

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Meeting Minutes
September 16-17, 2005
House of Blues Hotel, Chicago, IL**

Members Participating

Mark I. Harrison, Chair
James Alfini
Loretta Argrett
Dianne Cleaver
Thomas Fitzpatrick
Hon. M. Margaret McKeown
(by telephone)
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 B. Libby, Associate Ethics Counsel
Marcia Kladder, CPR Program Director
Nancy Slonim, Media Relations
Debra Taylor, Project Manager

Reporters Participating

Charles G. Geyh
W. William Hodes

Advisors Participating

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

Minutes of June 4 meeting were approved as submitted. Members approved a corrected version of minutes of the August 5 meeting.

At this weekend's meeting, the Joint Commission reviewed "concordances," proposed Code provisions containing references to public and Joint Commission member and advisor comments. For future meetings, the concordances will be updated to reflect comments the Joint Commission was unable to consider at this meeting.

Prior to its review of comments regarding Canon 1, members retraced the history of the decision to switch to a rules format and the largely favorable comments received regarding the proposed Code's format and structure. They also discussed whether the proposed Code has struck the proper balance between aspirational statements and enforceable rules.

The entire proposed Code will be reviewed to ensure that "independence, integrity, and impartiality," are used consistently and in that order. A member suggested that, as part of its review process, the Joint Commission consider whether every rule

needs a comment. The Reporter recommended that “should” not appear in the black letter rules.

A majority favored an advisor’s suggested rewrite of Canon 1, “[a] judge shall uphold the integrity and independence of the judiciary, shall perform the duties of the office impartially and shall avoid impropriety and the appearance of impropriety in all the judge’s activities.” It was recommended that “promote” be used instead of “uphold.”

Proposed Rule 1.01, “Observing Judicial Standards,” cmt. 2, was revised to read “[j]udges should participate in activities that promote ethical conduct generally among judges and lawyers. Judges also should study, implement, and enforce codes of conduct, support professionalism within the judiciary and the legal profession, and promote access to justice for all.” Any reference to ex parte contacts will remain in Canon 2, “A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently.”

Members generally approved the suggestion to rewrite proposed Rule 1.02 cmt. 1 to read, “[a]dherence to the judgments and rulings of courts depends upon public confidence in the independence, integrity, and impartiality of judges which, in turn, depends on judges acting without fear or favoritism in a manner free from self-interest or bias,” although some favored “deference” instead of “adherence.”

The Joint Commission considered whether proposed Rule 1.03, “Impropriety and Appearance,” should contain the same standard as in the commentary to Rule 2A in the Code of Conduct for United States Judges. Following discussion of the proposed Code’s treatment of “impropriety” and “appearance of impropriety,” members added “[t]he test for an appearance of impropriety is whether a reasonable person having knowledge of the circumstances would perceive that the judge’s ability to carry out judicial responsibilities with independence, integrity, and impartiality is impaired.” Members discussed whether to revise the definition of “impropriety,” and whether the definition should appear in comment.

Members revised Rule 1.04, “Compliance With the Law,” cmt.1, to state “[a] judge has an obligation to respect and comply with all law including the provisions of this Code. Judges are as obligated to observe the law as those who come before them.”

Regarding proposed Rule 2.01, “Giving Precedence to the Duties of Judicial Office,” members agreed that the following was preferable to the first sentence: “[t]he duties of judicial office shall take precedence over extrajudicial activities of the judge.” Proposed Rule 2.01 cmt. 1, regarding off the bench activities, was deleted.

The Reporter and staff will work on proposed Rule 2.02, “The Responsibility to Decide,” cmt. 1. Members discussed whether willful or intentional disregard of the law always constitutes a Code violation and whether “willful disregard” involves judicial competence. The Joint Commission discussed whether proposed Canon 2 should address competence as well as impartiality and diligence.

Proposed Rule 2.03 cmt. 3 was revised to state “[j]udicial competence may be diminished and compromised when a judge is impaired by drugs, alcohol, or mental conditions.”

The Joint Commission added the following language to proposed Rule 2.04, “Impartiality and Fairness,” cmt. 1: “[a] judge’s impartiality and fairness is not impaired, however, when the judge makes reasonable accommodations to ensure *pro se* litigants the opportunity to have their matters fairly heard.”

