

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Meeting Minutes
October 15-16, 2005
DoubleTree Guest Suites, 198 E. Delaware Place
Chicago, Illinois**

Members Participating

Mark I. Harrison, Chair
James Alfini
Loretta Argrett
Dianne Cleaver
Donald Hilliker
Hon. M. Margaret McKeown
Hon. Cara Lee T. Neville
Hon. Harriet L. Turney
Hon. James A. Wynn

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)
Jan Baran (by telephone)
Hon. Peter Bowie
Robert Cummins (by telephone)
Marvin L. Karp
M. Peter Moser (by telephone)
D. Dudley Oldham (by telephone)
Hon. Ellen Rosenblum (by telephone)
Seth Rosner (by telephone)
Robert H. Tembeckjian

Members reviewed proposed Canon 5 in the June 30, 2005, "Preliminary Report of the American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct." They also had the Reporter's October 10 revisions. Members considered how to proceed in light of the Eighth Circuit Court of Appeals opinion on remand in *Minnesota v. White*, and the Association's traditional posture favoring the disassociation of politics and the judiciary.

A majority were in favor of retaining proposed Rule 5.01(a), which prohibits a judge or candidate for judicial office from acting as a leader or holding an office in a political organization.

Members voted to retain proposed Rule 5.01(c), which prohibits judges and candidates for judicial office from endorsing or opposing a candidate for any public office.

A majority voted to keep proposed Rule 5.01(d), which prohibits a judge or candidate for judicial office from soliciting funds for, paying an assessment to, or making a contribution to a political organization or a candidate for public office.

Regarding proposed Rule 5.01(e), which concerns judges and candidates for judicial office purchasing tickets for dinners or other events sponsored by a political organization or a candidate for public office, a majority voted in favor of deleting “unless the tickets are for the judge or candidate’s personal use and the cost of the tickets does not appear to exceed significantly the value of the goods and services to be received by the judge or candidate at the dinner or other event.”

Members discussed whether attendance at dinners or other events sponsored by a political organization or a candidate for public office should be prohibited. They considered the rule’s application in non-partisan states.

Also with regard to non-partisan states, members considered moving proposed Rule 5.01(f), which prohibits judges and candidates for judicial office from publicly identifying themselves as candidates of political organizations. They decided to retain proposed Rules 5.01(f) and (g), which concern judges and candidates for judicial office publicly identifying themselves as candidate of political organizations and seeking or using endorsements from a political organization.

Members considered whether to revise proposed Rule 5.01(g), which states that judges and candidates for judicial office shall not personally solicit or personally accept campaign contributions. A majority voted to retain the June 30 version of proposed Rule 5.01(h) with “contribution” defined. They decided that “in kind” could be added to a definition of “contribution.”

There were no changes to proposed Rule 5.01(i) (“use or permit the use of campaign contributions for the private benefit of the candidate or others”).

Members examined proposed Rule 5.01(j) (“knowingly make any false or misleading statement regarding any candidate for judicial office”) and public comments regarding the rule. “[I]n connection with a campaign for judicial office” was deleted, which led to discussion regarding whether the proposed rule should prohibit private, off-the-bench expressions of bias or prejudice. A majority voted to delete “in connection with a campaign for judicial office” and to delete proposed Rule 5.01(l).

Members examined Rule 5.01(A)(3) in the Reporter’s October 10 version (“make any [public] comment that might reasonably be expected to affect the outcome or impair the fairness of a proceeding while it is pending or impending in any court”). They discussed whether to delete “public” and whether the provision affects candidates for nonjudicial office. They will add qualifying language to comment limiting the context to which the rule applies.

After comparing the June 30 and October 10 versions of proposed Rule 5.01(m), the “pledges, promises or commitments” provision, a majority voted to delete “with respect to cases, controversies, or issues that are likely to come before the court” and to retain “commitments.” They also voted in favor of relegating “administrative” to comment and deleting “judicial” before “office.” They considered the meaning of “pledges, promises, or commitments” in light of the Supreme Court *White* opinion, related court decisions, and state judicial ethics opinions.

No changes were made to proposed Rule 5.02(b), which permits candidates for judicial office in a partisan public election to “seek or use endorsements from any individual or organization, including a political organization.”

Regarding proposed Rule 5.02(c), which permits candidates for judicial office in a partisan public election to “establish a campaign committee pursuant to the provisions of Rule 5.06,” members discussed importing language from proposed Rule 5.01(e) as proposed Rule 5.02(d) with the addition of “as long as.” Proposed Rule 5.01(c) would become proposed Rule 5.02(e). “Other” was inserted before “campaign literature in proposed Rule 5.02(d) (“communicate with the public by speaking on their own behalf, or through any media, including, but not limited to, advertisements, websites, or campaign literature.”

Members discussed the fact that proposed Rule 5.02(e) (“publicly endorse or publicly oppose other candidates for a position on the same court for which they are running”) does not allow a judge to endorse another judge unless the first judge is running at the same time. They also discussed judges endorsing entire slates of judicial candidates. They decided to make no change to the proposed rule.

The Joint Commission turned to proposed Rule 5.03, which concerns permissible political activities of candidates for judicial office in non-partisan public elections. They discussed whether candidates covered under proposed Rule 5.03(a) should be able to both “seek or use endorsements from any individual or organization, including a political organization,” ultimately deciding to leave the provision as is.

Members added to proposed Rule 5.03 a provision similar to that in proposed Rule 5.01(e) permitting candidates for judicial office in non-partisan public elections to purchase tickets for dinners or other events sponsored by a political organization or a candidate for public office.

