

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Meeting Minutes
October 21-23, 2004
Embassy Suites Downtown Lakefront, Chicago, Illinois**

Members Participating

Mark I. Harrison, Chair
James Alfini
Loretta C. Argrett
Jan Witold Baran
Thomas M. Fitzpatrick
Donald B. Hilliker
Hon. Cara Lee T. Neville

Staff Participating

Jeanne P. Gray, CPR Director
George A. Kuhlman, Ethics Counsel
Eileen C. Gallagher, Justice Center Counsel
Marcia Kladder, Justice Center
Eileen B. Libby, Associate Ethics Counsel
Nancy Slonim, ABA Media Relations
Debra Taylor, Paralegal
Elizabeth Cohen, ABA/BNA Lawyer's Manual

Reporters Participating

Charles G. Geyh
W. William Hodes

Advisors Participating

Hon. Peter W. Bowie
Robert P. Cummins
Marvin I. Karp
M. Peter Moser
Hon. Ellen Rosenblum
Hon. Randall T. Shepard
Robert H. Tembeckjian

I. October 21, 2004, Meeting

The Chair began the meeting by welcoming Mr. Hodes as co-Reporter. The Commission began by reviewing two alternative drafts of revised Canon 5. The first draft, which was proposed by an advisor, set forth proscribed conduct without delineating every category of permitted conduct. The other draft, which was prepared by staff, reflects ABA policy favoring merit selection of judges over contested elections. A Reporter suggested a third approach, where the rule would contain prohibitions, with comment expanded to explain rule exceptions, i.e. "safe harbors." As the members reviewed the drafts, they also had before them comments from the Standing Committee on Ethics and Professional Responsibility and the Standing Committee on Professional Discipline.

Most members were of the view that the language used in Rule 5.01(a) of the staff draft contained useful introductory language that would equally well for the advisor draft. The Discipline Committee thought the provision should be broken down into three subparagraphs.

Members explored the distinctions between political activity and participation in partisan events. A member recommended that there be a comment warning judges that participation in certain types of activity could lead to recusal problems.

Members considered whether to delete Rule 5.01(b) of the staff version. Several members agreed with the suggestion that all provisions relating to political activity should be relegated to only one place in the Code. They considered the wisdom of grouping certain activities in particular categories. Members discussed that meaning of “political organization” and the fact that “political activity” is not limited to candidate support. It was suggested that political speech be used with greater precision. Members considered whether to delete subparagraph (c)(2) of the staff version, which deals with political endorsement.

The Commission discussed language changes to Rule 5.01(c)(3) of the staff version. They considered whether “meetings of political organizations” should be used in place of “political gatherings in subparagraph (c)(4) and whether subparagraphs (c)(4) and (5) should be combined. Members raised hypothetical examples to test the meaning of “political activity” and “political organization.” There was a suggestion that language is needed to cover situations where judges are not permitted to vote in primary elections or in caucuses where there is public endorsement.

Members discussed the difficulty of attempting to regulate the conduct of a judge’s family members. Some opined that the Commission should find a way to encourage judges to disassociate themselves from their family members’ misconduct. Members considered alternative language proposed by Cynthia Gray of the American Judicature Society.

A staff member suggested that the Code contain an analog to the Rule 8 series in the Model Rules of Professional Conduct.

Members will give thought to whether the last half of Rule 5.01(a) in the staff version more properly belongs in another section of the Code.

III. October 21, 2004, Meeting

Prior to beginning the Saturday session, members discussed the scheduling for the December meeting in Phoenix, Arizona. The Commission considered its timetable and the need to give ABA entities and others ample opportunity to review the final draft and offer comment. The Chair indicated the need to evaluate all comments that have been received prior to the December meeting. The Commission, Advisory Group members, and staff were assigned to teams. Each was assigned a proposed Canon and will review corresponding public comments. The Commission will produce a memorandum explaining the changes from the old Code to the proposed one.

The Commission considered whether to use “comments” or “communications” instead of “campaign speech” in the heading to Rule 5.02 of the staff version. Members attempted to identify examples of political speech that is not campaign speech. They considered whether the meaning of “misrepresentation” needed to be modified, which lead to discussion whether the Code should incorporate the “reckless disregard for the truth” standard of *New York Times. v. Sullivan*. A member spoke in favor of including the qualification that a statement must be false and that it has to be made knowingly. Members discussed how to define the term “knowingly” for purposes of this section of the Code. After further discussion, they decided in favor of the staff version of Rule 5.02(b), which uses “knowingly misrepresent.” Members discussed the meaning of “identity,” and whether “fitness for office” belonged in the Code. It was suggested that “experience” or “qualifications” be used in place of “identity.” Members decide to relegate the substances of Rule 5.01(a)(8) of the advisor draft to comment.

Members considered whether the revised rule would pass constitutional muster. Someone recommended that the provision should be broadened to allow judges to comment on “administrative” judicial matters such as the functioning of the court system, case assignment, etc. The Chair suggested that the Reporters redraft the advisor version and put it and the staff counterpart side-by-side in the next draft.

Regarding the provision allowing judges to make public comments, some members stated that, because judges should be held to a higher standard, the provision should not be limited to “public” statements. On the other hand, broadening the provision might infringe on judges’ free speech. “Statements made in the course of campaigning” was suggested. A comment should be added stating that the provision is not designed to inhibit free speech.

Members engaged in general discussion regarding whether judges should be allowed to personally solicit or accept campaign funds. The practice is allowed in a few states and its prohibition ruled unconstitutional in *Weaver v. Bonner*. Some members cautioned that if the prohibition is removed from the Code, judges will be forced to raise their own funds. Several members acknowledged that public perception is a problem and that judges are different from legislators. There was general agreement to include a non-solicitation provision until the Supreme Court rules that similar bans unconstitutional.

The Commission discussed whether what member called “inconsequential” acts such as asking a neighbor to put up lawn signs should be prohibited. They also considered whether the advisor’s Rule 5.01(a)(12) would prohibit judges from appearing before newspaper editorial boards. Members examined the differences, if any, between seeking an endorsement from a newspaper as opposed to an endorsement from a union or the National Rifle Association.

Members spoke for and against judges going to lawyers for support. They may add cautionary language to the comment. It was suggested that the Commission look into the historic reasons for the rule.

Side-by-side examinations of the two drafts led to consideration of the meaning of “political organization,” the problem of would-be judicial appointees being linked to political parties; the meaning of “partisan election,” whether there should be separate rules for partisan and non-partisan elections, and what non-partisan candidates should be permitted to do. Members discussed political attacks and the manner in which a candidate should be allowed to respond.

Regarding the staff version of the political contributions reporting rule, an advisor suggested that the provision state “within the period as required by law.” A member recommended that the provision contain a blank space so that the states can fill in the applicable statutory time period. Another member suggested that a comment be added emphasizing the importance of disclosure on the public’s right to know. Members discussed the extent to which judges know who made contributions to their campaign and how this information is discovered.

The Commission discussed various ways to redraft the proposed revisions to incorporate the best language from both drafts. The Reporters will make changes consistent with this meeting’s discussion and circulate a revised draft before the November teleconference. They will re-order material to go under a new heading, “Political Activity While Not in the Context of Campaigning.” The Rule “teams” will report on their work at the December meeting.