

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Meeting Minutes
December 3-4, 2004
Embassy Suites Phoenix Biltmore, Phoenix, Arizona**

Members Participating

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

Staff Participating

Jeanne P. Gray, CPR Director (by telephone)
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 Amon
Hon. Peter W. Bowie
Robert P. Cummins (by telephone)
Marvin I. Karp
M. Peter Moser (by telephone)
Dudley Oldham (by telephone)
Hon. Ellen Rosenblum
Seth Rosner
Robert H. Tembeckjian

I. Meeting of December 3, 2004

Minutes from the October meeting were approved. The meeting was devoted to finishing the redraft of Canon 5. When the entire revised Code goes to the House of Delegates, it will be accompanied by a memorandum explaining changes from the current Code.

The Reporter reviewed the second post-Chicago draft. Member discussed how to treat judges who currently are not running for office and whether “political activity” occurs only in the context of elections.

Members were asked to express their concerns. It was suggested that there be black letter rules for each selection method and that the Code have an uplifting, didactic purpose.

Proceeding to the draft, proposed Rules 5.01 and 5.02 were reorganized and its provisions refined. Members discussed whether to use more general language that would apply to a variety of situations, or address each category of judge in separate

rules. The latter approach, which the Commission adopted, requires repeating some of the same language in each rule.

Members discussed a variety of subjects, including judges attending political party dinners and other events, their membership in political clubs, the impact of the *Minnesota v. White* opinion on Canon 5, the time periods during which judges are candidates, and the parameters of the definition of “political organization.” Members next considered whether “dignity” should be omitted as a requirement within Canon 5 or whether it should be moved to Rule 5.02 or to the Canon’s title. They discussed whether the term was too amorphous to use in the Code or whether it should remain because judges are held to a higher standard.

The discussion regarding “dignity” led to a more general conversation concerning the use of hortatory language in black letter rules, whether moving provisions to comment will be regarded as weakening the Code, and how to make the Code more enforceable.

Members discussed terminology in Rule 5.02, including “knowingly,” “false or misleading,” “another candidate,” and “identity.” The Commission voted to retain “adjudicative” in the last line of Rule 5.02(c). It was suggested that Rule 5.02(d) be revised, especially “lack of impartiality” and “or similar characteristics” in line 6. The members decided to use “in the course of campaigning for judicial office” in Rule 5.02.

With regard to Rule 5.02(e), members discussed whether to use the bracketed term “public.” They decided to delete “public statement in the course of campaigning.” Members considered the disposition of leftover campaign funds, and will research how the states have handled the issue. The Commission discussed the distinction between employees who serve under “the direction and control of” as opposed to those serving “at the pleasure of” and the meaning of “reasonable steps to discourage.”

A majority voted in favor of placing the substance of revised Rules 5.01(c) and (d) into both Rules 5.01 and 5.02.

The Commission considered when and to what extent judges should be able to respond to attacks and other matters. Members acknowledged that it would be helpful to provide guidance as to what judges may do when someone they know is up for judicial office.

It was suggested that Rule 5.06(c) be rewritten to state “attend meetings or other events sponsored by a political organization and speak on the candidate’s behalf.” Members discussed the extent to which judges should be permitted to speak to nominating and endorsing organizations freely, which led to a suggestion that Rule 5.06(d) state that judges may publicly identify themselves as a candidate of a political organization..

II. Meeting of December 4, 2004

The Canon 5 draft was revised overnight to reflect changes suggested at the December 3 meeting. After members had a chance to review revised Rules 5.01 and 5.02, they examined the header to Rule 5.01. Members voted to use “political activity” and not “electoral activity.” They decided to examine Canon headers at future meetings.

The Commission renumbered provisions as follows. Rule 5.07 was changed to Rule 5.05; Rule 5.06 was changed to Rule 5.03; and Rule 5.057 was changed to Rule 5.04.

Members discussed the frequency with which “as expressly authorized by law” is used throughout the Code. They weighed the advantages of using cross-references as opposed to repeating words and phrases in each rule. Members again considered the importance of listing prohibitions under every category of judge, even at the risk of repeating themselves.

Members discussed whether the prohibition against purchasing tickets applies to inaugural events. The words “or candidate” were added after “political organization.” Various suggestions were made to reorganize Rule 5.01(a), including grouping together admonitions with respect to political organizations. Members voted in favor of dividing Rule 5.01(a)(3) into subsections.

