

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Meeting Minutes
August 5, 2005
Chicago Marriott Downtown, Chicago, Illinois**

Members Participating

Mark I. Harrison, Chair
James Alfini
Loretta Argrett
Thomas Fitzpatrick
Donald B. Hilliker
Hon. Cara Lee Neville
Hon. Harriet Turney
Hon James A. Wynn

Staff Participating

Jeanne P. Gray, CPR Director
Eileen Gallagher, Justice Center
George Kuhlman, Ethics Counsel
Marcia Kladder, CPR Program Director
Nancy Slonim, Media Relations

Reporters Attending

Charles G. Geyh
W. William Hodes

Advisors Attending

Hon. Peter Bowie
Robert Cummins
Marvin Karp
D. Dudley Oldham
Seth Rosner
Robert Tembeckjian

The business meeting followed a public hearing during which speakers addressed the Joint Commission's June 30, 2005, Preliminary Report. Earlier in the week, the Eight Circuit Court of Appeals issued an opinion in the *Republican Party of Minnesota v. White* remand. The Court held unconstitutional the prohibition on candidates for judicial election identifying themselves as members of a political organization; attending political gatherings; and seeking, accepting or using endorsements from political organizations. It also held unconstitutional the prohibition on judges personally soliciting campaign contribution.

The Joint Commission considered the impact of the opinion and a possible appeal upon the Joint Commission's proposed Canon 5 and upon its timetable. Members agreed that it might be necessary to defer submitting its report and recommendation to the ABA House of Delegates until the 2006 Annual Meeting. The Joint Commission directed the Reporter to draft a revised Canon 5 that would bring its provisions into harmony with only the clearest points expressed in the *White* opinion. The revised draft is to be circulated as soon as possible, and will be discussed at the Joint Commission's Chicago meeting on September 16-17, 2005.

Turning to the substance of the proposed Code, the Joint Commission decided to include "sex" and "gender" in the list of unacceptable factors for manifesting bias or prejudice in proposed Rule 2.05. Both terms are codified and commonly used in that

context. Members considered whether the black letter rule should be a broad prohibition against the manifestation of bias or prejudice, with the list identifying the various types of bias and prejudice relegated to commentary. Members voted to leave the list in its present location.

In the context of discussing proposed Rule 3.02, the Joint Commission considered whether the proposed Code contains instances where the commentary either repeats the black letter rule or goes beyond the rule's requirements or prohibitions. Ethics Counsel will determine if this is the case and will report his findings to the Joint Commission in a memorandum that will be available before the September meeting.

The Commission examined the distinctions among "shall," "should," "must," and "may," and whether members had the same understanding of those terms. The final review of the proposed Code will ensure that an appropriate term is used to delineate what conduct is mandatory and what conduct is aspirational.

Testifying before the Joint Commission earlier in the day was Alan B. Morrison of the Public Citizen Litigation Group. The Joint Commission considered proposed Rule 2.10 in light of Mr. Morrison's remarks. Members agreed to revisit the subject after receiving his written comments. The Joint Commission decided that it would wait for a revised presentation of the American Judicature Society's comments before proceeding further on the suggestions made by its witness, Cynthia Gray.

Also testifying before the Joint Commission was the Hon. Dole Koch of the National Council of Juvenile and Family Court Judges. Members discussed the testimony, which concerned problem-solving and "restorative" courts. They concluded that some of the concerns expressed during the testimony did not implicate the Model Code and that the provision for "court-approved procedures" that would otherwise be in violation of the Code is sufficient to address the problem. Nevertheless, the Reporter will draft additional language to address specialty courts.

The Joint Commission considered problems of interpretation arising from the use of phrases such as "legitimate cultural values" and "invidious discrimination." in proposed Rule 3.04. Members agreed to discuss the matter at greater length during the September meeting. Ethics Counsel will prepare a memorandum analyzing comments the Joint Commission has received on the subject of invidious discrimination.

Members also agreed that, at the September meeting, they will revisit the various proscriptions they have recommended with regard to proposed Canon 4. A Reporter urged the members to reconsider their frequent use of the unclear expression "[organizations] devoted to the improvement of the law." A member asked the Joint Commission to re-examine the contradiction between proposed Rule 4.12, which permits a judge to accept an award, and proposed Rule 4.04, which prohibits the judge from attending the event at which the award is given.

Without coming to a resolution, the Joint Commission considered whether to use the gender-neutral terms “judge” and “judges” for the easier-to-read “his,” “her,” and “their.” Members decided that it was unnecessary to replace the term “dispute resolution” with “case resolution.”