ABA/BNA Lawyers' Manual on Professional Conduct
ISSN 1521-5083

Judges

On Eve of Election Day, Judicial Code Panel Looks at Rules on Judges' Political Activities

CHICAGO—With Election Day nearing, the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct Oct. 22-23 used its ninth meeting and seventh public hearing to focus appropriately enough on what kinds of political activity by judges and judicial candidates should be considered inappropriate.

Among the many questions explored was whether it is even possible to come up with a one-size-fits-all rule on this subject, given the many different methods of judicial selection employed around the country.

In addition to its inquiry into reshaping Canon 5 of the Model Code of Judicial Conduct, the commission took advantage of the concurrent meeting in Chicago of the American Judicature Society's 19th National College on Judicial Conduct and Ethics by giving a packed audience of interested judges a pre-hearing update on the commission's progress in reforming Canons 1 through 4 of the code.

The commission also welcomed its new co-reporter, William J. Hodes Jr. of Indianapolis, who was appointed Oct. 14 to serve with Charles G. Geyh of the Indiana University School of Law.

Deadline Extended.

The commission's work on revising the judicial code seemed to come as a surprise to more than a few AJS attendees. Disappointed at this prospect, commission Chair Mark Harrison, of Phoenix, stressed that the commission has been actively soliciting as much input as it can get. Harrison asked those present to read the commission's materials and give the commissioners the benefit of their comments.

Emphasizing this point, Jeanne P. Gray, director of the ABA Center for Professional Responsibility, said that the commission wants to hear more from the judiciary as well as from the bar and the public. Hoping to generate a greater response, Gray announced that comments on all subjects, including those considered in previous meetings, will be welcomed until Jan. 15.

The group plans to revisit the entire code after receiving more comments; its goal is to present a final report for consideration by the House of Delegates at the ABA Annual Meeting, to be held in Chicago in August 2005.

To date, the commission has released drafts of its proposals to amend Canons 1 through 3 and parts of Canon 4. See 20 Law. Man. Prof. Conduct 262, 389, 526.

The panel indicated that its proposals for amending Canon 5 will follow.

For reports on previous hearings by the commission, see 20 Law. Man. Prof. Conduct 73, 179, 263, 318.

One for All?

This time around, most of the action took place at the commissioners' freewheeling meeting among themselves and their advisors rather than at the sparsely attended public hearing.

It quickly became apparent during the Oct. 23 meeting that the diversity of methods by which states select their judges poses a formidable question: Is it possible to formulate in the model judicial code one nationwide standard regarding judges' political activities that will work everywhere?

Many commissioners and advisors seemed astonished, if not aghast, to hear reports of how judicial campaigns are run in each other's jurisdictions.

In light of this varied background on judicial selection, commission members and advisors identified a number of issues that may need to be addressed in any amendments to Canon 5:
• Should there be one set of rules for elected judges and one for appointed judges?

• Should there be one subset for judges elected in a partisan election and another for judges elected in a nonpartisan election?

• What should be done about appointed judges who run for retention? Is it unrealistic to believe that a judge who must run for retention is not in some sense campaigning even when it’s not election season?

• What about a judge who runs for an elective judgeship while also seeking an appointment?

• How should the code treat judges appointed to fill vacancies?

• What about a lawyer who is angling for an appointment to fill the next judicial vacancy that opens up?

Draftsmanship Sprawl.

One possible source of confusion in the model code’s structure was raised at the meeting: What’s the relationship between the rules on political activities in Canon 5 and the rules governing extrajudicial activities generally in Canon 4? (The commission released draft revisions to Canon 4 on Oct. 5. See 20 Law. Man. Prof. Conduct 526.)

For example, if a judge or judicial candidate speaks publicly about tort reform, or getting tough on crime, is this political or does it constitute extrajudicial speech “concerning the law” that is permitted under Canon 4B?

