

**AMERICAN BAR ASSOCIATION  
JOINT COMMISSION TO EVALUATE THE  
MODEL CODE OF JUDICIAL CONDUCT**

**Summary of Meeting Minutes**

**February 12, 2005**

**Salt Lake City, Utah**

**Members Participating**

Mark I. Harrison, Chair  
James Alfini  
Jan Witold Baran  
Thomas M. Fitzpatrick  
Donald B. Hilliker  
Hon. Margaret M. McKeown  
(by telephone)  
Hon. Cara Lee T. Neville  
Hon. Harriet L. Turney  
Hon. James A. Wynn

**Staff Participating**

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

The members reviewed two documents, a November 29, 2004, memo by Judge Peter Bowie entitled "My Comments on Proposed Canon 2," and the "December 2005 Canon 2 Working Group Draft."

With regard to the disqualification provision, they discussed the objective standard in 28 U.S.C. § 455(a) (whether "an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality.").

Members decided to combine Rule 2.12(A) and (B), and to insert "including, but not limited to," at the end of A. Regarding proposed Rule 2.12(B)(6)(d) ("within the preceding three years"), the members decided to put a bracket around the "three," so jurisdictions can insert their preferred time period. They discussed the application of the Code to a judge whose spouse is involved in non-judicial elective politics, and children of judges working for law firms that appear before the judge.

Regarding a proposed comment to Rule 2.12, the Joint Commission decided to delete “[t]o assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule.”

With regard to proposed Rule 2.13, “promptly and” was added after “administrative responsibilities,” and “professional” was deleted from line 29. The largely stylistic changes to proposed Rule 2.14 were accepted.

The Joint Commission considered whether supervisory authority should be extended to judicial performance and whether the standard therein should be similar to the one in the Model Rules of Professional Conduct. The Joint Commission will continue work on language regarding proposed rule 2.17, which deals with mandatory reporting of judicial misconduct. The substance of Rule 2.18 (Lawyer Misconduct) was moved into Rule 2.17. A new Rule 2.19 cmt, 2 was added:

“Appropriate action” means action intended or reasonably likely to help the judge or lawyer in question to correct the problem, or to protect innocent third parties. This corrective action may include direct communication with the judge or lawyer who is believed to have the impairment, direct communication with that judge or lawyer’s partner or supervisor, or confidential referral to a lawyer or judicial assistance program.

The members will continue to work on Rule 2.19 to clarify whether the first report could be made directly to the disciplinary authority instead of the judicial assistance program. There was a suggestion that proposed Rule 2.17 and 2.19 cross-reference each other.

Members turned their attention to a proposed Preamble, which was distributed at this meeting. They voted in favor of preserving the Preamble as a statement of principle and policy. The proposed Preamble should contain a statement regarding the function of Canon titles and how they should be used. It was suggested that the following language be included, perhaps as a third paragraph: “Public confidence in the judiciary is eroded by improper conduct by judges. A judge should avoid all impropriety and appearance of impropriety, and should expect to be the subject of public scrutiny. The public should expect, and a judge should therefore accept, certain restrictions on the judge’s conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.”

A subcommittee was selected to continue working on the Preamble.

The remainder of the meeting was spent revising the proposed Commentary to Canon 5, which was circulated just prior to the Salt Lake City meeting. A member suggested that Rule 5.01 cmt. 1 begin with its second sentence. Several suggestions

were made regarding Rule 5.01 cmt. 2. They included adding transitional language between the first and second lines and ending the Comment after “for judicial office.”

It was suggested that language regarding outside appearances that appears in Rule 2.10(2) be added to Rule 5.01 cmt. 3. An advisor recommended that line 42 be redrafted to state “closely identified with organization” in place of “loyalty.” The last line was redrafted to state, “[a] judge may belong to a political organization, or register to vote as a member of a political organization; however, these activities are not prohibited.”

Another advisor objected to “tantamount to” in line 10 of Rule 5.01 cmt 5. A member suggested deleting the next sentence, which begins “[t]hat is the principle reason...” The last line of the Comment was redrafted to state “[p]rohibiting public endorsements and related campaign activity contributes to maintaining the impartiality and independence of the judiciary.” A member suggested placing the first sentence of Rule 5.01 cmt. 6 at the end of Comment [5], and retaining the reference to “prohibited by Rule 5.01(d).”

A member recommended that the last sentence of Rule 5.01 cmt. 7 be deleted. A majority disagreed with a suggestion to delete Rule 5.01 cmt. 8. An advisor would move it to the Reporter’s Notes.

Members discussed ways to make Rule 5.01 cmts. 9, 10, and 11 more concise, including deleting “on the judge’s behalf” in Comment [9]. In Comment [11], “especially those” in line 22 was deleted and “cultivating” in line 28 was changed to “creating.” An advisor suggested that lines 30-32 of Comment [11] be rewritten to say, “unless the judge had no prior knowledge of the family member’s plan or knew about it and was unable to discourage it.”

The Joint Commission discussed dissemination of false information regarding judges and whether the prohibition should apply only to judicial candidates. They also considered the extent to which individuals should be allowed to respond to, and comment upon sua sponte, false information and criticism. Staff will research the subject.

Members discussed whether, with regard to Rule 5.02 cmt 1, the “narrowly tailored” standard needed further elaboration. Members considered whether to combine Comments [1] and [2]. An advisor suggested that the Joint Commission might write a special memorandum to explain the rationale for Canon 5. The Reporter will redraft Rule 5.02 cmt 3 in order to clarify the applicability of the Code to non-judge candidates.

Members discussed whether Rule 5.02 cmts 4, 5, and 6 were necessary. A majority voted to delete Comment [6]. For the next draft, the Reporter will determine where to relocate “dignity.” An advisor suggested moving it to the second sentence of Comment [2] on page four. Another advisor recommended deleting the last clause of Comment [7] (“whether made in public during the course of a campaign, or to committees or

organizations that endorse or rate candidates for judicial office.”). The first line of Comment [8] was rewritten to state, “[c]andidates for judicial office may be the subject of unfair allegation made by an opposing candidate, a third party, or the media.”

Several members commented that it is preferable for a surrogate, rather than the judge, to respond regarding unfair allegations. “Cure” was changed to “address” in the last line of Comment [8]. Members reviewed written comments that suggest that judges should carefully consider whether their responses may be construed as predictive of their future rulings, and whether they convey a misleading view of their positions.

Members expressed their views regarding the applicability of the “pledges, promises, and commitments” clause to adjudicative and administrative duties.

Rule 5.02 cmt. 14 will be rewritten.

The Joint Commission was receptive to suggestions to use “blended” comment instead of repeating text, and to intersperse short summaries throughout the Code.

It was recommended that Rules 5.02(g), (h), and (i) be combined and that prohibited conduct be grouped by subject-matter.

The Chair stated that the Joint Commission should finalize the Canon 5 Comment over the next two weeks in order to release it to the public as soon as possible. Members were urged to send their comments and suggestions to the Reporter.

The Joint Commission next will meet in Chicago on March 19-20.