"This Rule does not preclude legitimate references to those factors when relevant to an issue in the proceeding" was added to the end of proposed Rule 2.05A, “Bias and Discrimination.” There was a request to add "marital status" and "parenthood" to the list of categories in proposed Rule 2.05B, which concerns judges not manifesting bias or prejudice.

Members examined new black letter and comment language that address sexual harassment. They considered whether they should be expanded to cover other forms of harassment, as well as the distinction between bias and prejudice in the context of sexual harassment. A majority voted in favor of keeping the new black letter rule, “[a] judge shall not engage in sexual or other forms of harassment and shall require the same standard of conduct from others subject to the judge’s direction and control.”

The heading to proposed Rule 2.05 was renamed “Bias and Prejudice.”

Members decided to retain "partisan interests" in proposed Rule 2.07A, "External Influences on Judicial Conduct" ("A judge shall not be swayed by partisan interests, public clamor or fear of criticism."). They also approved the addition of “financial” in proposed Rule 2.07B (“A judge shall not allow family, social, political, financial or other relationships to influence the judge’s judicial conduct or judgment.”).

"A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, court staff and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others subject to the judge’s direction and control" was added to proposed Rule 2.08B, "Demeanor and Decorum."

Proposed Rule 2.08 cmt. 3 was revised to read, "[i]f a judge is not otherwise prohibited by law, the judge may meet with jurors after trial to discuss ways to improve the jury process, but should not engage in any substantive discussion of the case. At such a meeting, a judge should not, for example, suggest or imply agreement or disagreement to a jury that he or she agrees or disagrees with the verdict, reveal matters not received into evidence, discuss the rulings on objections made at trial, or review any proceedings that took place outside the presence of the jury."

The Joint Commission discussed the value of judges receiving post-trial feedback from jurors, particularly with regard to lawyers’ performances, as well as the pitfalls of

such discussions. In this regard, they added “[a judge] may express appreciation to jurors who choose to remain after trial for their service to the judicial system and the community.”

Regarding proposed Rule 2.09, "Ensuring the Right to be Heard," members discussed whether more needed to be said regarding judges' involvement in settlement discussions, and whether the proposed language should contain limitations, an outright prohibition, or allow judges to exercise discretion regarding participation in settlement discussions and presiding over trials after settlement has failed.

Turning to proposed Rule 2.10A(2), members considered the distinction between judges consulting disinterested experts in the law *ex parte* and consulting other material, such as law journals. The Joint Commission will review the federal and state rules on the subject as well as comments from the American Judicature Society before it next reviews the provision.

Members agreed that it was important to give judges guidance regarding therapeutic or problem-solving courts. ABA language could serve as a model for the states.

Members discussed proposed Rule 2.10C cmt. 4, which states that "[a] judge must disclose to all parties, in a manner that ensures notice, all *ex parte* communications described in Rules 2.10A(1) and 2.10A(2) regarding a proceeding pending or impending before the judge." They also examined proposed Rule 2.10C cmt. 8, which concerns judges independently investigating facts.

With regard to proposed Rule 2.11, “Judicial Statements on Pending and Future Cases,” a majority voted in favor of adding the portion regarding responding directly to the media. An advisor suggested retaining the admonition that the comment may not affect the outcome.

Proposed Rule 2.11 cmt. 3 was revised to state “[t]his Rule does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. However, in cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.”

The first sentence of proposed Rule 2.11 cmt. 5 was revised to state “[s]ubject to the provisions of this Rule, judges who are candidates for judicial office may respond to unjust criticism.”

Regarding proposed Rule 2.12, “Disqualification,” a majority voted in favor of “[a] judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to circumstances where....”

Regarding proposed Rule 2.12A(2), members discussed a judge's "knowledge" in the context of disqualification. They also considered whether "domestic partner" should be separately defined.

Members revised the beginning of proposed Rule 2.12A(3) to state "the judge knows that he or she, individually or as a fiduciary, or the judge's spouse, domestic partner, or any child residing in the judge's household...." An advisor suggested that the Joint Commission consider the not uncommon problem of political contributions to campaigns of judicial spouses.

The Joint Commission will reconsider the "commits, or appears to commit" language in proposed Canon 2.12A(5) after it has had the opportunity to review comments received shortly before this meeting.

