

**AMERICAN BAR ASSOCIATION  
JOINT COMMISSION TO EVALUATE THE  
MODEL CODE OF JUDICIAL CONDUCT  
Summary of Teleconference Minutes  
January 10, 2005  
9:30 a.m., CST**

**Members Participating**

Mark I. Harrison, Chair  
James Alfini  
Jan Witold Baran  
Thomas Fitzpatrick  
Hon. M. Margaret McKeown  
Hon. Cara Lee Neville  
Hon. Harriet L. Turney  
Hon. James Wynn

**Advisors Participating**

Hon. Carol Amon  
Hon. Peter W. Bowie  
Robert P. Cummins  
Marvin Karp  
D. Dudley Oldham  
Hon. Ellen Rosenblum  
Seth Rosner  
Robert. H. Tembeckjian

**Reporters Participating**

W. William Hodes

**Staff Participating**

Jeanne P. Gray, CPR Director  
George A. Kuhlman, Ethics Counsel  
Eileen C. Gallagher, Justice Center  
Eileen B. Libby, Associate Ethics Counsel  
Maggie J. Viertel, Ethics Legal Assistant

The teleconference was spent discussing proposed Rules 5.01, 5.02, and 5.03 from the draft entitled “WWH Second post-Phoenix Draft.” Mr. Hodes explained his approach. He stated that some “cleanup” stylistic changes were required. In addition, he presented alternative proposals for certain provisions.

Before beginning their analysis, the Commission considered and rejected a proposal from an advisor to revise the draft of Canon 5 to contain a single rule with proscriptions followed by categories for the various types of judges. Members considered whether to use “political” in the lead sentence of Rule 5.01, so that it would state “[j]udges who are not candidates for judicial office shall not, directly or indirectly engage in the following activities,” and whether to stop after “indirectly”, followed by a colon.

Members agreed that, in order to make the best use of time, they would not focus on structural matters. It appears that another teleconference will be needed before the Midyear Meeting in Salt Lake City. It is unlikely that the Commission will be posting a full Discussion Draft to its website before that meeting.

A staff member inquired as to whether proposed Rules 5.01(b) and (c) change the meaning of their current counterparts. After discussing whether the current language is outdated, members voted in favor of the proposed language. Regarding proposed Rule 5.01(e), the Commission agreed to delete “financial.”

A member suggested reworking Comment [1] to eliminate passive voice. Regarding Comment [2], the Commission considered whether to add “as prescribed by state law.” It was suggested that it is important to provide guidance regarding when one is subject to Rules 5.01 and 5.02. Members discussed the example of the person who publishes a letter expressing the intention to run in an election far in the future and how that should be handled under the Code.

Members discussed whether proposed Comment [3] obscures the principles expressed in its current counterpart, and the differences between membership in a political party organization as opposed to membership in a political organization. Alternatives were considered, including moving the first two sentences to the end and/or substituting language from the original version. A member suggested that the Comment should permit judges to both vote and have membership in a political party.

The Commission considered whether the Comment needed to be more extensive than it is in the present Code. Once the members determined that the time allotted for the teleconference did not permit extensive discussion of the Comment, they decided to concentrate on the black letter rules in order to get them posted to the Commission’s website as soon as practicable.

Turning their attention to proposed Rule 5.02, “Conduct of Candidates for Judicial Office,” the Commission heard the Reporter summarize his approach. It was suggested that “shall not endorse” be added to the provision. Pursuant to a point raised by a staff member, the Commission discussed whether language added to Canon 3 pursuant to *Minnesota v. White* is redundant because it also appears in proposed Rule 5.01(c). The point led to discussion whether the provision applies to both sitting judges and to lawyers running for judge. A suggestion was made to qualify “comment” with “public or nonpublic,” but a majority voted to delete the language in the three places it appears.

Members voted on alternative proposals for Rule 5.03(a), choosing “establish a campaign committee to solicit and accept campaign contributions and conduct the public election campaign, as described in Rule 5.07.” The phrase “conduct the public election campaign” was deleted.

Turning to Rule 5.03(b), which reads “speak to gathering on his or her own behalf,” members considered their options, including whether to delete the provision in its entirety. After discussion, members agreed to retain the provision because it is important not to leave an impression that candidates can speak only to groups sponsored by political organizations. It was suggested that “gatherings” is an imprecise term.

The Reporter offered several alternative versions of proposed Rule 5.03 (c). After discussion, it was decided to retain “attend meetings or other events sponsored by a political organization.” Members had no comment regarding proposed Rule 5.03(d), relating to public identification as a member of a political organization.

Regarding proposed Rule 5.03(e), members decided to delete “or fundraising events” from “purchase tickets for events, [including fund-raising events], sponsored by a political organization.”

Members discussed the application of proposed Rule 5.03(f) to partisan and nonpartisan candidates. The rule states that candidates for judicial office subject to partisan public elections may “make a financial contribution to a political organization or to a candidate for public office.” An advisor expressed concern that the proposed rule treats nonpartisan and partisan candidates unevenly. Members discussed various scenarios involving judges paying to attend political events, including events where the judges receive endorsements. They considered whether to delete the provision in its entirety.

Regarding Rule 5.03(g), members favored “publicly endorse or publicly oppose other candidates for the same judicial office in a public election in which the candidate is running.” An advisor stated that the proposed Code neglects the subject of advertising. A staff member asked the Commission to reconsider the Canon 5 applicability language, which was dropped from the proposed black letter rules.

The Chair will poll the members to determine their availability for a January 17 teleconference. He urged the members to exchange e-mails regarding their concerns before the call. The Reporter will send staff a revised draft reflecting today’s discussion for dissemination to the Commission.