

Judicial Code Committee
MINUTES
SEPTEMBER 3, 2008

Justice Michael Bender, the committee chair, called the meeting to order at 1:35 p.m.

Also present were committee members The Hon. Roxanne Bailin; The Hon. Harlan Bockman; The Hon. Larry Naves; The Hon. Doug Vannoy; Dr. John Holcomb; Stewart Bliss; Jim Spaanstra, Esq.; Rick Wehmhoefer, Esq.; Barbara Miller; Mike Norton, Esq.; Eileen Kiernan-Johnson, Esq.; John Gleason, Esq.; Carol Haller, Esq.; Dan Cordova, Esq.

The chair called for approval of minutes of the April 22, 2008 meeting, and the committee voted unanimously to approve the minutes subject to a correction showing that Barbara Miller had been at the meeting.

The committee discussed the three alternative proposed **comments to Rule 3.4** drafted by the staff. Justice Bender outlined the differences among them and invited discussion on the merits of the options, noting that minority opinions were welcome. One committee member questioned need for a new comment at all. He observed that the black letter of the rule states that a judge can't accept a position on a governmental commission unless it is concerned with the law, legal system, or administration of justice. He advocated adhering to the test set forth by the JEAB. Otherwise judges fall into the trap some want them to and become, in essence, politicians.

A committee member asked whether the goal of modifying the commentary is to allow judges to serve on wider ranger of boards, not just those related to law, legal system, and the administration of justice. The chair clarified that that wasn't the goal, but instead the committee was attempting to correct some problems that arose from application of the JEAB's direct nexus test. The heart of the issue, he explained, is providing more clear guidance on what it means for a board to relate to or concern the law, the legal system, and the administration of justice. Another committee member suggested adding a comment stating that the black letter rule is designed to allow judges to participate on boards designed to systematically improve law. She advocated adopting the second option, which contained language she liked about avoiding service on commissions that creates pervasive conflicts or involves service that might call into question the judge's impartiality and effectiveness.

The chair pointed out that we have an expanding system due to population and that, as a result, Colorado will in the future need more judges. Judges will need to have contact with local community. In a legitimate administrative way, judges will need to work with local communities on, among other things, furnishing court houses. It is necessary to craft a rule that allows judges to work on these committees.

The committee parsed the phrasing of each of the three options, debating which best captured the essence of the issue. One committee member queried whether adopting the second option, which more strongly stated that the JEAB's opinions and direct nexus test would be repudiated, would throw into question the work of the board and suggest that it isn't worthy of consideration.

Another committee member suggested stating that the opinions are overruled or superseded without referring to the board or the direct nexus test. A different committee member noted that if the commentary refers to specific advisory opinions, people will have to go back and read them to understand the full import of the comment, which may not be helpful in the future. On the other hand, a committee member noted, adopting the third option might leave judges unaware of exactly which JEAB opinions are superseded. Another committee member suggested including a note in the commentary indicating that all ethics decisions issued before adoption of new code are no longer effective.

Another committee member stated that the words “pervasive” and “frequent” in relationship to the discussion of conflicts troubled him. He suggested an edit that would direct a judge to avoid boards that would call into question impartiality. Another committee member explained that there are two different concepts covered here. Service on some boards might create pervasive conflicts, like Safehouse, because a judge would have to disqualify on every domestic violence case. But service on such a board also could call into question the judge’s impartiality because it could suggest that judge favors one side.

The chair suggested asking the staff to rethink ways to approach the problem. Also, whoever wants to be in dissenting position should communicate their thoughts to Eileen Kiernan-Johnson so their position is reflected among the options.

A committee member opined that any option the committee ultimately selects must provide judges with guidance. In his view, the direct nexus test has been problematic in its application. A committee member asked about the result in the Alaska case cited in the annotation. He thought that the language was clear and useful. The staff will modify the annotation to reflect the result.

Next the committee turned to a discussion of **Rule 3.7(5)**, which the committee had earlier considered at the last meeting and decided to revisit once the staff was able to research the rule further. John Gleason explained the contents of emails sent from ABA staff regarding the rule. He committee decided to retain the draft language of the Model Code and include an annotation to the Colorado JEAB opinion.

The committee turned to **Rule 3.10** and agreed to implement the changes discussed at the last meeting.

