

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Minutes of Meeting, August 25-26, 2006
Westin River North Hotel, Chicago, IL**

Members Participating

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

Staff Participating

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

Reporters Participating

Charles G. Geyh
W. William Hodes

Advisors Participating

Hon. Peter W. Bowie (by telephone)
Robert P. Cummins
Marvin L. Karp (by telephone)
M. Peter Moser (by telephone)
D. Dudley Oldham
Seth Rosner
Hon. Randall T. Shepard
Robert H. Tembeckjian

The minutes of the July 21-22 meeting were approved.

Working from a document entitled, "Compendium of Substantive Comments Regarding Proposed Canons 4 & 5, April 10-August 21," the Joint Commission discussed each comment in turn and revised Canons 4 and 5 accordingly.

The Joint Commission unanimously decided not to add a threshold amount to Rule 4.10. Rule 4.10(A) was revised to state, "[a] judge may accept compensation for extra-judicial activities permitted by this Code or other law, including wages or salaries received in connection with business or other remunerative activities permitted by Rule 4.08, unless such acceptance would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality. Compensation for such extra-judicial activities shall be limited to a reasonable amount."

"Solicitation" was deleted from the heading of Rule 4.11 and "solicit or" from Rule 4.11(A). Further comment will be added to Rule 3.01 to explain solicitation. The comment will state, "[a] judge must not solicit gifts or other things of value from others who could reasonably be influenced by the judge's status as a judge. Acceptance of gifts is separately governed by Rule 4.11."

Also deleted from Rule 4.11(A) was "from any person or organization, except as provided for in this Rule or in Rule 4.12." The Rule was revised to state, "[a] judge shall not accept any gifts, loans, bequests, benefits, or other things of value, including reimbursement of expenses and waivers of fees or charges, if accepting is prohibited by law or would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."

A majority voted to delete Rule 4.11(B) ("A judge shall not solicit any gifts, loans (other than loans from a lending institution in its regular course of business, on the same terms generally available to similarly situated persons who are not judges), bequests, benefits, or other things of value from any party or person, including a lawyer in a representative capacity, who is appearing, has appeared, or is likely to appear before the judge, or from any party or person whose interests are before the judge, or whose interests have come or are likely to come before the judge.")

Rule 4.11(D) was moved up, redesignated Rule 4.11(B) and states: "Unless otherwise prohibited by law, or by Rule 4.11(A), a judge may accept the following without publicly reporting such acceptance...."

The phrases "in a representative capacity," "who, if they appeared or had an interest," and "in any event" were deleted from Rule 4.11(D)(2) (now Rule 4.11(B)(2)), so that the provision states, "gifts, loans, bequests, benefits, or other things of value from friends, relatives or other persons, including lawyers representing clients, whose appearance or interest in a case pending or impeding before the judge, would require disqualification of the judge under Rule 2.12."

"[A]warded" was deleted from Rule 4.11(D)(6) (now Rule 4.11(B)(6)). "[O]r awards" and "available" were added so that the provision reads, "scholarships, fellowships, and similar benefits or awards, if they are available to similarly situated persons who are not judges, based on the same terms and criteria."

"[P]rovided that acceptance of the incidental benefit would not appear to a reasonable person to undermine the judge's independence, integrity, and impartiality" was deleted from former Rule 4.11(D)(8) (now Rule 4.11(B)(8)) so that the provision reads, "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."

Rule 4.11(C) was revised to state, "[u]nless otherwise prohibited by law or by Rule 4.11(A), a judge may accept the following, but only if such acceptance is publicly reported as provided for in Rule 4.13. If the value of an item, alone or in the aggregate with other items received from the same source in the same calendar year does not exceed \$ [], however, public reporting is not required."

"[S]olicitor," "himself or herself," and "soliciting or" were deleted from Rule 4.11(D), formerly Rule 4.11(F) so that it now states, " judge shall urge a spouse, a

domestic partner, or members of the judge's family residing in the judge's household not to accept gifts or other things of value that the judge is prohibited from accepting."

No change was made to Rule 4.11(D)(1) (now Rule 4.11(B)(1)) ("items with little intrinsic value, such as plaques, certificates, trophies and greeting cards").

No change was made to "ordinary social hospitality" in Rule 4.11(D)(3) (now Rule 4.11(B)(3)).

In Rule 4.11(C)(2)(b) (Rule 4.11(E)(2)(b) in the July 26 draft), the Joint Commission deleted "provided that, in either case, acceptance of the invitation would not appear to a reasonable person to undermine the judge's independence, integrity, and impartiality" so that the Rule states, "an event associated with any of the judge's educational, civic or charitable activities permitted by this Code, if the same invitation is offered to non-judges who are engaged in similar ways in the activity as is the judge."

