

To: The ABA Joint Commission to Evaluate the Model Code of Judicial Conduct  
From: David L. Hagen, 61485 CR 13, Goshen IN 46526.  
Date: August 1, 2005  
Re: Comment on Preliminary Draft of Code Canon 1: **Set Goals detailed by Rules 1.05, 1.06**

**Summary:** Top level goals of “uphold Justice within the objective Rule of Law by foundational transcendent principles of organic law” are proposed for Canons 1 and 5. These are detailed by proposed Rules 1.05, 1.06, (plus a comment on 1.04):

CANON 1

**A JUDGE SHALL UPHOLD JUSTICE BY FOUNDATIONAL TRANSCENDENT PRINCIPLES WITHIN THE OBJECTIVE RULE OF LAW, INCLUDING UPHOLDING THE INTEGRITY, IMPARTIALITY AND INDEPENDENCE OF THE JUDICIARY, AND AVOIDING IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.**

**1.05 Upholding the Rule of Law: A judge shall uphold the foundational transcendent organic principles of the Rule of Law, as embodied in the DECLARATION OF INDEPENDENCE and the CONSTITUTION and mutually required by all States for equal footing in the Union.**

**1.06 Preserving the Rule of Law: A judge shall preserve the protections to Justice within the Rule of Law, including the sanctity of Oaths, consent of the governed, a republican form of government, separation of powers, including the independence of an impartial ethical Judiciary, impeachment, free elections, and petition for redress of grievances.**

**1) Discussion: Code’s structural weakness on the goals of justice and the Rule of Law:**

The Commission asks: “**Could the format and organization of the Code be improved?**”

The Commission has commendably extensively addressed the “trees” of judicial conduct and appearance in the proposed Model Code. The Commission also seeks to articulate “aspirational goals and ideals.” The Model Code somewhat addresses the intermediate objectives of “integrity, impartiality and independence of the judiciary.” However it appears to provide relatively little guidance for the major controversial issues judges must face. Justice is a critical but not the sole factor to preserve the Rule of Law. “Integrity, impartiality, independence of the judiciary, avoiding impropriety and the appearance of impropriety” are all objectives within the higher goals of justice based on foundational organic principles of organic law and preserving the Rule of Law.

The proposed Code appears to have a serious weakness of being subjective and recursive. It provides little reference to the complementary securities of the Rule of Law. These securities include Oaths to uphold the CONSTITUTION and the First Principles of transcendent law mutually required by all States for equal standing in the Union. The Code’s emphasis on judicial “independence,” without the balance of this context, dangerously encourages judges to take license and act by arbitrary personal whim. The Code needs to reference foundational principles of organic law, including “consent of the Governed,” and inviolability of the Constitution which ground the Rule of Law. See below.

**2) Include the highest level goal of the Rule of Law:**

To redress this structural weakness, I recommend incorporating into CANON 1:

**“JUSTICE BY TRANSCENDENT FOUNDATIONAL PRINCIPLES WITHIN THE OBJECTIVE RULE OF LAW, INCLUDING UPHOLDING”**

The revised Canon 1 reads:

CANON 1

A JUDGE SHALL UPHOLD **JUSTICE BY FOUNDATIONAL TRANSCENDENT PRINCIPLES WITHIN THE OBJECTIVE RULE OF LAW, INCLUDING UPHOLDING THE INTEGRITY, IMPARTIALITY AND INDEPENDENCE OF THE JUDICIARY, AND AVOIDING IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.**

**3) Add Rules 1.05:** These goals are clarified by adding the following Rule 1.05:

**1.05 Upholding the Rule of Law: A judge shall uphold the foundational transcendent organic principles of Justice within the objective Rule of Law, as embodied in the DECLARATION OF INDEPENDENCE and the CONSTITUTION and mutually required by all States for equal footing in the Union.**

**4) Comments for Goals and Rule 1.05**

These goals are explained with the following proposed comments:

**“COMMENT**

[1] **Goals:** CANON 1 gives a judge’s immediate aspirational goal and ideal to uphold “Justice” within the higher goal to uphold “the objective Rule of Law”. These provide guidance for all other Canons, rules and judicial actions.

[2] **“Foundational . . . organic principles . . . as embodied in . . . Union;”** refers to the organic principles of the DECLARATION OF INDEPENDENCE (U.S.C. 1776) and the CONSTITUTION (U.S.C. 1787). These principles were mutually required by all States for ‘equal footing’ in the Union by the DECLARATION and by Acts enabling States to join the Union. These foundational principles were required of and accepted by Arizona, Colorado, Hawaii, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Utah and Washington by enabling acts. See:

*Hawaii Admission Act, § 1, 73 Stat. 4 (18 March 1959) Pub. L. 86-3; 1 HRS 90 (1993).* Etc.

