

Canon 1
Conduct in General
Lawrence J. Fox, Esq.
July 23, 2004

In a spirited plea, Mr. Fox urges the Commission to retain the appearance of impropriety requirement for judicial conduct.

Mr. Fox identifies two issues in the current standard that requires a judge to avoid the appearance of impropriety in all of the judge's activities:

- *Whether any new disciplinary rule applying to judges should address appearances.* On this point there should be no debate since the public's confidence in the independence, impartiality and conscientiousness of judges depends almost entirely on how the judiciary appears to be acting.
- *If appearances are preserved, exactly what should be preserved needs to be identified.* Impropriety is too broad, difficult to define and subjective. Judges should not engage in conduct that might lead the public to question their impartiality, independence, honesty and competence.

Mr. Fox suggests the following construction of Canon 1:

Conduct in General: A judge shall act with diligence, integrity and independence. Moreover, a judge shall avoid engaging in conduct that would provide the appearance that any of these required standards of conduct have been compromised.

Canon 1, Commentary
Conduct in General
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Mr. Fox finds the comments to Canon 1 "hopeless," confused, unorganized, contradictory and unhelpful. He notes the following problems:

- Rather than explaining the black letter, the comments obfuscate its meaning.
- The comments "bounce around" among disparate topics in a circular fashion and address many topics multiple times, often inconsistently.
- The Comments are unclear about whether a violation of the appearance of impropriety is an independent violation.
- Comments [3] and [5] seem out of place.
- Comments [9] and [10] should be dropped.

Mr. Fox suggests the following replacement Comments to accompany his suggested revision of Canon 1, and urges the Commission to consider explicating the difference between impartiality

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and integrity and including some notion of competence in Canon 1. Revised Comment [9] and [10] are offered in the event the Commission retains the concepts in these Comments over Mr. Fox's recommendation that they be dropped. (Additions underlined.)

[1] A judge's diligence, integrity and independence in fact are fundamental requirements of the rule of law.

[2] Diligence of a judge is reflected in careful study and preparation; prompt attendance and rapt attention; and articulate and timely completion of opinions, orders and other essential written work product.

[3] The integrity of a judge is reflected in honesty, impartiality and fairness to all who come before the judge – lawyers, litigants and court personnel.

[4] The independence of a judge is reflected in the judge's commitment to carry out the judge's duties without regard to outside influences, calling them as the judge sees them despite public opinion or other inappropriate influences and without regard to consequences other than as the law requires.

[5] While being diligent, acting with integrity and maintaining independence are necessary, they are not sufficient to fulfilling a judge's duties under these Canons. Equally important is that the public have confidence that these standards are being achieved. Such confidence is eroded anytime a judge acts in a way that appears to compromise the judge's diligence, integrity and independence, even if that is not in fact what has occurred.

[6] As a result, this Canon takes the position that the Code is violated whenever a judge conducts him or herself in a manner that conveys the appearance that this Canon has been violated..

[7] For this reason, judges are required to conduct both court business and their out of court lives in a manner that is far more circumscribed than the average lawyer or member of the public. What may be a benign ex parte conversation can easily be misconstrued. Similarly, participation in certain social intercourse that in fact does not compromise a judge's integrity can be viewed as doing just that.

[8] Under this Canon a judge must always be asking him or herself two questions: (1) am I acting with diligence, integrity, and independence? (2) will the public view my conduct as conveying the appearance that my diligence, integrity and independence remain uncompromised? If the answer to either question is in the negative, the judge shall refrain from the conduct.

[9] The duty to act in a manner that promotes public confidence in the integrity of the judiciary does not imply that judges have an obligation to refrain from discussion of important matters of public policy. Judges are in a unique position to identify and address problems affecting the courts, and judges accordingly are encouraged to address those matters in an appropriate way, as a means to promote the effective administration of justice.

[10] In addition to complying with the standards of judicial conduct, a judge is encouraged to participate in activities that promote ethical conduct generally among judges and lawyers, including efforts to study, develop, maintain, implement and enforce codes of conduct, encourage pro bono representation, and support professional responsibility within the judiciary and the legal profession.