Newly-redesignated Rule 4.11(C)(4) will state, "gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer representing clients, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge."

"Integrity" was restored in Rule 4.11 Comment [1], line 36. "[I]n any event" was deleted from Rule 4.11 Comment [2]. "[U]nder these circumstances" was added to the last line ("Accordingly, Rule 4.11(B)(2), places no restrictions on the ability of a judge to accept gifts or other things of value from friends or relatives under these circumstances, and does not require public reporting.")

Rule 4.12(B) ("In order to comply with Rule 4.13(A) as regards a waiver of fees or charges, including a partial waiver, a judge shall require the person or organization providing the waiver to state the amount that would have been charged absent the waiver.") was deleted. Rule 4.12(C) was renumbered (B) and "publicly" was inserted in the first sentence ("When publicly reporting as required by Rule 4.13(A), a judge shall report the date, place, and nature of the activity for which the judge received any compensation, and a description of any gift, loan, bequest, benefit, other thing of value, reimbursement of expenses, or waiver or partial waiver of fees or charges received.")

Members considered whether separate or aggregated amounts must be reported with regard to reimbursements and waivers. In Rule 4.12(C), "alone or in the aggregate with other items" was deleted. Members discussed whether the reporting amount should be stated or left blank for implementing jurisdictions to determine.

The lead in language to Rule 4.12 Comment [3] was revised. "[A]n expenses-paid or fee-waived" was deleted and new language added so that the Comment reads, "[a] judge must assure himself or herself that attendance on an expenses-paid or fee-waived basis would not appear to a reasonable person to undermine the judge's independence,

integrity or impartiality. The factors that a judge should consider when deciding whether to attend a particular activity on such a basis include the following."

Rule 4.12 Comments [3](a), (b), and (c) were revised to state: "(a) whether the sponsor is an accredited educational institution or bar association rather than a trade association or a for-profit entity; (b) whether the funding comes largely from numerous contributors rather than from a single entity and is earmarked for programs with specific content; (c) whether the content is related or unrelated to the subject matter of litigation pending or impending before the judge, or to matters that are likely to come before the judge."

"In addition, the judge must determine whether attendance would create the appearance of impropriety, and should assure himself or herself that attendance would not appear to a reasonable person to undermine the judge's independence, integrity or impartiality" was deleted from the end of Rule 4.12 Comment [3].

Rule 4.12 Comment [4], which discussed making available to the public information concerning the judge's participation in educational activities and other extrajudicial events, was deleted.

"[T]o do so would violate Rule 1.01 if the judge's attendance might be perceived as manifesting approval of the organization's policies" was deleted from Rule 4.12 Comment [5]. "[O]r other extra-judicial" was added so that the Comment reads, "A judge must not attend educational or other extra-judicial activities sponsored by organizations with which the judge may not properly be associated, such as organizations that practice invidious discrimination."

Rule 4.13(A) was revised to state, "[a] judge shall publicly report the acceptance and amount of compensation received for extra-judicial activities as required by Rule 4.10, the acceptance and amount of gifts and other things of value as required by Rule 4.11, and the acceptance and amount of reimbursement of expenses and waiver of fees or charges as required by Rule 4.12."

"[J]udges" was deleted from the first sentence of what is now Rule 4.13(C) and "public" and "required by Rule 4.13(A)" added, so that the provision reads, "The public report required by Rule 4.13(A) shall be made at least annually, except with respect to reimbursement for expenses and waiver of fees or charges, which shall be reported at least quarterly."

The Joint Commission next discussed the July 25 version of Canon 5. No change was made to Rule 5.01(G) ("shall not seek, accept, or use endorsements from a political organization.") Regarding Rule 5.01(H) ("shall not solicit campaign contributions in person, or accept campaign contributions other than through a campaign committee authorized by Rule 5.04"), "in person" was changed to "personally."

"[M]ight" was changed to "would" in Rule 5.01(L) ("shall not make any statement that would reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court").

Rule 5.02 was substantially revised. In the introductory paragraph, "[e]xcept as," "more," and "as the case may be" were deleted and "[u]nless," "earlier," "all" and "elective" were added so that the provision reads, "[u]nless prohibited by law, and not earlier than [1 year] prior to the first applicable primary election, caucus, or general or retention election, all candidates for elective judicial office."

In Rule 5.02(B)(1), "identify themselves as candidates of a political organization, unless they are candidates in a non-partisan [or retention] public election" was deleted and "establish a campaign committee pursuant to the provisions of Rule 5.04" was added.