"[t]he constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." See also:

*Arizona Enabling Act, 36 Stat. 557, 568-579, (20 June 1910).*

*Colorado Enabling Act 18 Stat. 474 (3 March 1875).*

*Enabling Act of Feb. 22, 1889, ch. 180, 4, 25 Stat. 676 (Mont., N.D., S.D. & Wash.).*

*Nebraska Enabling Act, ch. 59, 13 Stat. at L. 47 (19 April 1864).*

*Nevada Enabling Act, 12 Stat. 36 (21 March 1864).*

*New Mexico Enabling Act 36 Stat. 557-567 (20 June 1910).*

*Oklahoma Enabling Act*, 34 Stat. 267 (June 16, 1906).

*Utah Enabling Act*, 28 Stat. 107 (16 July 1894).

By requiring these foundational principles of acceding States for equal footing in the Union, all other States reaffirmed that their constitutions would also not be repugnant to those principles.

[3] “**Transcendent**” summarizes the presupposed foundation to law on which the United States of America and its CONSTITUTION were established. Constitutions presuppose one of three foundations: Acknowledgment of Transcendent law, agnostic ignoring or atheistic rejection of Transcendence. The Common Law incorporated transcendent law. E.g., CODE of Alfred (901 AD). The MAGNA CARTA (1215 AD) and Bill of Rights (1689 AD) were established before God and secured by Oaths. However, King George and Parliament rejected the American Colonists’ petitions for redress of breaches of foundational Charters, transcendent principles and unalienable rights. The Founders then appealed to the “supreme Judge of all the world,” establishing the USA on the foundation of Transcendent law by the Declaration of Independence (1776 AD.) They then required every government officer and every State Legislator to swear to uphold the CONSTITUTION.

These transcendent organic First Principles include:

- a) securing the CONSTITUTION and Justice by Oaths, swearing or affirming ‘So help me God.’
- b) claiming endowment with ‘unalienable rights’ to ‘life, liberty and the pursuit of happiness,’ by the Creator;
- c) claiming entitlement to found government by the ‘laws of Nature and of Nature’s God;’
- d) relying ‘on the protection of Divine Providence;’
- e) appealing to the ‘Supreme Judge of all the world for the rectitude’ (rightness) ‘of our intentions;’
- f) preserving unalienable rights to free exercise of religion and speech with robust mutual tolerance;
- g) providing alternatives for the sake of conscience. E.g. oath or affirmation, and alternative service;
- h) government being instituted, and codifying law by the ‘consent of the governed.’ (See ‘Great Governor of the World’ in Articles of Confederation;) and
- I) securing law by the unalienable right of petition for redress of grievances.

The foundational transcendent organic principles provide guidelines to interpret Federal and State Constitutions and laws. Those guidelines are mutually required by all States for equal footing, and with the clear ‘consent of the governed’. They presuppose and set the foundation of theism.

By contrast, establishments of Nontheism led to the greatest breaches of unalienable rights in history. More than 125 million people were killed by dictators and many more were unjustly imprisoned within the Gulag etc. in the 20<sup>th</sup> century.

[4] “**Objective**” emphasizes the importance of judges and justices performing their Oath of office to “administer justice. . . under the Constitution and laws of the United States” (28 U.S.C. 453). This grounds the Code within the Rule of Law based on enduring constitutions of governments that are ‘republican in form’ with the ‘consent of the governed’ as mutually required by all States for ‘equal footing’ in the Union. This protects the People from the tyranny of personal whim.

[5] “**Including upholding**” shows that those further principles of CANON 1 are embodied within the “objective rule of law” and the “foundational transcendent organic principles.” This further emphasizes that the objectives of ‘integrity, impartiality, and independence’ are to be interpreted by the highest level goal of the Rule of Law.”

### 5) Discussion on goals of Canon 1 and Rule 1.05

The primary goal of “Justice” within the higher goal of “the objective Rule of Law” is clarified to:

**uphold the foundational transcendent organic principles of the Rule of Law, as embodied in the Declaration of Independence and the Constitution,**

Because of King John’s breaches of the Rule of Law, Bishops and Barons interposed to codify before God the Magna Carta (1215) secured by oaths. The seven Bishops interposed for the sake of conscience over King James II’s Declaration of Indulgence (1688). This led Parliament to codify the (English) Bill of Rights (1689) before God and codify the form of the oath.