Proposed Rule 2.12A(6)(a) was revised to read "served as a lawyer in the matter in controversy or who substantially participate in the representation." Proposed Rule 2.12A(6)(d) ("was a material witness in the matter") was deleted. Proposed Rule 2.12A(6)(b), which concerned judges leaving the bench for the "private practice of law" was deleted.

Members decided not to add a new rule encouraging judges to educate themselves and further providing that information acquired from attending educational or training programs should not serve as a per se basis for disqualification.

Proposed Rule 2.12B, which concerns children residing in the judge's household, was left intact.

At its next meeting, the Joint Commission will choose among several alternatives of proposed Rule 2.12C, regarding judges making disclosures that might serve as the basis for disqualification. The Joint Commission discussed the rationale for proposed Rule 2.12 cmt. 5, which concerns disclosures that may not require disqualification.

Members accepted recommended changes to the first sentence in proposed Rule 2.12 cmt. 7 so that it now reads: "'Economic interest' denotes ownership of more than a de minimis legal or equitable interest, but does not extend to such holdings or interests as a judge might have, for example, in mutual or common investment funds, non-convertible debt instruments such as municipal or corporate bonds deposits a judge might maintain in financial institutions, mutual savings associations or credit unions, or government securities owned by a judge."

The Joint Commission considered the following language regarding the supervisory obligation to ensure fair disposition of matters: "A judge with supervisory authority for the performance of other judges shall take responsible measures to assure that those judges properly discharge judicial responsibilities, including the prompt and efficient disposition of matters before them."

The Reporter will include the American Judicature Society's definition of "nepotism" in the next draft of proposed Rule 2.16A. The Joint Commission decided against a rule stating that "[a] judge should seek the necessary time, staff, expertise, and resources to discharge all judicial and administrative responsibilities."

Regarding proposed Rule 2.19, "Disability and Impairment," there was sentiment in favor of using "reasonable belief" instead of a knowledge standard. It was suggested that the comment be expanded with examples and that "appropriate action" be used with greater consistency.

Proposed Rule 2.20, "Immunity for Discharge of Duties," will be deleted because it is the subject of other rules and does not involve judicial ethics.

Turning to proposed Canon 3, members decided to delete several suggested provisions, including the new rule that states that "[a] judge shall maintain the integrity and decorum of the office at all times." Members agreed that proposed Rule 3.01, "Influence of Personal Interests on Judicial Conduct," was duplicative and deleted it.

Regarding proposed Rule 3.02, "Misusing the Prestige of Judicial Office," members decided to use "misuse" instead of "lend."

In proposed Rule 3.02A cmt. 3, the members deleted "[p]rohibited 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."

The Joint Commission will divide proposed Rule 3.04, "Affiliation With Discriminatory Organizations," into two rules, with the prohibition on holding membership constituting Rule 3.04A, and the portion of Rule 3.04 that addresses use of a discriminatory organization's facilities constituting Rule 3.04B. The proposed rule should incorporate a knowledge requirement and should eliminate the "to any significant extent" limitation. Members discussed the meaning of "invidious" discrimination.

Regarding proposed Rule 3.04 cmts. 1 and 2, the Joint Commission decided to use the following language: "[a] judge's attendance at an event in a facility of a group which he should not join as a member under this Rule is not a violation of the Rule when the judge's involvement in the event is de minimis. A judge's attendance at an event is de minimis when the attendance is an isolated occurrence and does not constitute an endorsement of the organization."

The Joint Commission examined the following language from proposed Rule 3.04 cmt. 1: "Rule 3.04 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, or in any organization which is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited," and considered whether to add additional comment language. They discussed the meaning of

“legitimate” and which organizations fall within the rubric of Comment [1]. Several Joint Commissioners and advisors preferred the Canon 2C comment in the 1990 Code.

The Reporter explained the most recent changes to proposed Canon 5 as contained in his August 25 redraft. Members considered the utility of a Canon 5 that clearly sets forth in comment what judges may or may not do with respect to political activities. The provisions could be tied to “independence, integrity, and impartiality.” An advisor stressed the importance of addressing political conduct when judges are not subject to election.

The Joint Commission added two additional teleconferences and an in-person meeting to its October schedule. It plans to have a separate, in-person meeting to focus on Canon 5. The Chair urged members to re-read the *Minnesota v. White* and other opinions.