Rule 5.02(B)(7) ("may communicate with the public by speaking on behalf of their own candidacies through any medium, including, but not limited to, advertisements, websites, or other campaign literature") was moved to Rule 5.02(B)(2).

Rule 5.02(B)(8) ("may publicly endorse or oppose candidates in their own race, or for a position on the same court for which they are running") was moved to Rule 5.02(B)(3). "[M]ay seek, [accept] or use endorsements from any organization, including a political organization, unless they are candidates in a non-partisan public election or a retention election, in which case they may seek, [accept] or use endorsements from any organization other than a partisan political organization" was deleted.

The Joint Commission moved "may attend or purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office" from Rule 5.02(B)(5) to Rule 5.02(B)(4).

"[M]ay seek, [accept] or use endorsements from any individual" was moved from Rule 5.02(B)(2) to Rule 5.02(B)(5) and revised to state, "may seek, accept, or use endorsements from any individual or organization other than a political organization; and...."

"[M]ay contribute to a political organization or candidate for public office" was moved from Rule 5.02(B)(2) to Rule 5.02(B)(6) and revised to state, "may contribute to a political organization or candidate for public office but not more than \$ [] to any one organization or candidate."

New Rule 5.02(C) will read, "[u]nless prohibited by law, and not earlier than [1 year] prior to the first applicable primary election, caucus, or general election, candidates for judicial office in a partisan public election: (1) may identify themselves as candidates of a political organization; and (2) may seek, accept, and use endorsements of a political organization."

"[A] scheduled election" was deleted from Rule 5.04(C). "[T]he applicable primary election, caucus, or general or retention election" was inserted so that the provision reads, "[c]andidates for judicial office subject to public elections shall direct their campaign committees not to solicit or accept contributions for a candidate's current campaign more than one year prior to the applicable primary election, caucus, or general or retention election, nor more than [] days after the last election in which the candidate participated."

After it was suggested that Canon 4 is in effect a subcategory of Canon 3, there was a recommendation to roll Canon 4 into Canon 3, and to move Rule 3.01 to Canon 1. A majority voted to restructure the proposed Code by collapsing Canons 3 and 4. They changed what will be the Canon 3 heading to "A Judge Shall Conduct the Judge's Personal Affairs and Extra-Judicial Activities so as to Preserve the Independence, Integrity and Impartiality of the Judiciary and to Minimize the Risk of Conflict with the Obligations of Judicial Office." They determined that Rule 3.03 should be moved to Canon 2, and that Rules 3.02 and 3.04 be moved to Canon 4.

"[S]hall not" was deleted from the introductory paragraph to Rule 4.01 and instead will lead off each of the Rule's subparagraphs.

After considering whether to delete Rule 4.01(B) ("demean the judicial office or detract from the dignity of the court"), members decided to move it to Canon 1. New Rule 4.01(B), was revised to state, "shall not engage in extra-judicial activities that will interfere with the proper performance of the judge's judicial duties."

The Joint Commission added Rule 4.01(D), which states, "shall not engage in conduct that would appear to a reasonable person to be coercive under the circumstances."

Rule 4.04 comment was reorganized and alternatives to Comments [4] and [5] considered. Comment [4] was revised and moved to Rule 4.01 Comment [1] ("While engaged in permitted extra-judicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending on the circumstances, a judge's solicitation of contributions or memberships for an organization, as permitted by Rule 4.04(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so in order to curry favor with the judge. Some of the factors that might be relevant in determining whether such efforts are coercive include the size of the community and the number of judges holding judicial office in it, the prior relationship between the judge and the person solicited, and the extent to which the organization is associated with the judge personally within the community or regarded as controversial.")

New Rule 4.01 Comment [3] will state, "[w]hile engaged in permitted extra-judicial activities, judges must not coerce others or take action that would reasonably be perceived as coercive. For example, depending on the circumstances, a judge's solicitation of contributions or memberships for an organization, as permitted by Rule

4.04(A), might create the risk that the person solicited would feel obligated to respond favorably, or would do so in order to curry favor with the judge. Some of the factors that might be relevant in determining whether such efforts are coercive include the size of the community and the number of judges holding judicial office in it, the prior relationship between the judge and the person solicited, and the extent to which the organization is associated with the judge personally within the community or regarded as controversial."

The July 26 version of Rule 4.02(B) ("with respect to matters that might reasonably merit the attention and comment of the judge because of knowledge or expertise acquired in the course of the judge's judicial duties; or") was deemed unnecessary and was deleted.

Regarding Rule 4.04, members discussed the meaning of "educational, civic or charitable organization," which led to further discussion regarding whether to restore "religious" and "fraternal" to the list of activities. They rejected a suggestion to delete "civic and charitable" in favor of "other organizations." They added "that is not conducted for profit."