Because of systematic breaches of the Rule of Law by King and Parliament, the Founders again interposed, establishing the USA by the DECLARATION OF INDEPENDENCE (U.S.C. 1776). They explicitly declared their foundational transcendent principles of the Rule of Law including unalienable rights, as well as explaining those principles by their breach. They declared:

‘to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.’ DECLARATION OF INDEPENDENCE para. 2.

They secured these principles by consent, codifying them in the CONSTITUTION (U.S.C. 1787). The foundational organic principles of the Rule of Law, as embodied in the DECLARATION OF INDEPENDENCE (U.S.C. 1776) and the CONSTITUTION, were required or accepted as binding by all States for ‘equal footing’ in the Union by the accession thirteen States, including the last two Alaska and Hawaii:

“The constitution of the State of Alaska shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence.” *Alaska Admission Act*, 72 Stat. 339 § 3 (7 July 1958) Pub. L. 85-508.

"The constitution of the State of Hawaii shall always be republican in form and shall not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." *Hawaii Admission Act*, 73 Stat. 4 § 3 (18 March 1959) Pub. L. 86-3.

For “equal footing” in the Union, all States have mutually required that their Constitutions not be repugnant to these foundational transcendent organic principles by having established, required or accepted them. While the Constitution provides explicit codified law with embodied principles, the Declaration of Independence includes foundational transcendent principles by which that Supreme Law and all State Constitutions and laws are to be interpreted.

The USA’s basis of theism is further shown by the contrast of communist countries founding their laws on atheism. E.g., The U.S.S.R. CONST., art. 124, (1936) prescribed *the church in the U.S.S.R. is separated from the state, and the school from the church. . . .*

The Judiciary has major perception problems with the People. E.g.,

“A 1996 poll of New York residents found that only 2 percent of respondents thought the criminal court system was "excellent," while 64 percent gave it a negative rating, and 55

percent thought that judges should be easier to remove.” Wendell Jamieson, Judges Losers, Cops Winners in Poll , N.Y. DAILY NEWS, 33, April 28, 1996.

The reference to transcendent organic principles addresses the People’s primary objections to Judicial actions and the consequent degradation in respect for the Judiciary that come from major departures from and perceived breaches of the Rule of Law. E.g., to avoid imposing Federal requirements or prohibitions respecting religion on the States in the name of Amend. I which proscribes Federal requirement or prohibition of religious exercise. It further preserves the respective primary powers of the States.

This clause on transcendent law incorporates into the Code the Judges’ primary duty to uphold the Constitution nor of foundational transcendent organic principles. This avoids the danger of the Code itself being held up as the primary requirement for Judges. Reference to transcendent law avoids the critical danger of circular reasoning without ‘consent of the governed.’ Appealing to widely recognized principles of transcendent law consented to by the People and mutually required by all States avoids the danger of Judges formulating and declaring the Code to be law, and then interpreting whether they have obeyed it, declaring what it means - all without legislative debate and vote, or consent by ‘the People.’ This addresses Chief Justice Fabe’s recommendation:

“And although the essence of judicial independence is to allow judges to make fair decisions, based on the law and facts before them, without regard to outside pressures or public opinion polls, *we as judges also recognize that judicial independence must be paired with judicial responsibility.*” State of the Alaska Judiciary February 20, 2002 Chief Justice Dana Fabe. (emphasis added.)

Clearly committing to these mutually required foundational transcendent organic principles of the Rule of Law as embodied in the DECLARATION OF INDEPENDENCE and the CONSTITUTION and complying with them earns the People’s confidence in the Judiciary, helps preserve its independence, and preserves the Rule of Law.

**6) Add Rule 1.06:** The goal of ‘Justice’ within the higher goal of ‘the objective Rule of Law’ is further detailed by adding the following Rule 1.06:

**1.06 Preserving the Rule of Law: A judge shall preserve the protections to Justice within the Rule of Law, including the sanctity of Oaths, consent of the governed, a republican form of government, separation of powers, including the independence of an impartial ethical Judiciary, free elections, impeachment, and petition for redress of grievances.**

**7) Comments for Rule 1.06:** This Rule 1.06 is explained by the following proposed Comments:

“COMMENTS:

[1] **preserve the protections:** Judges have duties and responsibilities, together with Legislators and Executives, to uphold the protections essential to preserve Justice and government under the Rule of Law.

