

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Meeting Minutes
December 5-6, 2003
Washington, D.C.**

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
Hon. M. Margaret McKeown
Hon. Harriet L. Turney (by telephone)
Hon. James A. Wynn

Staff Participating

Jeanne P. Gray, CPR Director (by phone)
Eileen Gallagher, Justice Center Counsel
George A. Kuhlman, Ethics Counsel
(by telephone)
Eileen B. Libby, Associate Ethics Counsel
(by telephone)
Maggie Viertel, Research Assistant
(by telephone)
Nancy Slonim, ABA Media Relations
(by telephone)

Reporter Participating

Charles G. Geyh

Advisors Participating

Hon. Carol Amon
Hon. Peter W. Bowie
Robert P. Cummins
Marvin I. Karp
M. Peter Moser
Robert H. Tembeckjian
Seth Rosner

The Commission discussed their reactions to the December 5 open hearing and roundtable discussion. The remainder of the meeting was spent focusing on the Reporter's recent draft. Members engaged in an extensive discussion regarding whether the black letter rules should contain hortatory statements or whether they only should be used to provide a basis for discipline. Some members were of the view that the Code could contain broad precepts as well rules designed to provide a basis for discipline. Other members opined that broad policy statements could be subject to constitutional attack and the Commission should focus on assisting states in enforcement by articulating clear and definable rules. Members discussed the importance of drafting provisions to withstand constitutional challenges.

The Commission discussed the Code of Conduct for U.S. Judges and the system in place for enforcing its provisions.

Regarding proposed Rule 1.01, it was suggested that "impartiality" be inserted in the black letter rule and wherever "independence" appears in the Judicial Code. The Commission will consider whether "independence of the judiciary" is deserving of a

separate rule. The Reporter will draft language changes to Rule 1.01 for the Commission's review. Commission members discussed making Rule 1.01 comport with current Canon 1.

Members discussed the lack of definitions in the Code, in particular, the word "independence." They also discussed the necessity of revisiting the definition of "impartiality."

Regarding Rule 1.02, someone suggested that the title be switched to "complying with the law" or something similar. It also was suggested that "independence" be added to 1.02. A member opined that it is important to maintain the current standard relating to on-the-bench personal behavior, which led to discussion regarding whether to place rules relating to on-the-bench and off-the-bench activities together. After further discussion, the Commission preliminarily decided that Rule 1 should contain broader notions and general principles; Rule 2 should relate to off-the-bench, personal behavior; and Rule 3 should relate to official conduct. It was suggested that present Canons 2 and 4 be placed together and that present Canons 1 and 3 be placed together. It further was suggested that rule headings should be plain and simple, e.g. "Professional Activities." The Commission discussed the enforceability of rule headings.

The Commission considered whether to delete "impartiality" from Rule 1.02 or to explain it further. Also regarding Rule 1.02, the Commission agreed to delete "at all times" as surplusage both here and elsewhere in the Code.

The Commission discussed the placement of "[t]he test for appearance of impropriety" in Comment [1], and considered whether to move it to Rule 1.03. Turning to Rule 1.03, the members discussed the subjective nature of the meaning of "impartiality" and acknowledged the need to take due process concerns into consideration when defining the term in the Code. In this regard, they discussed whether to use "should" or "shall" in the rule. Members decided to bracket "shall" and "should" in the rule and look to see what states use what term in their current codes. It was suggested that the Commission explore how "appearance of impropriety" has been used in state disciplinary actions, in state ethics opinions, and in federal opinions.

A suggestion was made to move the text of Rule 1.04 to "Category 3," on-the-bench activities, and to keep Rule 1.05 in its present place. Another suggestion was made to incorporate the "dispose of all matters" language of Rule 2.03. In discussing Rule 1.04, an advisor suggested that this rule comes from a much larger grouping from the old Canon 3B(7) addressing *ex parte* communications. It was suggested that this rule might be better back in the on-bench conduct grouped with the *ex parte* rules. Another suggestion was made that it might be beneficial to have it stand alone. It was agreed that the Commission would bracket this issue in both places.

Noting the great amount of litigation regarding Rule 2.01, the Commission decided to add "or recusal where required or appropriate." The Commission will

examine recusal-related questions further. They considered whether the reference to recusal should remain in Rule 2.01.

Members discussed the “competence” and “faithful to the law” provisions in Rule 2.02. They recognized that it is fundamental to our system of jurisprudence that judges feel free to break new ground, challenge existing assumptions, present novel legal reasoning and experiment with different approaches. In most instances they must be able to do so free from fear of discipline for the free expression of their ideas. Members agreed to renew this issue after reviewing case law. It was recommended that the “despite his or her personal views” might be inserted into the rule.

The Commission considered whether to move Rule 2.02 to “Category 3,” on-the-bench activities.

Members discussed whether the Code could be improved with respect to addressing problems associated with impaired jurists. The Commission will spend more time on the issue in the future

Members will consult the draft chapters of *The Annotated ABA Model Code of Judicial Conduct* to examine how “faithful to the law” is used.

Regarding whether to use introductory language setting up the subparts that follow, members will examine the entire text of the Code to determine whether such language is required and, if it is, how to make the overall style of the Code internally consistent.

Members will discuss Rule 2.05(a) after they have reviewed an article by Harvard Professor Andrew L. Kaufman on the subject of affiliation with discriminatory organizations. They discussed the history of the amendments to Canon 2 in 1990. A member requested that “sexual orientation” should be added to the list in Rule 2.05(a). The members discussed whether Rules 2.05(b) and (c) are susceptible to First Amendment attack. They also discussed whether “by words or conduct” was unnecessary. Members reached a consensus that “manifest” was the best possible term to convey the correct meaning. It was suggested that Comment [6] should be in the black letter rule.

A member suggested that the Code should provide more guidance to the profession regarding judicial involvement in settlements. A member and the Reporter were asked to work together on language addressing the issue.

It was decided that the cases cited in Rule 2.05, Comment [1], should be deleted. The first paragraph of the comment should be associated with 2.05(a). Discussion of paragraphs 2 and 3 will be deferred until after the Commission reviews the Kaufman article. In Comment [5], the provision relating to facial expression and body language will be rewritten. “[I]n addition to oral communication” will be deleted and “even” will

be placed before “facial expression.”

The members discussed how Rule 2.06(b), which deals with a judge obtaining the advice of disinterested experts on the law, often is violated. They examined the difference between consulting other judges for help and using others to perform adjudicatory duties. They considered whether consulting outside sources was problematic if the parties are given notice. Several members recommended that stronger language was needed stating that it is impermissible for judges to form their opinions based upon independent factual investigations and other information outside the evidentiary record. Members agreed this issue needs to be discussed further, especially in light of the Internet’s immediate access to information.

There was a suggestion that Rule 2.06 Comment [1] be rewritten to reference communication both to and from lawyers, by replacing “from” with “with,” and that “except to the limited extent permitted” be placed in the black letter rule. It was suggested that paragraph 2 take into account that, in emergency situations, it might not be possible for all parties to be present. Members agreed that the black letter and the comment need revision in order to comport with each other.

The Reporter will produce a new draft reflecting comments made at this meeting.