

Rule 4.01 (c)
Extra-judicial Activities in General
Association of Professional Responsibility Lawyers
Committee on Model Code of Judicial Conduct
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The Association of Professional Responsibility Lawyers (APRL) commends the Commission on its Preliminary Draft of Canons 3 and 4 and its efforts to formulate clear, precise and workable rules for inclusion in the Model Code of Judicial Conduct. APRL believes that clear and precise rules are vital to judges, magistrates and other judicial officers who are subject to the rules. Moreover, the forewarning provided by clear and precise rules satisfies due process concerns that arise in enforcement of the Model Code of Judicial Conduct, particularly in jurisdictions that use the Model Code primarily for judicial disciplinary purposes.

In view of the necessity of clear and precise rules, APRL believes that the language of Rule 4.01(c) (“A judge shall conduct all of the judge’s extra-judicial activities so that they . . . do not demean the judicial office;”) is too broad to give a judge forewarning of the type of conduct that may place the judge in jeopardy of being subject to judicial misconduct proceedings. Consistent with its June 30, 2004 letter to the Commission regarding proposed Canons 1 and 2 and the appearance of impropriety standard, APRL believes that vague and overbroad language should be removed from the Model Code of Judicial Conduct because it presents too great a risk of subjective interpretation.

In APRL’s view, the term “demean the judicial office” is sufficiently ambiguous to present a significant risk of disciplinary action depending upon the whim of judicial disciplinary authorities. APRL suggests that the Commission consider the test for vagueness established in *In re Harper*, 77 Ohio St.3d 211, 221, 673 N.E.2d 1253, 1262 (Ohio, 1996) (laws should give person of ordinary intelligence a reasonable opportunity to know what is prohibited).

APRL observes that, as with the “appearance of impropriety” standard, the “demean the judicial office” standard as used in the Commission’s Preliminary Draft fails to give judges fair notice of the type of conduct that may violate the Model Code of Judicial Conduct. While the “demean the judicial office” standard has not been roundly criticized or rejected, it nevertheless is used in judicial disciplinary matters to support sanctioning a wide variety of conduct, including arguably private conduct that should not be the subject of public scrutiny or discipline. (APRL provides examples of private conduct distilled from judicial disciplinary decisions, as well as APRL hypotheticals.)

If the Commission is concerned about private conduct that would reasonably cast doubt on the judge’s capacity to be impartial, as set forth in Rule 4.01, Comment 2, APRL urges the Commission to consider inclusion of such language from Comment 2 in the black letter for Rule 4.01(c). APRL believes this approach would be more helpful, insofar as some jurisdictions may adopt the Model Code but not the commentary.

APRL suggests the following revision of Rule 4.01(c) (Additions underlined; deletions struck through.)

4.01 Extra-judicial Activities in General. A judge shall conduct all of the judge's extra-judicial activities so that they:

* * *

(c) do not reasonably cast doubt on the judge's capacity to act impartially as a judge ~~demean the judicial office~~; and

APRL believes this change would not only more clearly forewarn judges of the type of activity that is likely to involve a violation of the Model Code of Judicial Conduct, but also help a judge understand that s/he will not be prosecuted for private conduct that some may consider embarrassing unless the conduct reasonably casts some doubt as to the judge's ability to act impartially as a judge.