The committee moved on to consideration of **Rule 3.11**, which addresses a judge’s ability to pursue financial activities. A committee member explained the judicial ethics opinions addressing the issue from other states (and made a correction to the materials noting that the judge at issue in that opinion was required to divest, not prevented from divesting). Rule 3.11(B)(1) whether a judge may serve a variety of roles in a business, unless it is a closely held business or engaged in investment.

Rule 3.12 through 3.15 deal with public reporting and disclosure by judges. The statutory requirements are in some cases duplicative, but in some cases are broader. The statutes don’t apply to magistrates, while the Code does. Carol Haller explained that in her memo, was trying

to lay out the state of Colorado law on disclosure, and then she explained the model code requirements. She recommended retaining **Rule 3.12** because otherwise magistrates would have no obligation to report gifts and income. She explained that **Rule 3.13** starts with things judge may accept but don't have to report, and then moves on to what must be reported. The Model Code language is a different formulation than what Colorado has used in the past, but is an improvement over what Colorado has had.

One of the most significant differences is found in Rule 3.13 subsection (B)(8), regarding gifts, awards and benefits to a judge's spouse, domestic partner, or family member, but that incidentally benefit the judge. This is broader than what Colorado's Code currently requires, and somewhat inconsistent. The committee discussed whether we Colorado should retain the old rule or adopt the Model Code. Carol Haller noted that the provision in 3.13(B)(8) goes hand-in-hand with the changes in (C)(3), which would be a significant departure from Colorado's existing Code. Subsection (C)(3) allows a judge to accept, if the judge reports, gifts even if from a party likely to come before the judge. Our current Canon forbids a judge to take those things, even if the judge reports.

A committee member stated that she has a problem with (B)(8) allowing a judge to accept but not report certain items. If we're going to have a transparent system, judges need to disclose and report what their family members receive. Otherwise, the public will think that, even if judge isn't primary beneficiary, the gift-giver's generosity was not lost on judge. As for subsection (C)(3), she doesn't think it is appropriate at all, whether or not the judge discloses. If a party is likely to come before the judge, the judge can't and shouldn't take anything from that party.

Another committee member noted that his wife is a prominent person who frequently is given free items. It simply isn't practical to report everything she is given, and the judge and his wife do not avail themselves of everything she receives. His wife frequently emcees dinners and he escorts her, as part of her job, and doesn't report them all. That can't be what Code expects. Another committee member seconded this view, opining that if the reporting language is too broad and demanding, there might be many potential judges who don't want to serve because they feared inadvertently violating the code. The committee member favors the Colorado Code's existing language because it deals with parties who give gifts who might come before the judge.

A committee member voiced his opinion in favor of adopting the Model Code language. Every gift a judge might get can't be quantified, but what the Model Code tries to do is set a standard – a judge can accept if benefit to judge is only incidental. Another committee member explained that one of the biggest differences between Colorado's code and model is that ours has a monetary value and thus is clearer – either a gift is over \$100 or not; he favored that language and suggested retaining it. Another committee member, however, urged adoption of the Model Code language, questioning why Colorado should have a different rule than rest of country. A committee member pointed out that the Model Code provides a very protective “belt and suspenders” type approach through subsection (A), which prohibits a judge from accepting any gift that would appear to a reasonable person to undermine the judge's impartiality, integrity, or independence, and Rule 2.11, which addresses disqualification for a whole range of things. Another committee member pointed out that given that the only real difference between the Colorado and Model Codes is that Colorado specifies a dollar amount and the Model Code

discusses gifts to a judge's family member that confer "incidental" benefits on the judge, it isn't worth departing from the national model.

A committee member stated that he is more concerned with subsection (C)(3) because the source and purpose of the gift are of more concern than the dollar amount. He suggested focusing the committee's attention on that provision. Another committee expressed trepidation about eliminating or modifying 3.13 (C)(3) because we don't want to suggest that people involved in litigation can give judges gifts without the judge being obligated to report the gift. She suggested making it explicit that a judge can't accept anything of value from someone who is coming before the judge, whether the judge reports it or not. A committee member pointed out that the difference between subsections (A) and (C)(3) is that a judge can't accept a gift if it appears that reason the judge is getting gift is that giver intends to influence the judge and affect the judge's partiality.

