

**AMERICAN BAR ASSOCIATION  
JOINT COMMISSION TO EVALUATE THE  
MODEL CODE OF JUDICIAL CONDUCT  
Summary of Teleconference Minutes  
October 6, 2005**

**Members Participating**

Mark I. Harrison, Chair  
James J. Alfini  
Loretta C. Argrett  
Jan W. Baran  
Dianne Cleaver  
Thomas Fitzpatrick  
Donald B. Hilliker  
Hon. Cara Lee T. Neville  
Hon. Harriet L. Turney

**Staff Participating**

George A. Kuhlman, Ethics Counsel  
Eileen B. Libby, Associate Ethics Counsel  
Nancy Slonim, Media Relations

**Reporters Participating**

Charles G. Geyh  
W. William Hodes

**Advisors Participating**

Hon. Carol B. Amon  
Hon. Peter Bowie  
Robert Cummins  
Marvin L. Karp  
Hon. Ellen Rosenblum  
Seth Rosner  
Robert H. Tembeckjian

Members reviewed the Reporter's September 29 proposed Canon 4 Concordance, which references comments the Joint Commission had insufficient time to review at its September 16-17 meeting. There were no objection to the revised Canon title: "Extra-Judicial Conduct: A Judge Shall Conduct The Judge's Extra-Judicial Activities So As To Minimize The Risk Of Conflict With The Obligations Of Judicial Office."

Regarding proposed Rule 4.01, "Extra-Judicial Activities in General," "but only" was deleted from "[a] judge may engage in extra-judicial activities, but only to the extent that they...."

Members considered alternative language proposals for proposed Rule 4.01(A), including the addition of "do not demean the [judicial] office or detract from the dignity of the court" either as a separate paragraph, or as part of proposed Rule 4.01(A). The Joint Commission decided to incorporate the suggested language as a separate provision after proposed Rule 4.01(A). The bracketed "judicial" will be retained. Proposed Rule 4.01(B) will be designated Rule 4.01(C).

The Joint Commission considered whether to add "do not lead to frequent disqualification of the judge or otherwise interfere with the proper performance of judicial duties" to proposed Rule 4.01(A). They revised the first sentence of Comment

[1] to state, “[j]udges are encouraged to engage in appropriate extra-judicial activities so as not to become isolated from their communities, and to further the public’s understanding of how courts and the judicial system affect their lives.”

Members examined proposed rule 4.01 cmt. 2, with some urging that the current version be reinstated. For the October meeting, the Reporter will provide alternatives.

Without coming to a decision, member examined several alternatives to proposed Rule 4.01 cmt. 3. They considered whether to add language such as “these activities are appropriate as long as they do not impair judges’ independence, integrity, and impartiality.” The Reporter will continue to work on this provision.

. Most of the members were unconcerned by judges’ involvement with The American Law Institute’s development of *The Restatements of the Law* and similar activities. The Reporter agreed with a suggestion to add language stating that a judge may engage in these activities to the extent that time permits and to the extent that the judge’s impartiality is not compromised. The language will be placed between Comments [1] and [3].

A majority voted in favor of adding “[a] judge shall not make more than incidental or use of court staff, resources, stationary, equipment or premises in furtherance of extra-judicial activities permitted by Rule 4.01” as a black letter rule qualified by reference to the fact that a court’s own rules might deal with the use of court resources for non-work related purposes, e.g., “as otherwise permitted or prohibited by court rules.”

Members decided to retain proposed Rule 4.02, “Appearances Before Governmental Bodies, subparagraph A, which states that “[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” unless subpoenaed.

Proposed Rule 4.02 cmt. 1 was revised to read, “[j]udges 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 that will have an effect on the law and are not law-related but upon which they may be well qualified to comment from their unique vantage point as jurists.”

Also with regard to proposed Rule 4.02 cmt. 1, members decided to delete “[f]or example, a judge may comment on the need to create more options for judges in sentencing in criminal cases, such as ordering treatment in cases involving substance abuse or mental illness or providing for services for children and juveniles involved in the system, although a judge should not promote any particular option or program to avoid lending the prestige of office to advance private interests and should avoid involvement in debates with the service-provider community and among executive agencies and between the legislative and the executive branches.”

The rest of the Comment [1] will read, "[j]udges 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, Rule 3.02, prohibiting judges from lending the prestige of office to advance the interests of themselves or others, and Rule 4.01(B), prohibiting judges from engaging in extra-judicial activities that cast reasonable doubt on the judge's integrity, impartiality, and independence."

The Joint Commission deleted "general" from the last line of proposed rule 4.02 cmt. 2 ("The judge must not refer to his or her judicial position, however, and must exercise care, not to lend the prestige of judicial office to advance general causes with respect to which the judge possesses no special judicial competence."). They also deleted "particular" and "in their locality" from "[i]n general, it would be an unnecessary and unfair burden to prohibit judges from appearing before governmental bodies on matters that are likely to have a particular special 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 in their locality."

There was no objection to the deletion of Comment [3] of the reference to other rules.

The Joint Commission discussed judges publicly commenting on subjects generally affecting them as citizens, such as health care proposals and tax reform.

Members decided not to add comment language regarding judges gathering sufficient information to determine whether the work of a particular government commission concerns the improvement of the law, the legal system, or administration of justice and whether the judge's participation on the commission would cast reasonable doubt on a judge's capacity to act with independence, integrity, and impartiality.

In proposed Rule 4.03 cmt. 1, member decided to retain "[t]hus, a judge should not serve on a governmental commission that requires an excessive time commitment or is embroiled in controversial subject, or whose members are limited to advocating for one side in a policy debate," ultimately agreeing with a member to leave Comment [1] as is. After further discussion, "for" and "policy" were eliminated.

Members decided not to add the following suggested language: "[a] provision in a statute or executive announcement specifying that one of the members of a governmental commission should be a judge does not preempt Rule 4.03. Principles of separation of powers and judicial independence require that whether judicial participation is appropriate be independently evaluated under the standards in Rule 4.03 without automatic deference to the mandate of the legislative or executive branches."

Proposed Rule 4.04(B)(1)(b) was revised to read "personally solicit funds or in-kind donations for the organization in person, or through telephone or electronic contact."

The Joint Commission will draft definitions for "civic" and "charitable" activities in the Terminology section.

The members discussed judges appearing as speakers, guests of honor, or other featured participants at an organization's fund-raising event, except for an organization devoted to the improvement of the law, the legal system, of the administration of justice. They also discussed judges attending and allowing their names to be used to publicize certain events by certain non-profit organizations. They considered whether a blanket prohibition of such appearances would be constitutional.

The Joint Commission agreed that proposed Canon 4 discussion will resume after it completes its consideration of proposed Canon 5 at its October 15-17 meeting. After the meeting, members will hold a minimum of two additional teleconferences.