) instead of “180 days.”

Proposed Rule 5.05 Comment [1] was revised to state, “[i]n most, if not all, campaigns for non-judicial elective public office, candidates make pledges, promises, or commitments as to positions they would take and ways they would act if elected to office. Although appropriate in non-judicial campaigns, this manner of campaigning is inconsistent with the role of a judge, who must remain fair and impartial to all who come before him or her. The potential for misuse of the judicial office, and the political promises that the judge would be compelled to make in the course of campaigning for non-judicial elective office, together dictate that a judge who wishes to run for such an office must step down from the bench upon becoming a candidate.”

Proposed Rule 5.05 Comment [2] was revised to state, “[t]he ‘resign to run’ rule set out in Rule 5.05(A) ensures that a judge cannot use or appear to use the judicial office to promote his or her candidacy for non-judicial office, and prevents post-campaign retaliation from the bench in the event that the judge is defeated in the election. Where a judge is seeking appointive non-judicial office, however, the dangers are not sufficient to warrant imposing the ‘resign to run’ rule; see Rule 5.05(B).”

Regarding other Canon 5 Comments, “to the greatest extent possible” was inserted in the first sentence in proposed Rule 5.01 Comment 1 (“The state has a compelling interest in maintaining the independence, integrity, and impartiality of the judiciary, thus enhancing public confidence in the justice system. In furtherance of this interest, judges and candidates for judicial office must, to the greatest extent possible, be free and appear to be free from political influence and political pressure”). The bracketed “undue” was deleted before “political influence” in the second sentence.

Proposed Rule 5.01 Comment [2] was revised to state, “[w]hen a non-judge becomes a candidate for judicial office, Canon 5 of this Code immediately becomes applicable to his or her conduct. Thus, 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. An unsuccessful candidate who was a lawyer may be subject to discipline instead under Rule [___] of the [name of jurisdiction] Rules of Professional Conduct.”

Proposed Rule 5.01 Comment [7] was deleted. It said, “Rule 5.01(A)(3) does not prohibit judges or candidates for judicial office from privately expressing their views on candidates for any public office.”

Proposed Rule 5.01 Comment [12] was revised to state, “[a]ll candidates for judicial office, including candidates who are currently sitting judges, are prohibited from making comments that might impair the fairness of pending or impending judicial proceedings. With respect to affecting the outcome, however, Rule 5.01(L) does not prohibit argument to the court or summation to the jury by a lawyer, or to instructions or rulings from the bench by a judge, or other similar statements or comments that may appropriately affect the outcome of a matter.”

Proposed Rule 5.01 Comment [13] was revised to state, “[b]ecause a judge must keep an open mind with respect to matters coming before him or her, Rule 5.01(M)—which is identical to Rule 2.11(C)—prohibits judges from making pledges, promises, or commitments about how they will rule in future cases or classes of cases, or to treat specific litigants or classes of litigants more or less favorably than the facts or law applicable to their cases require. Moreover, because it would be no less destructive of the judicial system for a candidate to gain judicial office on the basis of prohibited pledges, promises, or commitments than it would be for a sitting judge to engage in the same impropriety, Rule 5.01(M) extends the prohibition of Rule 2.11(C) to all candidates for judicial office.”

The following language was deleted from proposed Rule 5.01 Comment [15]: “Indeed, because Rule 5.01(A)(13) restricts candidates for judicial office only with respect to pledges, promises, and commitments regarding the results to be reached in specific cases or classes of cases, it would not be inappropriate for a candidate to make specific campaign promises with respect to judicial organization, administration, and court management, such as disposing of a backlog of cases, starting court sessions on time, or avoiding favoritism in appointments and hiring. Candidates may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or lobbying for more funds to improve the physical plant and amenities of the courthouse.”

Proposed Rule 5.01 Comment [16] was revised to state, “[c]andidates 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 itself prohibit candidates from responding to this kind of inquiry, but, depending on the wording of the questions and the format provided for answering, a candidate’s responses might be viewed as pledges, promises, or commitments to perform the adjudicative duties of office other than in an impartial way. To avoid violating Rule 5.01(M), therefore, candidates who choose to respond to media and other inquiries should also give assurances that they will keep an open mind while on the bench, and will carry out their adjudicative duties faithfully and impartially if elected. See Comments [13]-[15]. Candidates who choose not to respond may state their reasons for not responding, such as the danger that answering might be perceived by reasonable persons as undermining a successful candidate’s independence and impartiality, or that it might lead to frequent disqualification. See Rule 2.12.”

Proposed Rule 5.01 Comment [17] was revised to state, “[a] candidate for judicial office, including a sitting judge, must urge members of the candidate’s family to adhere to the same standards of political and campaign conduct in support of the candidate as apply to the candidate. Candidates must also require court personnel and other employees under their direction and control to refrain from doing on the candidate’s behalf what the candidate is prohibited by this Code from doing.”

The Commission will have a final, in-person “clean up” meeting in Chicago on August 25-26, 2006. In addition, the Commission will complete its work on proposed Canon 4.