

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Teleconference Minutes
January 17, 2005**

Members Participating

Mark I. Harrison, Chair
James Alfini
Thomas Fitzpatrick
Hon. Cara Lee Neville
Hon. Harriet L. Turney

Advisors Participating

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

Reporters Participating

W. William Hodes

Staff Participating

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

On January 10, the Joint Commission reviewed proposed Rule 5.01, “Political Activities of Judges”; Rule 5.02, “Conduct of Candidates for Judicial Office”; and Rule 5.03, “Conduct of Candidates for Judicial Office Subject to Partisan Public Elections”. Before turning to the remaining provisions in Canon 5, the members reviewed their previous effort, particularly in light of extensive comments received from one of the advisors.

The Joint Commission discussed whether Canon 5 should cover political conduct outside the context of campaigns, particularly conduct involving bias or prejudice. Members discussed if it would lead to confusion to omit from some, but not all, judicial categories, “a candidate for judicial office, including an incumbent judge, shall not, directly or indirectly manifest bias or prejudice, based upon a person’s race, gender religion, national origin, ethnicity, disability, age, sexual orientation, or socioeconomic status.” After further discussion, they provisionally agreed to restore the language to Rules 5.02(c) and (e). They also considered whether use of “incumbent judge” was too limited.

Pursuant to an advisor’s recommendation, the title of proposed Rule 5.03 was changed to “Permitted Political Activities of Candidates for Judicial Office in Partisan Public Elections.” Rule 5.03(a) was changed to read “[a] candidate for judicial office subject to partisan public election may establish a campaign committee pursuant to the provisions of Rule 5.07.”

Regarding proposed Rule 5.04, “Conduct of Candidates for Judicial Office Subject to Non-Partisan Public Election,” prior to today’s teleconference, a member circulated an e-mail regarding non-partisan elections. The e-mail called upon the Joint Commission to address the subject in a separate provision in the revised Code. The decision to do so requires a determination of the purpose of non-partisan elections, whether they involve “political activity” or “political organizations,” and whether they mean complete lack of political party involvement. Members considered whether to retrain the non-partisan election provision or to let states having such systems determine their own rules. Acknowledging the difficulty of crafting a rule of general application, some members spoke in favor of doing so in order to provide non-partisan states with guidance. An advisor volunteered to research states with non-partisan judicial elections to determine what conduct is permitted and prohibited.

Turing to proposed Rule 5.05, “Conduct of Candidates for Judicial Office,” members discussed the differences between retention elections and other forms of judicial elections. They considered whether the subject of retention elections needed a separate rule or whether it could be covered adequately in comment. Similarly, the members discussed whether the substance of proposed Rule 5.06, “Conduct of Candidates for Appointive Judicial Office,” could be addressed in comment.

After discussion, they agreed to the following formulation of proposed Rules 5.06(a) and (b), which were proposed by an advisor:

A candidate for appointment to judicial office may:

- (a) communicate with the appointing authority, including any selection or nominating commission or other agency designated to screen candidates;
- (b) seek support or endorsement for the appointment from organizations that regularly make recommendations for reappointment or appointment to the office, and from individuals.

Regarding proposed Rule 5.07, “Campaign Committees,” members accepted an advisor’s suggested language for subparagraph (c): “A campaign committee may not solicit and accept contributions for a candidate’s current campaign more than [one year] prior to a scheduled election nor more than [90] days after the last election in which the candidate participated.”

No later than Wednesday, January 19, the Reporter will circulate a revised version of the black letter rules discussed today. Members discussed where to place the applicability provision.

Members were urged to send in their comments regarding the black letter and comments as soon as possible in order that they can be placed on the Joint Commission’s listserv and website as soon as practicable. He directed the Reporter and staff to prepare

a memorandum explaining the Joint Commission's revisions. It will be posted together with the proposed provisions.