

**AMERICAN BAR ASSOCIATION
JOINT COMMISSION TO EVALUATE THE
MODEL CODE OF JUDICIAL CONDUCT
Summary of Teleconference Minutes
December 20, 2004**

Members Participating

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

Staff Participating

Eileen C. Gallagher, Justice Center Counsel
Marcia Kladder, Associate Director, Justice Center
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Eileen B. Libby, Associate Ethics Counsel
Maggie Viertel, Editorial Assistant
Nancy Slonim, ABA Media Relations

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Advisors Participating

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Hon. Peter W. Bowie
Robert P. Cummins
Marvin I. Karp
M. Peter Moser
Dudley Oldham
Hon. Ellen Rosenblum
Seth Rosner
Robert H. Tembeckjian

The entire focus of the teleconference was discussion of the December 15, 2004, Canon 5 redraft. The Commission discussed the draft's organization and how it related to the discussion at the Phoenix meeting earlier this month. Members considered whether Rule 5.01 should contain an outright statement that incumbent judges who are not candidates for political office must not engage in political activity.

The December 15 draft set forth alternative provisions, which the Commission examined in turn. The Commission first decided which of four alternate headings to select. They provisionally elected to call Canon 5 "When Engaging in Political Activity, a Judge or Candidate for Judicial Office Shall Uphold the Impartiality, Integrity and Independence of the Judiciary."

Turning to the Rule 5.01 provision regarding judges' political activities during periods when they are not candidates, the Commission discussed two alternative provisions, one of which contained the following subparagraphs:

- (f) shall not knowingly permit employees and officials subject to the JUDGE'S direction and control from doing on the JUDGE'S behalf what the JUDGE is prohibited from doing under this Canon; and

- (g) shall discourage MEMBERS OF THE JUDGE’S FAMILY from doing on the JUDGE’S behalf what the JUDGE is prohibited from doing under this Canon.

The capitalized terms will be separately defined elsewhere in the Code. After discussion, members voted to delete both subparagraphs. In their place will go language that will deal generally with “acting through another” and related topics. In light of the deletion, the Reporter will insure that comments are consistent with the remaining language.

The Commission recalled its decision in Phoenix to repeat provisions throughout Canon 5 for the various modes of judicial selection.

Members next considered Rule 5.01(e), which dealt with soliciting funds for, paying an assessment to, making a financial contribution to, or purchasing tickets for dinners or other fund-raising events sponsored by a political organization or a candidate for public office. They sought language that was broad enough to embrace the problem identified, which led to suggestions to add “or other events” or “other fundraising events sponsored by a political organization.” This in turn led to examination of the meaning of “political organization.” After further discussion, a majority voted in favor of the following language:

JUDGES who are not CANDIDATES for judicial office shall not directly or indirectly engage in the following activities: (e) solicit funds for, pay an assessment to, make a financial contribution to, or purchase tickets for dinners or other events sponsored by, a POLITICAL ORGANIZATION or a CANDIDATE for public office.

The introductory language “JUDGES who are not CANDIDATES for judicial office shall not directly or indirectly engage in the following activities” also was added to the introduction to proposed Rule 5.02.

The Commission considered the meaning of “political activity,” and whether the term encompasses only election-related activities. A member questioned whether holding office in advocacy groups such as “Save the Whales” would be permitted. Members discussed the propriety of judges attending meetings of or soliciting funds for a labor union, a business or trade association, an issue advocacy organization, or another community organization.

Members also considered whether to add a reference to “political activity” in the lead-in sentence that will apply to every subparagraph under Rule 5.01.

The Commission weighed the merits of fashioning Canon 5 as a broad, expansive statement as well as the advantages of using the list of prohibitions as contained in the most recent draft. Several members advocated in favor of staying with the present approach in that broad statements are vulnerable to constitutional attack.

Members analyzed comments relating to judges attending meeting sponsored by political organizations judges' spouses and children speaking at meetings sponsored by political organization.

Turing to proposed Rule 5.02(b)(1), members examined two alternatives, ultimately voting in favor of the following:

- (b) shall not, in the course of advancing his or her candidacy, KNOWINGLY make any FALSE OR MISLEADING statement regarding any CANDIDATE for judicial office.

The comment will be clarified to state that the provision applies both to other candidates and the judge himself or herself.

Members also considered several alternative versions of Rule 5.02(c), ultimately voting to retain the existing language:

- (c) shall not, with respect to case, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the IMPARTIAL performance of the adjudicative duties of the office.

A comment that relates to judges and lawyer making clarifying statements regarding legal matters that have become matters of public controversy, prompted discussion of the proper place of bar association "fair response committees."

Members discussed whether a comment concerning judicial candidates soliciting public support and public endorsements from individuals or organizations is subject to constitutional attack.

The Reporter will circulate a revised draft of proposed Rules 5.01 and 5.02 before the end of the week. Members will discuss it at a teleconference tentatively scheduled for January 10, 2005.