



**Community  
Rights  
Counsel**

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July 14, 2004

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American Bar Association  
ABA Justice Center  
321 North Clark Street  
Chicago, IL 60610

Dear Ms. Gallagher:

On behalf of Community Rights Counsel, I appreciate the opportunity to provide comments on the first partial draft proposals to revise existing Canons 1 through 3 of the Model Code of Judicial Conduct. I also look forward to testifying before the Joint Commission to Evaluate the Model Code of Judicial Conduct in early August.

We recognize both that the Commission's work is unfinished and that the Commission is dealing with competing pressures. We must nonetheless express our profound disappointment with the proposed revisions to the Code contained in the new draft Canons 1 and 2. In a time of unprecedented public attention and concern over judicial ethics and extrajudicial conduct, the Model Code should be made stronger and less ambiguous. Instead, all of the proposed revisions either weaken judicial ethical obligations or make them more difficult to enforce. In addition, although we recognize that the drafts recently released are only partial, we are concerned that revised Canons 1 and 2 fail to address significant and pressing ethical issues.

**1. The proposed revisions inappropriately weaken judicial ethical obligations.**

The proposed draft Canons send the absolute wrong message to judges about what they must do to obtain and maintain the public's confidence. 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), nor are they any 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). There is no longer a requirement that "the provisions of this Code are to be construed and applied to further [the independence and impartiality of the judiciary]." Inexplicably, the words "and honorable" are dropped

from the phrase “an independent and honorable judiciary is indispensable to justice in our society.”

Perhaps most importantly, new Canon 1 strongly implies that conduct which creates the appearance of impropriety is no longer a stand-alone violation of the Code. Comment 2 to new Canon 1.01 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.” The Code cannot address all the ways in which a judge’s conduct can undermine public confidence in the judiciary, and the prohibition against conduct that creates the appearance of impropriety is an important catch-all that should not be tied to another rule in order for it to be enforced. To give just one example, it may not violate any specific Canon provision for judges to participate in privately-funded judicial seminars paid for by litigants with cases before them, but such conduct clearly creates an appearance of impropriety. The objective of the Model Code should be to improve judicial conduct and public confidence in the judiciary, not to produce an exclusive list of do’s and don’ts.

**2. The revised Model Code should unambiguously prohibit judges’ involvement in cases where they have a financial interest in one of the parties.**

Numerous press accounts and investigative reports reveal that, with alarming frequency, judges are ruling in cases where they own stock or have other financial interests in one of the parties. A judge should never rule in a case in which he has a financial interest in a party, no matter how small or “de minimis” that interest is. Unfortunately, the existing Model Code, and, apparently, the revised Canon 2.12, adopt a subjective standard. The existing Code defines the term “economic interest” to exclude “de minimis” interests, allowing judges to contend in many cases that their stock interest in a party is so small that it will not compromise their decision making. In addition, draft Canon 2 creates a new section, 2.02, 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 instructs judges that “a fundamental obligation of the judicial office is to decide the matters that come before the court or tribunal.”


This is an area which demands a bright line rule. The problem is not that judges are refusing to sit, it is just the opposite. Congress has solved this problem with respect to federal judges by requiring in 28 U.S.C. § 455 that judges recuse themselves whenever they own a “legal or equitable interest, however small” in a party to a proceeding. The Commission should incorporate this bright line rule into the Model Code by redefining “economic interest” to track the definition of “financial interest” in 28 U.S.C. § 455(d)(4).

### 3. The draft Canons fail to address important topics.

Finally, we note that the draft Canons 1 and 2 also completely fail to address important ethical issues that the Code needs to address. For example, current Canon 2(c) prohibits judicial membership in organizations that discriminate on the basis of race, sex, religion, or national origin. This prohibition is found nowhere in the new draft Canons and the Commission has not, to our knowledge, provided a public explanation for this omission. We trust this prohibition will be incorporated into Canons that are still to be released, but the Commission should have included with the release of its first drafts an overview of the topics that will be addressed in subsequent Canons, to address concerns that important topics are going to be left out.

Thank you for your consideration of these comments. I look forward to testifying before the Commission on August 6<sup>th</sup>.

Respectfully submitted,

A handwritten signature in black ink that reads "Doug Kendall". The signature is written in a cursive, flowing style.

Douglas T. Kendall  
Executive Director