[2] **Sanctity of Oaths:** Judges shall preserve the primary protection of the Sanctity of Oaths recognizing their duty before ‘the Supreme Judge of all the world for the rectitude of’ their actions.

Oath of Office: The Founders secured the CONSTITUTION by Oath or Affirmation:

“The Senators and Representatives . . . all members of the several state legislatures and all executive and judicial officers . . . shall be bound by Oath or Affirmation to support this Constitution.” U.S. CONST. art. VI ¶ 3.

Witness Oath: Every Witness before the Court is required to swear to tell the truth. See also U.S. CONST., art. I, § 3, ¶ 6.; U.S. CONST., art. II, § 1, ¶ 8; 5 U.S.C. 3331 Oath of Office. See Story, J. *Commentaries*, Ch. 43 §1837-1840.

[3] **consent of the governed:** Judges shall preserve the protection of the constancy of Constitutional law established by ‘consent of the governed’ with prescribed means for amendment. See:

‘to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed.’ DECLARATION OF INDEPENDENCE para. 2.

[4] **a republican form of government:** Judges shall preserve the protection of the representative ‘republican form of government’ mutually required by all States. See enabling acts:

“[t]he constitution of the State of Hawaii shall always be republican in form” etc.

[5] **separation of powers:** To preserve the objective of “Independence of the Judiciary,” judges shall uphold the higher foundational organic principle of **“Separation of Powers”** as codified in the Constitution. See: the Massachusetts Constitution (1780) Part I Sec. XXX:

“In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.”

Diligently upholding and clearly communicating this higher level constitutional principle will help earn the respect of the People for the Judiciary and help to preserve the Rule of Law.

[6] **including the independence of an impartial ethical Judiciary:** To uphold Justice and the Rule of Law, judges shall preserve and maintain the Judiciary’s explicit function within higher the “Separation of Powers.” This includes the critical characteristics of “independence,” “impartiality” and “integrity” (“ethical”) required to achieve Justice as detailed within the Code. The term “ethical” embodies the foundational principles of transcendent law essential to Justice.

[7] **free elections:** Judges shall carefully preserve the freedom of elections as an essential protection against tyranny.

[8] **impeachment:** To protect against tyranny, is critical that judges preserve the protection of impeachment of any government official breaching the Constitution. Thirty three democracies succumbed to tyrants in the 20<sup>th</sup> century when constitutional protections including impeachment were not upheld. Judges only hold their office while under “good behavior.”

[9] **petition for redress of grievances:**

The Rule of Law is primarily secured by Justice upholding the CONSTITUTION and law that has been established with consent. Constitutional justice, including trial of equals under the law of the land, is secured by the guarantee of the unalienable right to petition for redress of grievances of any breach thereof, as codified in the Magna Carta 17 John Sec. 39, Sec. 61 para 1,3 (1215).

“[S]ince we desire that they shall be enjoyed in their entirety, with lasting strength, for ever, we give and grant to the barons the following security: . . .

If we, our chief justice, our officials, or any of our servants offend in any respect against any man, or transgress any of the articles of the peace or of this security, and the offence is made known to four of the said twenty-five barons, they shall come to us - or in our absence from the kingdom to the chief justice - to declare it and claim immediate redress.”

This was affirmed in the Bill of Rights (1689)

"That it is the right of the subjects to petition the king, and all commitments and prosecutions for such petitioning are illegal."

This essential unalienable right of redress petition is preserved in Amendment 1. Redress petition requires only one prayer for redress and one signature. By the oath of office, every government officer is bound to uphold the right of redress petition.

[10] **Review:** The power to interpose by judicial review is founded on the inviolability of the Constitution established by ‘consent of the governed,’ the separation of powers, and the Oath of office to uphold the Constitution. These powers justifying judicial review empower Congress, the Executive, and the States with equal authority to interpose over any breach of CONSTITUTION or foundational transcendent organic principles.”

**8) Section Order:** In the final Code, the priority of Rules would be better shown by rearranging to position this Rule 1.05 after Canon 1, followed by the current rules 1.01 to 1.04.

### **9) Discussion on upholding the Rule of Law with the ‘consent of the governed.’**

Interpretations contrary to these foundational principles of transcendent organic law, are the greatest cause of public conflict. They undermine the rule of law and the respect for and independence of the judiciary.

