

Originally published in the Fall 2006
Judicial Conduct Reporter

28 NO. 3 JCR 1
Fall 2006

PROPOSED REVISIONS TO THE ABA MODEL CODE OF JUDICIAL
CONDUCT

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The American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct has released a final report proposing changes in both format and substance to the 1990 ABA Model Code of Judicial Conduct. The ABA House of Delegates will consider the recommendations at its February 2007 meeting. The final report, previous drafts, comments, and other background are available at www.abanet.org/judicialethics/.

Organizational Changes from the 1990 Code

The final report reorganizes the canons to provide what the Joint Commission "considers a more logical, functional and helpful arrangement of topics." Proposed Canon 1 and its rules combine the subjects of current Canons 1 and 2, establishing the obligations of judges to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and the appearance of impropriety, and to avoid abusing the prestige of judicial office. Canon 2 and related rules cover a judge's professional duties, which constitute most of Canon 3 in the current model code. Canon 3 and its rules address extra-judicial and personal conduct, corresponding to the current Canon 4. Finally, proposed Canon 4 and its rules establish standards for the political conduct of judges and judicial candidates like the current Canon 5.

Judicial Duties (proposed Canon 2; current Canon 3)

The Joint Commission recommends the addition of ethnicity, marital status, gender, and political affiliation to the list of prohibited grounds for discrimination by judges (Rule 2.3(B)). "Harassment" is prohibited in black letter language (Rule 2.3(B)). New comments give examples of improper bias and define harassment.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics.

Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment ... is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Several new comments reflect developments in court practices and policies since the model code was most recently revised in 1990. For example, using electronic research is identified as falling within the prohibition on independent investigations of facts (Comment 6, Rule 2.9). A new comment cautions judges who hold discussions with jurors following trial to "be careful not to discuss the merits of the case" (Comment 3, Rule 2.8). A comment designed for judges "serving on therapeutic or problem-solving courts, mental health courts, or drug courts" notes that the exception to the prohibition on ex parte communications authorized by law may permit certain ex parte communications in those courts where "judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others" (Comment 4, Rule 2.9).

Finally, a new comment indicates that a judge may "make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard" without violating the rule requiring impartiality (Comment 4, Rule 2.2).

A new rule (Rule 2.16) requires a judge to "cooperate and be candid and honest with judicial and lawyer disciplinary agencies" and prohibits a judge from "retaliat[ing], directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer."

The Joint Commission proposes a new rule (Rule 2.14) dealing with the "difficult and extremely important issue" of impaired judges.

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Comment:

[1] "Appropriate action" means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent

harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program. [2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge's responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge's attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body.

Personal and Extra-judicial Activities (proposed Canon 3; current Canon 4)

The report proposes adding organizations that invidiously discriminate on the basis of gender, ethnicity, and sexual orientation to the list of organizations in which membership by judges is prohibited (Rule 3.6(A)).

Several new exceptions are created to the prohibition on soliciting contributions for charitable organization. One new exception allows a judge to solicit members of the judge's family. (Rule 3.7(A)(2)). In addition, under the proposed rules, a judge could speak or receive an award at, be featured on the program of, and permit his or her title to be used with a fund-raising event for an organization that concerns the law, the legal system, or the administration of justice (Rule 3.7(A)(4)). Finally, a new rule allows judges to "encourage lawyers to provide pro bono publico legal services," including "providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work" (Rule 3.7(B)).

The final report proposes a rule that expressly prohibits a judge from using "court premises, staff, stationery, equipment, or other resources" for personal and extra-judicial activities, "except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law" (Rule 3.1(E)).

Political and Campaign Activity (proposed Canon 4; current Canon 5)

The Joint Commission debated extensively what changes if any should be made to the restrictions on political and campaign activity in light of the United States Supreme Court decision in *Republican Party of Minnesota v. White*. The report explains:

Throughout its deliberations, the Joint Commission has sought to find a balance that accommodates the political realities of judicial selection and election while ensuring that the concepts of judicial independence, integrity, and impartiality are not undermined by the participation of judges and judicial candidates in political activity.

The structure of proposed Canon 4 establishes general restrictions on campaign and political activity and then creates exceptions depending on the selection method, differentiating between judicial candidates seeking appointment and those running in elections and, further, between partisan, non-partisan, and retention elections.

The final report retains the current restriction on a judicial candidate making "in connection with cases, controversies, or issues that are likely to come before the court, ... pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office" (Rule 4.1(A)(13)). A comment explains:

The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them to distinguish between candidates and make informed electoral choices.

Moreover, additional comments emphasize that pledges, promises, or commitments are distinguishable from "statements or announcements of personal views on legal, political, or other issues, which are not prohibited" but "a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views." Further, a comment describes the types of promises that are appropriate in a judicial campaign.

A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or lobbying for more funds to improve the physical plant and amenities of the courthouse.

There is also a proposed new requirement that judicial candidates personally approve the contents of campaign literature and other election materials (Rule 4.2(A)(3)) and a new prohibition on judges using "court staff, facilities, or other court resources in a campaign for judicial office" (Rule 4.1(A)(10)).

The Joint Commission proposes deleting the requirement that judicial candidates maintain "appropriate dignity," finding "the phrase both unhelpful and less effective at capturing the fundamental characteristics of proper judicial conduct, independence, integrity, and impartiality, than using the terms themselves."

The proposed rules retain the current prohibition on judicial candidates personally soliciting campaign contributions and the current requirement that candidates establish campaign committees for fund-raising (Rule 4.1(A)(8)). The current prohibition on candidates personally seeking "publicly stated support," however, is eliminated in the final report.

To review an AJS editorial describing the important changes the report proposes as well as several unwise suggestions the report makes, go to www.ajs.org/ethics/eth_ABA_commission.asp.

The Evaluation Process

Created in July 2003, with a grant from The Joyce Foundation, the Joint Commission was appointed by and operated under the auspices of the ABA Standing Committees on Ethics and Professional Responsibility and on Judicial Independence. The members are 10 judges and lawyers and a public member. The Joint Commission also included in its discussion 11 advisors, many of whom served as formal liaisons from organizations, including the American Judicature Society.

Over 39 months, the Joint Commission met in person or by conference call over 50 times. The Joint Commission heard comments from several dozen individuals at public hearings. Representatives of the Joint Commission met several times with the Conference of Chief Justices and with entities within the Judicial Division of the ABA. The Joint Commission posted drafts of portions of the code on a web-site with requests for comments and suggestions. Thirty-nine entities and 300 individuals filed written comments on the 1990 Model Code, a preliminary report distributed in June 2005, or a proposed final draft in December 2005.

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