

**AMERICAN BAR ASSOCIATION  
JOINT COMMISSION TO EVALUATE THE  
MODEL CODE OF JUDICIAL CONDUCT  
Summary of Teleconference Minutes  
November 15, 2004**

**Members Participating**

Mark I. Harrison, Chair  
Loretta C. Argrett  
Jan Witold Baran  
Thomas M. Fitzpatrick  
Hon. M. Margaret McKeown  
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 C. Gallagher, Justice Center Counsel  
Eileen B. Libby, Associate Ethics Counsel  
Nancy Slonim, ABA Media Relations

**Reporters Participating**

Charles G. Geyh  
W. William Hodes

**Advisors Participating**

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

The entire teleconference was devoted to discussion of the latest draft of Canon 5. The Chair stated that the Phoenix, Arizona meeting on December 3-4, 2004 will be devoted to redrafting Canon 5 and to hearing the results of the teams reviewing public comments. It is hoped that, following the meeting, proposed Canon 5 can be posted on the Commission website.

The Commission examined revised Canon 5, which is a combination of drafts from an advisor and staff. Members discussed the structure of the proposed Canon, and whether it should be reorganized so that Rule 5.01's restrictions apply only to sitting judges and Rule 5.02's restrictions only to candidates for judicial office who may or may not be sitting judges. Members considered the proper place in the Canon to define "political organization" and "political activity." The proposed draft defines these terms in the rule, so that readers do not have to flip back and forth to the Terminology section. Others argued in favor of defining these and related terms in Terminology. It was suggested as an alternative that "political activity" could be defined in Rule 5.02.

A recommendation was made to draft Rule 5.01 to deal with political activities and organizations and to draft Rule 5.02 to deal with judges generically seeking appointment or election. The latter provision would contain a "laundry list" of

proscriptions. Rules 5.03, 5.04, and 5.05 could be redrafted to provide additional guidelines regarding different types of elections. Rule 5.01(a) could be moved to Rule 5.02. The Chair requested that these changes be made so that the Commission could compare them with other versions and determine their preference.

The Commission considered whether to add “engaging in political activity that maintains the dignity of judicial office,” which led to discussion regarding the distinction between statements that are for disciplinary enforcement and those that are guidelines. If certain guidelines are relegated to comment, there is a danger that they will not be used by jurisdictions do not adopt commentary. These jurisdictions should be encouraged to adopt the rules and comment in tandem.

Members discussed whether use of “ordinarily” in comment gives the appearance of weakening the Code, especially with regard to “appearance of impropriety.”

Regarding proposed Rule 5.01, members expressed concern regarding the use of “political organization” in light of *Minnesota v. White*, which led to discussion regarding First Amendment concerns. Members also discussed the ramifications of proposed Rule 5.01(d), which deals with “family members and close personal acquaintances,” and whether the provision is overly broad. Members agreed to discuss the rule more extensively at the Phoenix meeting.

A discussion of proposed Rule 5.01(b)(8) led to discussion regarding whether judges are becoming unnecessarily restricted in what they can say. The issue necessarily implicates recusal and disqualification. A Reporter will modify the Rule 5.01(b)(8) comment to remind judges to proceed carefully in this area. Members discussed other sections of the proposed Canon that may be unconstitutional, for example Rule 5.01(b)(5).

The members discussed the extent to which judges may engage in political activity and the negative impact of special interest groups. The Commission deferred making a decision to delete language until they review the next draft. They discussed whether judges should be prohibited from participating in caucuses because they are a form of public endorsement.

The Commission next discussed proposed Rule 5.02, which contains a revised version of the current “pledges, promises, or commitments” clause. They considered whether the proposal was an adequate response to *Minnesota v. White*. A member questioned the meaning of “matters.” Regarding proposed Rules 5.02(d) and (e), members considered whether “imply” was preferable to “state,” leading one member to opine that it is preferable to use the more objective term. Canon 5 of the Oregon draft was offered as a model.

Regarding 5.02(f), members considered whether the provision clearly states that that judges must comply with all provisions of the Code, which led some to state that some provisions clearly do not apply to those not running for office.

The Chair requested that another draft be produced as soon as practicable. If at all possible, the Commission might schedule another teleconference before the Phoenix meeting.