

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Minutes of Teleconference
November 3, 2005**

Members Participating

Mark I. Harrison, Chair
James Alfini
Thomas Fitzpatrick

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

Robert Cummins
Marvin L. Karp
M. Peter Moser
Hon. Ellen Rosenblum
Robert H. Tembeckjian

The Joint Commission reviewed a portion of a “concordance,” consisting of proposed Canon 4 provisions containing references to public and Joint Commission member and advisor comments. They made provisional decisions and flagged important issues for future discussion when more members are present. With regard to judges accepting public testimonials or awards, the Reporter stated that he planned to revise proposed Rule 4.04 in light of the discussion at the October 26 teleconference and his review of the Oregon Code of Judicial Conduct and the Code of Conduct for federal judges. The Reporter also will add to Rule 4.04(C) cmt. 2 proposals from the Standing Committee on Pro Bono and Public Service that would further clarify a judge’s role in encouraging pro bono service.

Regarding proposed Rule 4.05(b), members discussed a comment from an advisor stating that it is unnecessary to speak to the situation where the judge as fiduciary comes before his or her own court because the judge would be disqualified anyway. The Reporter eliminated the middle portion of the comment, leaving only the ban on appearing before another judge on the same court, or court under appellate jurisdiction. A member stated that the focus should be upon a judge’s decision-making at the outset.

Members considered situations where service as a fiduciary would be absolutely prohibited, for example, where the judge is the only probate judge in a county. After further discussion, members decided to make no changes to the provision.

The Reporter stated that the language in the two comments to proposed Rule 4.05 has been reorganized to put more emphasis on “Time for Compliance” in the Application section. The revisions are not substantive. The reference to proposed Rule 4.11 in proposed Rule 4.05 cmt. 2 should be to 4.10. Members decided not to change proposed Rule 4.06.

Regarding proposed Rule 4.07 cmt. 1, the Reporter stated that the first part of the original Comment [2] was engrafted onto the end of Comment [1]. Members considered whether the remainder of Comment [2] is needed. They discussed a comment urging the Joint Commission to adopt language that would permit judges to engage in pro bono private mediation unless prohibited by law. Members considered whether such activities have a negative impact on judicial duties.

An advisor expressed concerns regarding the last sentence in proposed Rule 4.07 cmt. 1 (“However, in so doing, a judge must not abuse the prestige of office to advance the interests of the judge or the judge’s family”), stating that the proposed Code permits judges to receive additional remuneration in other situations. Although the subject-matter of the comment had been discussed extensively over the course of previous meetings, members were not completely satisfied with this iteration.

After deciding to delete the last sentence of Comment [1], the Joint Commission continued to discuss the provision, with at least one advisor suggesting a return to the current comment, perhaps with a reference in the black letter to “court rule.” Members discussed whether the addition of “court rule” was necessary because the matter already is covered by the Application section. They also considered whether to add the first sentence of the pre-concordance Comment [2] (“The integrity of the judiciary is undermined, however, when judges take financial advantage of their offices by rendering private dispute resolution services for pecuniary gain as an extra-judicial activity.”)

The Joint Commission’s ultimate decision was to retain current Canon 4F, “Service as Arbitrator or Mediator,” and its comment.

No changes were made to proposed Rule 4.07. The Reporter explained his changes to Comment [1], in particular, the addition of “including situations in which a judge is properly appearing in a fiduciary capacity and.” Members discussed whether the phrase concerns a legal, rather than an ethical, question, and whether it substantially changes the black letter rule. After further discussion, they decided to delete it. However, they retained “including matters involving litigation.”

The Reporter explained the changes to proposed Rule 4.08 cmt. 1. He stated that the previous versions of Comments [1] and [3] were flipped and the last sentence of Comment [2] deleted. The first sentence of Comment [2] was deleted pursuant to an American Judicature Society suggestion. Members decided to delete the last sentence in Comment [1], “[w]ith respect to affiliation of relatives of a judge with law firms appearing before the judge....” They also deleted Comment [3] because it repeats the substance of proposed Rule 3.03.

Turning to proposed Rule 4.09, members discussed whether “real estate investments” was a defined term, ultimately concluding that it was not. The Reporter will decide if the phrase is necessary.

The Joint Commission considered a member's comment that several of the rules in this section either are redundant or build upon each other and can be combined. The Reporter explained why "investments" appears in the proposed rule. An advisor expressed concern regarding the broadness of "other remunerative activities." Others responded that the phrase is useful as a reminder. The Reporter will place it at the beginning of the rule, followed by exceptions and explanatory text in comment. He suggested "blending" language from proposed Rule 4.08, 4.09, and 4.10. Members opted in favor of performing this re-write now instead of waiting until after the Preliminary Report is filed with the House of Delegates in November.

The Reporter explained that the concordance versions of proposed Rule 4.09 cmt. 1 and proposed Rule 4.10 cmt. 1 have been deleted because they are repetitive of the rules.

No changes will be made to proposed Rule 4.11 other than to perhaps add cross-references.

The Joint Commission will hold another teleconference in one week in order to revisit what was discussed during today's call, followed by discussion of proposed Canons 1-3 and new comments.