

I. ANALYSIS OF CHANGES

At a time of unprecedented public concern over judicial ethics, the ABA has proposed dramatic changes to its Model Code of Judicial Conduct that, if enacted, would make the Model Code significantly weaker and less easily enforced.

Specifically, the ABA is proposing to combine all of existing Canon 1 and important portions of Canon 2 into a new shorter Canon 1. The new Canon 1 eliminates a number of very important elements of the existing code:

- Judges are no longer obligated to act at all times “in a manner that promotes public confidence in the integrity and impartiality of the judiciary (compare existing Canon 2A with new Canon 1.02).
- Judges are no longer obligated to “participate in establishing, maintaining, and enforcing high standards of conduct” (compare the second sentence of existing Canon 1A with new Canon 1.01).
- The requirement that judges avoid “an appearance of impropriety” in all their activities is now modified by the label “Conduct in General” and commentary to the new Canon 1 instructs that judges are not “ordinarily” supposed to be “disciplined for engaging in conduct that creates an appearance of impropriety” unless the judge can also be charged with “violating some other specific rule.” (See Comment 2 to new Canon 1.01). Under the existing Canons the appearance of impropriety standard was fully and independently enforceable.
- The new Canon 1 eliminates the requirement that “the provisions of this Code are to be construed and applied to further [the independence and impartiality of the judiciary].”
- The new Canon 1, inexplicably, drops the words “and honorable” from the phrase “an independent and honorable judiciary is indispensable to justice in our society.”

New Canon 2 combines the remaining portions of existing Canon 2 with all of existing Canon 3. It is too long (16 pages) to reproduce in full (both the proposed and existing Canon’s are available at www.abanet.org/judicialethics/home), but again, the ABA is proposing important changes that weaken the existing code. Most significantly, the New Canon 2 eliminates the existing prohibition on judge’s serving as members in organizations that discriminate on the basis of race, sex, religion, or national origin. New Canon 2 also creates a new section called “The Duty to Decide,” giving added prominence to the requirement that judges “hear and decide matters assigned to the judge.” New Commentary to this section (Canon 2.02) instructs judges that “a fundamental obligation of the judicial office is to decide the matters that come before the court or tribunal.” This change to the Canon and new Commentary will make it less likely that judges will recuse themselves from cases where their conduct raises a question about their ability to be impartial.

II. NEW AND EXISTING CANON TEXT

NEW CANON 1:

CONDUCT IN GENERAL: A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES, SO AS TO UPHOLD THE INTEGRITY, INDEPENDENCE AND IMPARTIALITY OF THE JUDICIARY

1.01 Observing Standards of Judicial Conduct: A judge shall observe the high standards of conduct embodied in these Rules so that the integrity, independence and impartiality of the judiciary, and the public's confidence therein, are promoted and preserved.

1.02 Complying with the Law: A judge shall respect and comply with the law.

EXISTING CANON 1:

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

A. An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary will be preserved. The provisions of this Code are to be construed and applied to further that objective.

EXISTING CANON 2:

A JUDGE SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL OF THE JUDGE'S ACTIVITIES

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.