

Possible Changes to the Model Code of Judicial Conduct with Respect to the Problem of Judicial Retaliation Against Those Who File Complaints Against Judges

The main change is a proposed new Section D(4) to Canon 3, and new accompanying Commentary, explicitly and broadly prohibiting retaliation by judges and requiring actions by the judge to prevent the appearance of retaliation, including in the process by which a judge makes appointments.

There is also a proposed addition of a new Subsection E(1)(b) of Canon 3, adding as a reason for judicial disqualification a list of situations involving complaints against the judge. The potential burden of this is moderated somewhat by a limitation upon the duty of disclosure by the judge, described in new language in the second paragraph of Commentary to Section E(1) of that Canon.

Finally, there is a proposed small general change to the first paragraph of Commentary to Canon 2A, which highlights the need for judges to be required to take action to avoid the appearance of impropriety.

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.

Commentary:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny and to be required to act to minimize the appearance of impropriety. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. Examples are the restrictions on judicial speech imposed by Sections 3(B)(9) and (10) that are indispensable to the maintenance of the integrity, impartiality, and independence of the judiciary.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out

judicial responsibilities with integrity, impartiality and competence is impaired.
See also Commentary under Section 2C.

CANON 3

A JUDGE SHALL PERFORM THE DUTIES OF JUDICIAL OFFICE IMPARTIALLY AND DILIGENTLY

D. Disciplinary Responsibilities.

(4) When a judge receives information that a complaint has been, or may be, filed against him or her, the judge has a particular responsibility to ensure that there is no retaliation, or appearance of retaliation, or perception of retaliation, or threat of retaliation against the person or entity involved in the actual or possible complaint against the judge. This responsibility continues after the resolution of the underlying complaint or potential complaint.

Commentary:

There is no greater potential threat to the integrity of the judicial discipline system, and therefore to the integrity of the judiciary itself, than retaliation, the threat of, the appearance of, or even just the perception of retaliation. For this reason, retaliation, or actual or implied threats of retaliation, or failure to act to prevent a reasonable perception of retaliation or of the threat of retaliation, constitute independent violations of this code, for which a judge is subject to discipline under this Code independently of the merits of the underlying complaint. The judge's obligations under this section extend to those under his or her control, and to those associated with the judge, to the extent that the judge may reasonably be expected to act to prevent, to minimize, or to dissociate him or herself from the actions of those with whom the judge is associated.

There is a particular responsibility upon the judge in the situation described in this section to make sure that there is no real or apparent violation of Canon 3C(4) governing impartiality in the process by which a judge makes appointments.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality* might reasonably be questioned, including but not limited to instances where:

Commentary:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in

which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. Provided, however, that when the reason for possible disqualification is as described in subsection E(1)(b) of this Canon, the need for affirmative disclosure by the judge is limited to circumstances in which counsel (or in the case of a party without counsel, the party him or her self) would not reasonably be expected to know of the prior, current or past actual or possible complaint.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

- (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge* of disputed evidentiary facts concerning the proceeding;**
- (b) the judge has received information of an actual or possible, prior, current, or future complaint against the judge by a party's lawyer or a party.**
- (c) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;**