Canon 4 purports to be about all extrajudicial activities, meeting attendees said. Is Canon 5 a subset? Or should political activities be treated as completely disposed of in Canon 5, without reference to Canon 4? Why are some of the criteria in Canon 5 different from those in Canon 4 anyway? And for that matter, should there be one set of rules addressing political activities generally and a separate, more liberal, set addressing political activities in the course of a judicial campaign? Moreover, how far into Canon 5 is the reach of *Republican Party of Minnesota v. White*, 536 U.S. 765, 18 Law. Man. Prof. Conduct 402 (2002), and *Weaver v. Bonner*, 809 F.3d 1312, 18 Law. Man. Prof. Conduct 663 (11th Cir. 2002)?(In August 2003, the ABA amended several provisions of the model judicial code, including Canon 5A(3)(d), in light of *White*. See 19 Law. Man. Prof. Conduct 467, 470.)

We could make things clearer if we keep all related rules together, several attendees at the meeting said.

The reporters said they would try to accomplish this goal.

‘Let’s Get Rid of It.'

In addressing each provision of Canon 5, the harder the commissioners looked the more they seemed to find the potential for mischief. The “let’s get rid of it” option—suggested sometimes in jest, but not always—popped up regularly.

The very first sentence of Canon 5's comment, for example, with its resounding declaration that a judge or candidate for judicial office “retains the right to participate in the political process as a voter,” raised some eyebrows at the outset.

Some also expressed concerns about the requirement of Canon 5A(3)(a) that a candidate for judicial office “encourage members of the candidate’s family to adhere to the same standards of political conduct in support of the candidate as apply to the candidate.” Among the points raised: Surely the rule is not saying that the candidate’s family members are bound by the Code of Judicial Conduct. If that were the case, no family member could run for political office. Furthermore, why the qualifier “in support of the candidate”? What does the requirement of “encouragement” mean? What level of encouragement is sufficient? What if the judge simply doesn’t discuss it? Is that a violation?

And finally, is it realistic for the law to suppose that anyone controls what his or her family members do? Commission member James Alfini, dean of the South Texas College of Law, quoted Charles Dickens. “‘If the law supposes that,’ said Mr. Bumble, ‘the law is a ass—a idiot.’”

Several other provisions received just as much skeptical scrutiny when the commission looked at them. But however appealing a revision or deletion might seem, said commission advisor Peter Moser, of Baltimore, the panel is not writing on a clean slate. Each provision has a long history, he said, and that very history may imbue it with a certain presumptive validity as well as a particular meaning that has given rise to settled expectations.

Moser cautioned that the commission must be able to clearly articulate its reasons for any changes it decides to recommend.

Clearer Standards.

The commission members seemed to agree during the meeting that Canon 5 and its comment as currently written—a mixed bag of shalls, shall nots, mays, may nots, musts, must nots, exceptions, exceptions to exceptions, and examples of permissible and impermissible activities—are not as helpful as they could be.

Commissioners appeared to favor moving toward a prohibitory approach: a clear statement of what is prohibited, with informative comment. If something isn't prohibited in the black-letter rule, it would be permitted.

But if we start weeding things out, some asked at the meeting, will this create new problems? Will eliminating examples of permitted activities be misinterpreted as a substantive change indicating that the particular activities are now forbidden? Let’s explain that we aren’t rejecting old black-letter provisions specifying permitted activities, one advisor suggested. Rather, we are deleting them because it’s no longer necessary to separate them out; if an activity is not mentioned it means it’s permitted.

Give this interpretive guidance up front, stressed other advisors and members. Do not make it necessary

for state and local ethics committees to produce a slew of ethics opinions advising that even though the ABA no longer specifically says you may do X, we interpret the new rule to mean you may still do X.

All who spoke at the commission meeting agreed that a judge is forbidden to ask a lawyer directly for a campaign contribution;most said that such a request demeans the judge no less than it jeopardizes the public perception of justice.

And while not everyone agreed that setting up campaign committees is an adequate alternative, most who spoke at the meeting indicated that it's better than nothing. At least the campaign committee offers a kind of buffer zone, it was said. It may be artifice—in the same sense that wearing black robes may be artifice—but the alternative would be "disastrous."

Maybe these are "enabler" provisions, suggested one commissioner, adding that the real evil is the need to fund judicial campaigns in the first place. Maybe a regulatory approach that countenances campaign committees just avoids dealing with it. If judges did have to go around asking for money directly, the commissioner said, perhaps we'd finally get public financing of judicial campaigns.