E.g., In *Newdow v. US Congress* 9<sup>th</sup> Cir. No. 00-16423 (2003), the 9th Circuit held that ‘under God,’ in the Pledge “impermissibly coerces a religious act” by *Lee v. Weisman*, **505 U.S. 577 (1992)**, and endorses religion, breaching the Establishment Clause. This caused a massive nationwide outcry. The Senate in S. 2690 reaffirmed ‘under God’ in the pledge of allegiance by a vote of 99 to 0. The House in S. 2690 upheld the phrase ‘under God’ in the Pledge and ‘In God we trust’ in the national motto by a vote of 401 to 5. The *Pledge of Allegiance Bill 2002*, Pub. L. No: 107-293 strongly affirmed the First Principle of ‘under God.’ By Texas’ *amici curiae* brief for petitioners in *Elk Grove v. Newdow* U.S. No. 02-164 (2004) 48 states and two territories detailed their statutes acknowledging God. Such Judicial interpretations that are opposed by 99% of Representatives and 96% of States’ Dept. of Justice are without “consent of the governed.”

To guide interpretation of Constitutions and laws, these clauses are provided for the Judiciary to clearly affirm the foundational transcendent organic principles which all States mutually require

and which they use to codify and enforce Constitutions and laws. These powers justifying judicial review equally empower Congress, the Executive, and the States with equal authority to interpose over any breach of CONSTITUTION or foundational transcendent organic principles. Legislatures further retain the powers of the purse, and impeachment. The Executive retains the power to enforce laws and judicial rulings. The People retain their powers to change the form of government. For judges to perform their duties to provide Justice within the Rule of Law, and preserve the independence and respect of the Judiciary, it will be very important for them to clearly understand and abide by the foundational principles established by the People and mutually required by all States with the ‘consent of the governed.’

#### **10) Comment for Rule 1.04: Complying with the Law**

Propose adding the following Comment:

**“[2] Laws breaching constitutions or foundational principles are *ipso facto* ‘null and void.’ By their Oath (or Affirmation) of Office, Judges have the primary duty to interpose to uphold constitutions and unalienable rights within the bounds of the foundational principles mutually required by all States, whenever laws or interpretations breach those constitutions or foundational principles.”**

#### **11) Discussion to Comment [2] on Rule 1.04.**

Within the Judeo-Christian culture, the Rule of Law and unalienable rights have primarily been restored, codified and secured by individuals or People interposing over breach of transcendent and constitutional law, often at risk of their lives. Some pertinent examples are:

- a) Moses interposing over laws enslaving Hebrews in Egypt and codifying the Mosaic Code.
- b) Esther interposing over the Persian law prescribing genocide of the Jews, and obtaining a counteracting law.
- c) Daniel exercising his unalienable right to appeal to God over Persian law forbidding such appeal, resulting in a counteracting law.
- d) The Maccabees interposing over imposition of Greek religion, overthrowing the Greeks.
- e) Christian martyrs maintaining “Jesus is Lord” over the law requiring “Caesar is Lord” and emperor worship, until emperor Constantine became a Christian and repealed those laws.
- f) Martin Luther interposing with the 95 Thesis, affirming his conscience “here I stand” resulting in the reformation.
- g) Archbishop Stephen Langton and the Barons interposing over King John’s tyranny by codifying and imposing the Magna Carta (1215).
- h) The seven Bishops petitioning King James II over Declaration of Indulgence (1688) leading to Parliament codifying the Bill of Rights (1689) and affirming the right of petition.
- i) The Founders interposing over King George and Parliament breaching unalienable rights, redress petition and the Magna Carta, with the Declaration of Independence (1776).
- j) Lincoln and the Abolitionists interposing over slavery and the Dred Scott decision, resulting in the 13<sup>th</sup> and 14<sup>th</sup> Amendments.
- k) Christians and the Allies interposing over Hitler’s tyranny and genocide of the Jews, resulting in the Universal declaration of Human Rights and the Convention on Genocide.
- l) Rev. Martin Luther King and the civil rights movement resulting in the Civil Rights Act.

- m) Churches in eastern Europe holding prayer vigils that precipitated the collapse of each of the eastern European communist governments, re-establishing democracies in those countries.

The Nuremberg trials clearly established the principle that orders by superiors are no excuse for breaching unalienable rights, constitutions or oaths to uphold those constitutions. Rule 1.04 and its comment [1] need the balancing comment to protect against blind obedience to tyrants. During the 20<sup>th</sup> century, thirty three democracies failed to preserve their constitutional protections including Germany, Russia and China. This resulted in the deaths of 125 Million people. It is critical that the Code clearly protect against this far greater danger of failing to protect against tyranny.