Members considered whether it is permissible for a judge to attend events at a candidate’s home and the importance of judges attending “meet the candidate” forums. Members considered whether “political organizations” are those that are devoted to electing more than one candidate, and whether they include candidates’ committees.

A majority favored deleting Rules 5.01(b) and (c). and adding a provision stating that one cannot do indirectly what one cannot do directly. The Commission reorganized the Rule 5.01 comments. They considered whether the rationale for Rule 5.01 Comment [6]. Members acknowledged the importance of avoiding vague language such as “rule in a particular way,” which appears in the current Code.

The Commission proceeded to apply the list of prohibitions in Rule 5.01 to the rest of Rule 5.02.

Rule 5.02(d) was revised to read, “[m]ake any public or nonpublic 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.”

With regard to Rule 5.02(f), the Commission agreed to go back to the original language, so that the provision reads “[a] candidate shall not use or permit the use of campaign contributions for the private benefit of the candidate or others.”

The bracketed “knowingly permit” in Rule 5.02(g) was approved.

Rule 5.03(d) was rewritten to state “publicly identify oneself as a member or a candidate of a political organization.” A majority stated they preferred “political organization” over “political party.” Members also considered whether stating “endorsed by” was acceptable. The Commission discussed the impact of *Minnesota v. White* on judges identifying themselves with causes.

The Commission explored the policy reasons behind the current version of Rule 5.03(f). Members acknowledged that the provision must be drafted to avoid “giving the edge” to candidates who currently are not judges. Pursuant to a vote, Rule 5.03(f) was redrafted to read “contribute to a political organization.”

“[I]ncluding a judicial office” was deleted from Rule 5.03(g). Members agreed that the “publicly endorse or publicly oppose” language should be revised to state “publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running.”

The Commission considered whether the newly-revised provisions relating to partisan public elections could work just as well for the rule relating to non-partisan elections. They revised what newly-designated Rule 5.04(a) to state “establish a committee of responsible persons to solicit and accept campaign contributions and conduct the public election campaign, as described in rule 5.08.”

After further discussion, the rest of Rule 5.04 was revised to read:

- (b) speak to gatherings on his or her own behalf;
- (c) attend meetings or other events sponsored by a political organization;
- (d) purchase tickets for events sponsored by a political organization;
- (e) contribute to a political organization other than a political party or a partisan candidate;
- (f) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running without making reference to political party affiliation;

The Commission considered whether, in a non-partisan state, candidates can indicate their party affiliation. They explored the significance of campaign committees and whether “political organization” encompasses “campaign committee.” Members considered whether “political organization” could be defined in comment.

Members next considered the rules dealing with candidates for judicial office subject to retention elections and those who are candidates for appointment. After discussion, members decided to keep the rule related to retention a separate provision:

A candidate for judicial office subject to retention election may:

- (a) establish a committee of responsible persons to solicit and accept campaign contributions and conduct the public election campaign, as described in rule 5.08;
- (b) speak to gatherings on his or her own behalf;
- (c) attend meetings or other events sponsored by a political organization;
- (d) purchase tickets for events sponsored by a political organization;
- (e) contribute to a political organization other than a political party or a partisan candidate;
- (f) publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the judge or judicial candidate is running without making reference to political party affiliation.

Members acknowledged that an individual can be up for appointment and election at the same time.

Rule 5.07(b) was modified to read “[s]uch committees may solicit and accept reasonable campaign contributions, not to exceed, in the aggregate, [\$] from any individual, or [\$] from any entity or organization. such committees may also manage the campaign, including the expenditure of funds for the candidate's campaign and obtain public statements of support for his or her candidacy.” Members briefly discussed whether to leave in the bracket or to insert a set dollar amount.

The Reporter committed himself to completing a redraft, which he will circulate to the members by December 15. Members decided to hold a teleconference on December 20 to discuss the revised draft. The Chair requested that the Commission's subcommittees assigned to review individual Canons submit to the Commission listserve by December 15 any issues that ought to be revisited before the Commission disseminates a discussion draft of the entire Code prior to the 2005 Midyear Meeting.

(I:\USERS\LIBCPRA\ETHICS\JUD-CODE\Code Revision 2003-2004\Minutes\Summaries\120304.minutes.summary.doc 12/10/2004 12:40 PM)