Public Support.

If it is offensive for a judge to ask a lawyer for money, is it any less offensive for a judge to ask a lawyer for a public statement of support? Oregon and Washington allow direct solicitations of publicly stated support, even though the Model Code of Judicial Conduct does not.

One advisor pointed out that if the ban on asking for "publicly stated support" meant what it said, a judge could never form a campaign committee in the first place. That's why Section 5C(2) has to specify that a candidate "may, however, establish committees of responsible persons to conduct campaigns."

Some commissioners and advisors wondered if there is any principled distinction between asking "May I add your name to my campaign committee?" (permitted), and "Will you publicly support me?" (prohibited). In theory, a judge could avoid the prohibition against soliciting public statements of support by simply asking every lawyer to serve on the campaign committee.

And what's the difference between the judge asking a lawyer "Will you publicly support me?" (prohibited) and the governor calling the lawyer and asking "Will you publicly support the judge?" (permitted). If this is an imperfect compromise, Harrison reflected, could we improve upon it?

Teeth Without Gums.

What's "publicly stated support" anyway? some asked. It could be anything from a newspaper endorsement to a lawn sign. Does it make any sense to treat them alike? Isn't it "absurd" to prevent the candidate from going personally (as opposed to sending someone from his campaign committee) to a newspaper or union to seek its endorsement? And what is the sense in letting members of the judge's campaign committee ask their neighbors to put up lawn signs but not letting the judge's clerk or family members ask them to?

The rule may be toothless, several members of the group agreed, but it needs to be there. One commissioner wondered whether it is possible ever to achieve public confidence if the code allows distinctions of this sort.

Several commissioners mused about whether a strictly regulatory approach—all teeth and no gums—would work better, but others suggested that the unenforceable parts serve an important educative

function.

The rule against asking for publicly stated support is really an attempt to protect lawyers from feeling coerced, one advisor offered, adding that perhaps the commissioners could improve upon the attempt with the benefit of research detailing the history of the rule.

And let's define what "publicly stated support"means, suggested Eileen Gallagher, who directs the ABA Standing Committee on Federal Judicial Improvements.

Judge's Perspective.

At the Oct. 22 public hearing, only two speakers testified. Their comments addressed questions Harrison had raised in his memorandum accompanying the release of the commission's draft revisions to Canons 1 and 2 in May. See 20 Law. Man. Prof. Conduct 262.

Circuit Judge Ray McKoski of Lake County, Ill., spoke passionately about the importance of judges' ability to speak informally with jurors after a trial. It's an excellent teaching opportunity, he said, and it means a great deal to the jurors.

McKoski said that on exit questionnaires in his jurisdiction more jurors comment upon this than upon any other aspect of their experience. The second most popular subject of their comments, he joked, is the length of the lunch line.

McKoski also asked the commission to have the code make clear when a judge may use official stationery to write a letter of recommendation. Does stationery improperly imbue a recommendation letter with (in the words of Canon 2B) "the prestige of judicial office"? he asked. Is there any principled difference between using judicial stationery (likely to be prohibited, as a general rule) and saying in the text of the letter that you're a judge (less likely to be prohibited, as a general rule)? Shouldn't it make a difference whether you're recommending a lawyer for a local job or recommending an applicant to a university arts program in another state? Please address this, he said, and please say something definitive.

Prof. Leslie W. Abramson of the University of Louisville Law School spoke about parties' ability to waive a judge's disqualification, another issue raised in the chair's May 11 memorandum.

Waiver or "remittal" of judicial disqualification depends upon disclosure, Abramson noted. As things stand, he said, only a judge who is "subject to disqualification" may disclose the basis of his disqualification in order to obtain a waiver. The circular phrasing, he argued, tends to discourage rather than encourage the very disclosure that would make waiver possible.

by Elizabeth J. Cohen

Drafts of revisions to the Model Code of Judicial Conduct proposed by the judicial code commission are posted on its Web site, http://www.abanet.org/judicialethics/home.html