Regarding proposed Rule 5.04, which sets out permitted political activities of candidates for judicial office in retention elections, members agreed to add “[n]otwithstanding any restrictions set forth in Rule 5.01, candidates for judicial office in a retention election may publicly state or announce their views on legal, political or other issues.”

Members considered whether to add the aforementioned announce clause to proposed Rule 5.05, which describes permitted activities of candidates for appointive

judicial office, which lead to discussion regarding the pros and cons of publicly airing judicial candidates' views. After further discussion, a majority voted in favor of adding the provision as subparagraph (a). With regard to proposed Rule 5.05(b), a majority voted to delete "other than a political organization" from "[n]otwithstanding any restrictions set forth in Rule 5.01, candidates for appointment to judicial office may seek or use endorsements for the appointment from any individual or organization other than a political organization."

In proposed Rule 5.06, "Campaign Committees," "subject to the regulations contained in this Rule" was changed to "subject to these rules," and "with these regulations" changed to "these rules." It was suggested that proposed Rule 5.06 not be changed but rather re-cast to make judges rather than committees responsible for compliance with the rule's strictures.

It was recommended that a campaign committee shall not solicit or accept contributions for a candidate's current campaign more than one year prior to a scheduled election, nor more than 90 days after the last election in which the candidate participated.

Regarding proposed Rule 5.07, "Activity of Judges Who Become Candidates for Non-judicial Office," a majority voted in favor of relegating proposed Rule 5.07(b) to comment with the Reporter's proviso "provided that the judge complies with other provisions of this Code."

At its Sunday meeting, the Joint Commission examined the September 29, 2005, "Concordance of Canon 4 Comments," in particular, the "widely attended events" language in proposed Rule 4.12(A)(3)(a) and the "and the judge's spouse, domestic partner or guest" from proposed Rule 4.12A(3) ("an invitation to the judge and the judge's spouse, domestic partner or guest to attend without charge."). They also considered at length whether a general prohibition of gifts is unduly restrictive.

A majority voted in favor of deleting "widely attended event" and retaining "and the judge's spouse, domestic partner or guest" with the proviso in proposed Rule 4.12A(4), "provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties."

Regarding proposed Rule 4.12A(6), members discussed changing the definition of "gift" to include "loans." They had no objection to judges receiving reduced dues in certain organizations, for example, bar associations. They also had no objection to the inclusion of "any other person" in proposed Rule 4.12A(7)(b) ("a lawyer, party, or any other person, who is likely to come before the judge, or a person whose interests are likely to come before the judge, in the foreseeable future.").

Members considered revising the \$250 bracketed amount in proposed Rule 4.12C.

Rule 4.12 comment will be revised to better explain what is meant by "ordinary social hospitality." Members deleted subparagraph (e) ("rewards and prizes given to

competitors in random drawings, contests or other events that are open to the public, awarded to persons who are not judges”). They considered the ethical propriety of judges receiving public testimonials or gifts.

The Joint Commission deleted the last sentence of proposed Rule 4.12 cmt. 3 (“A judge cannot, however, reasonably be expected to know or control all of the financial or business activities of all family members residing in the judge’s household.”)

There were no objections to proposed Rule 4.12 cmt. 4 (“A gift to a judge, or to a member of the judge’s family living in the judge’s household, that is excessive in value raises questions about the judge’s impartiality and the integrity of the judicial office and might require disqualification of the judge.”).

Members deleted proposed Rule 4.12 cmt. 5, which prohibits judges from accepting gifts from lawyers or their firms if they have come or are likely to come before the judge.

There were no objections to proposed Rule 4.12 cmt. 6, which states that the rule does not apply to contributions to a judge’s campaign for judicial office.

Proposed Rule 4.12 cmt. 7, which concerned acceptance of an invitation to a law-related function, was deleted.

There were no objections to proposed Rule 4.12 cmt. 8, which states that “[r]egardless of whether the rule would permit receipt of a particular gift by a judge or a member of the judge’s family residing in the judge’s household, other Rules may prohibit the gift.”

The Joint Commission decided against adding a new comment stating that “[f]or purposes of this Canon, gifts are considered to be from the same source if the donors are members or employees of the same law firm, corporation, or government entity.”

Turning to proposed Rule 4.13, “Reimbursement or Waiver of Charges for Travel-Related Expenses of the Judge or the Judge’s Spouse, Domestic Partner or Guest,” members discussed the appropriate reporting amount and time period. A majority voted to retain the rule.

Proposed Rule 4.13 cmt. 1 was revised to read “[a]ttendance at educational activities where the expenses are paid for by persons or entities other than the judge or the judicial system, however, must nevertheless be evaluated by the judge to determine whether attendance is consistent with the requirements of this Code.” The last sentence of the comment (“For example, Rule 4.01B requires that a judge’s extra-judicial activities be conducted so that they do not cast reasonable doubt on the judge’s capacity to act with impartiality, integrity, and independence”) was deleted.

Following discussion of judges' attendance at privately-funded educational seminars, it was recommended that the standard in Committee on Codes of Conduct Advisory Opinion No. 67, "Attendance at Educational Seminars," be imported into the proposed Code.

There were no revisions to proposed Rule 4.14, "Compensation for Extra-Judicial Activities."

The Joint Commission discussed at some length the reporting requirements in proposed Rule 4.15, "Reporting of Compensation, Reimbursements of Expenses and Waiver of Charges," specifically, whether they practical.

The Joint Commission will hold two additional teleconferences and another in-person meeting before November. At the next meeting, the Joint Commission will discuss proposed Rules 4.04 through 4.11 and will return to consideration of proposed Canon 5 and the remainder of the proposed Code.