Members discussed alternative language for new Rule 4.02(B) (formerly Rule 4.02(C)), ultimately choosing "when the judge is acting pro se in a matter involving the judge's legal or pecuniary interests, or when the judge is acting in a fiduciary capacity."

The Joint Commission considered whether Rule 4.04(B)(1) ("shall not misuse or permit others to misuse the prestige of judicial office for fundraising or membership solicitation") was duplicative because due to the restructuring, its substance now is in Canon 1. They ultimately made substantial revisions to the provision.

The introductory paragraph to Rule 4.04 was revised to state, "[s]ubject to the requirements of Rule 4.01 and other law, a judge may participate in activities on behalf of or sponsored by an educational, civic or charitable organization, that is not conducted for profit...."

"But only" was added to Rule 4.04(A)(1) ("a judge may personally solicit contributions for the organization, but only from members of the judge's family, or from judges over whom the judge does not exercise supervisory or appellate authority"). "[T]he" was inserted in Rule 4.04(A)(2) ("a judge may assist the organization in planning related to fundraising, and may participate in the management and investment of the organization's funds").

Rule 4.04(A)(3) was revised to state, "a judge may appear at, speak at, receive an award or other recognition at, be featured on the program of, and permit his or her title to be used in connection with an event of the organization, even though the event may serve a fundraising purpose, but only if the event concerns the law, the legal system, or the administration of justice."

Rule 4.04(A)(4) was revised to state, "a judge may solicit membership for the organization, even though the membership dues or fees generated may be used to support the objectives of the organization, but only if the organization is concerned with the law, the legal system, or the administration of justice." "[E]ven though the membership dues or fees generated may be used to support the objective of the organization" was deleted.

Rule 4.04(A)(5) was revised to state, "a judge may make recommendations to public and private fund-granting organizations with respect to programs and activities of an organization, but only if the organization is concerned with the law, the legal system, or the administration of justice; and."

Rule 4.04(A)(6) was revised to state, "a judge may serve as an officer, director, trustee, or non-legal advisor of such organizations or governmental entities, but only if they are concerned with the law, the legal system, or the administration of justice, unless it is likely that the organizations or governmental entities."

Rule 4.04(A)(7) became Rule 4.04(C) and was revised to state, "[a] judge may encourage lawyers to provide pro bono publico legal services."

"Usher" was added to Rule 4.04 Comment [5] and "ticket-taker, cashier" deleted so that the provision reads. "[b]ecause only a direct request for financial support or in-kind services is considered to be a personal solicitation prohibited by this Code, it is permissible for a judge to serve as an usher, food server or food preparer, or to perform similar functions at fundraising events sponsored by educational, civic or charitable organizations."

"In addition, a judge must make reasonable efforts to ensure that the judge's staff, court officials, and others subject to the judge's direction and control do not solicit contributions on the judge's behalf for any purpose." was deleted from Comment [6] so that it now reads, "Identification of a judge's position in an educational, civic or charitable organization on letterhead used for fundraising or membership solicitation does not violate Rule 4.04, provided that the letterhead lists only the judge's name and office or other position in the organization, and, if comparable designations are listed for other persons, the judge's judicial office. "

There were no changes to Rules 4.05 or 4.06. In Rule 4.07 Comment [2], "legal representative" was changed to "lawyer."

Members next considered whether Rules 4.08 and 4.09 were consistent. After it was suggested that the Rules do not prevent a judge from working another job evenings and weekends, members discussed whether the Code should regulate judges' private lives that do not interfere with the performance of their judicial duties or their continued ownership of pre-existing family businesses. A majority voted to move Rule 4.09 into a modified Rule 4.08.

The Joint Commission discussed whether to insert "royalties" in the list in Rule 4.10 Comment [1] ("A judge is permitted to accept honoraria, stipends, fees, wages, salaries [royalties] or other compensation for speaking, teaching, writing, and other extra-judicial activities....")

New Rule 4.10 Comment [2] shall state, "[u]nlike wages and salaries, dividends, interest, profits, royalties or other income derived from activities permitted by Rule 4.08 are not considered compensation for purposes of this Rule, and are therefore not required to be publicly reported under Rule 4.10(B). Judges should be mindful, however, that public reporting of such income may be required by other law."

The Joint Commission took up two additional matters. Regarding Rule 2.10(A)(1)(c), members voted to modify the provision to state that the judge may obtain "the written advice of a disinterested expert," and that the parties be given a reasonable opportunity to "object and respond." They decided to modify the definition of "economic interest" in Terminology to reflect the fact that the "mutual or common investment funds" exception is supposed to exclude only the individual holdings within such a fund and not the judge's interest in the fund itself.