The chair suggested separating the discussion of (B)(8) from (C)(3), and the committee decided to vote on the former, regarding gifts to a judge's family member. A majority voted to adopt the Model Code language, which allows a family member to accept gifts that only incidentally benefit the judge. A minority voted to retain Colorado's existing language, favoring the bright-line \$100 threshold that it sets out.

The committee then focused on (C)(3). The chair asked Carol Haller to explain her concerns with that provision. She pointed out that under Colorado's current Code, a judge may not accept a gift from a party or a lawyer likely to come before the judge; the Model Code allows a judge to accept gifts from such persons but requires the judge to disclose the gift. She strongly urged retaining Colorado's language, which is clearer and much less likely to get judges in trouble. She doesn't think judges should accept gifts from anyone likely to come before judge.

A committee member voiced an opposing view, noting that in smaller communities, people give each other, including judges, things all the time. People know each other well and are intermingled, and the existing Colorado rule is impractical in such circumstances. Another committee member expressed his appreciation for the committee's careful debate, but opined that between subsection (A) and (C)(3), the Model Code covers all gift-giving scenarios in a principled way, and advocated adopting the Model Code language. He noted that the protection is in the disclosure and in subsection (A)'s prohibition on a judge accepting any gift that would appear to a reasonable person to undermine the judge's impartiality, integrity, or independence. In smaller communities, a judge could accept a gift but simply would have to report it, in which case everyone would know about it.

A majority of the committee voted to adopt Rule 3.13 in its entirety, including subsection (C)(3), as drafted in the Model Code. A minority opposed adopting subsection (C)(3), preferring to retain Colorado's blanket prohibition on judges accepting gifts from persons who come before the judge or are likely to do so.

The committee turned to consideration of **Rule 3.14**, which addresses reimbursement of expenses and waiver of fees or charges. The chair asked whether Colorado's statutes are broader than the Model Code. He asked the staff to look at the statutes and note anything greater in

statutes and include a more specific annotation. The committee will revisit Rule 3.14 at the next meeting.

The committee moved on to **Rule 3.15**, which addresses reporting requirements. The chair asked the staff to integrate the dollar amounts specified in the statute into subsection A of the Model Code rule. Carol Haller noted that 3.15(B) is much broader than what Colorado requires now; the existing rule doesn't require a judge to report the place, nature of activity, etc. A committee member suggested incorporating into the Code what the Colorado statute requires since judges here are obligated to follow anyway. He noted that judges now have to report according to two requirements – the statute and the Code. To add a third is too onerous. Since the legislature determined what is necessary, that's what judges should follow. A committee member pointed out that Rule 3.15 is a substitution for Canon 6, which is an annual disclosure; we would not be adding a new disclosure requirement, just substituting one. The chair directed staff to prepare suggested amendments or comments to the rule reflecting statutory requirements. The committee will reconsider the rule at the next meeting.

Next, the committee turned to the first third of the definitions in the **Terminology** section. The committee agreed with the staff's recommendations to eliminate in its entirety the term "aggregate" and to modify several other definitions' references to rules that the committee either changes or did not adopt.

The committee then discussed Judge Taubman's request to consider implementing a number of modifications to the Model Code proposed by Karla Gray, the Chief Justice of the Montana Supreme Court, regarding access to justice issues. The chair asked the committee to look at the philosophy of the suggestions. Colorado has some case law stating that judges are not supposed to afford pro se litigants any special treatment, but rather, to approach them like any other party. Today there are an increasing number of pro se litigants, especially in domestic litigation. These ideas or principles that Gray articulated are really an effort to bring about a philosophy that a judge, without abandoning his or her neutrality, should take into account that pro se litigants generally do not have a law degree and thus the judge shouldn't treat that person as if he or she were a lawyer. He pointed out that the first issue to consider is that Colorado has some cases that are at odds with Gray's suggestions, and the committee needs to consider how to approach the suggestions in light of that. They could recommend a course that is inconsistent with the caselaw, although the effect of such a recommendation would be uncertain. Second, if the committee wants to change things a bit to accommodate pro se litigants, they'd need to do so in a way that makes sense with Code as a whole. The chair asked the staff to evaluate the changes. If the committee wants to make changes, are these the kinds of changes we'd want to make? Do we want to make more modest ones? What is necessary? Does it make sense to make a change or two? What have other jurisdictions done?

The committee then set the next two meetings. The first will be on Friday, November 21 at 9:30am, and the next will be on Friday, January 23, 2009 at 9:30 a.m.