

MEMORANDUM

To: Individuals and Entities Interested in Judicial Ethics
From: Mark I. Harrison, Chair, ABA Joint Commission to Evaluate the Model Code of Judicial Conduct
Date: January 28, 2005
RE: Posting of Fourth Draft Proposals for Public Consideration and Comment

The American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct hereby posts to its website, <http://www.abanet.org/judicialethics> a fourth installment of proposed revisions to the ABA Model Code of Judicial Conduct. The draft contains the black letter rules of Canon 5, which covers political activity of judges and judicial candidates. Commentary to these rules will be posted at a later date.

In drafting the proposed revisions that are being posted today, the Joint Commission once again relies upon the information it has gained from an ongoing series of public hearings that have been held in conjunction with its frequent meetings, and upon the research being conducted by the Joint Commission's Reporters and Counsel. The draft provisions circulated here represent only the current thinking of the members of the Joint Commission and its advisors, and the current draft will be reconsidered following receipt of public comment.

The Joint Commission welcomes comments and questions regarding the substantive provisions of this fourth preliminary draft. Comments should be directed to Eileen C. Gallagher at gallaghE@staff.abanet.org, or to her via mail at American Bar Association, Justice Center, 321 North Clark Street, Chicago, IL 60610. If you believe that changes should be made in the proposed language, please provide specific language to the Joint Commission. The Joint Commission will next meet in Salt Lake City February 11-12, 2005, during the ABA Midyear Meeting. The Joint Commission would appreciate all comments as soon as possible, but not later than March 15, 2005.

The following issues, addressed in specified provisions of this draft, were prominent in the discussions of the Commission, and were considered to be of enough significance that the Commission makes particular reference to them here, noting questions that remain unresolved. Your comments on these issues will be helpful. However, the Commission expects that comments on other issues, which may not yet have been identified, will also be very helpful. *You are encouraged to bring any and all concerns to our attention.*

1. The preliminary draft of Canon 5 takes a new approach to outlining the rules related to political activity. The first rule governs the political activity of sitting judges only. The second rule provides a list of prohibited political activity for judicial candidates. Rules 5.03 through 5.05 provide specifics related to judicial selection method, e.g. 5.03 relates to partisan judicial elections, 5.04 relates to non-partisan and retention judicial elections, and 5.05 related to the appointive process. The Joint

Commission seeks comments on whether this organization and format provides a more user-friendly, coherent delineation of permitted and prohibited political activities.

2. Commentary to Canon 5 is not included in this draft. The Commentary has undergone substantial revision and continues to be a subject of discussion for Commission members. We deemed it advisable to release the black letter, without Commentary, in order to obtain input on the Commission's direction sooner rather than later. The Commentary will be released in the near future.
3. There are a few instances in which existing black letter provisions are intended to be moved into the yet-to-be-released Commentary. Notable in this regard, for example, is Section 5A(3)(e) of the Model Code, which permits candidates for judicial office to "respond to personal attacks on the candidate's record"; we anticipate that this concept will ultimately be placed in Commentary to Rule 5.02(b)
4. The Joint Commission has tentatively decided to eliminate the black letter provision of Canon 5A(3)(a) that states, "[a] candidate for judicial office shall maintain the dignity appropriate to judicial office and act in a manner consistent with the impartiality, integrity and independence of the judiciary...." choosing instead to place these concepts in the Canon title, and noting that they are overarching obligations already identified earlier in the Code. Suggestions for alternative approaches would be appreciated.
5. Commission members spent a significant amount of time debating the definition of "political organization." Although not proposing a change in the current definition of the term in the Code's "Terminology" section, the Commission has formulated its proposed black letter provisions using an interpretation of the phrase that includes political parties, PAC's dedicated to the election or defeat of candidates, and campaign committees for individual candidates. Comments as to the use of this term, as well as to the issue of whether the current definition of "candidate" is useful, are welcome.
6. Rules 5.01(b) and 5.04(a)(1) use the phrase, "publicly speak in support of or against a political organization." This is a redrafted version of the current Model Code language, which is phrased, "make speeches on behalf of a political organization." Does the new language unintentionally change the meaning of the rule? Does the new language raise issues with the prohibition of speaking "against" a political organization?
7. Rule 5.04 covers not only non-partisan judicial candidates but also judicial candidates running in retention elections. Do the provisions of this Rule adequately address the unique issues of retention elections, especially when considering the allowance to create campaign committees?
8. Rule 5.06 covers the creation of campaign committees. This preliminary draft deletes language of the existing Canon, especially language found in Canon 5C(2) that specifies the ways the campaign committees may run the campaign. Also deleted is the reference that the judicial candidate must instruct his or her campaign committee to

accept only campaign contributions that adhere to the monetary limits established by the Code. Comments on these proposed changes are appreciated.

9. The Application section of Canon 5, which addresses disciplinary jurisdiction over successful and unsuccessful candidates who violate provisions of this Canon, is not contained in the current draft. The tentative decision is to move this to the Code's general application section. Comments on this tentative decision are welcome.

The Joint Commission appreciates the interest you have demonstrated in monitoring – and we hope commenting upon – this ongoing project. We will carefully consider your comments and specific proposals.

