

## **AJS Comments on Preliminary Draft of Revisions to ABA Model Code of Judicial Conduct**

Submitted to the ABA Joint Commission to  
Evaluate the Model Code of Judicial Conduct  
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- The American Bar Association Model Code of Judicial Conduct is more than a description of the bare minimum in ethical standards or a description of what judges can and cannot get away with if they want to stay out of trouble. Since 1972, individual judges and the judiciary have used the code to provide guidance on ethical principles, as an education tool to help judges understand and aspire to the highest standards in ethical conduct, and as a reflection of what does and does not inspire public confidence in the judiciary. While making the code an effective disciplinary tool is an important goal, it would be a disservice to the judiciary to focus only on that goal and deprive judges of one of the few sources they have for understanding and explaining their role in an independent, impartial, upright justice system.

For this reason, AJS is pleased that the preliminary report retains the appearance of impropriety standard. The rule is important as a disciplinary standard, and there is no evidence that it is subject to being used arbitrarily or unfairly. But just as importantly, the standard is a necessary aspirational goal for judges. Although judges must ignore public clamor about the substance of their decisions, they cannot afford a callousness toward public opinion about their integrity and impartiality based on the choices they make about their conduct.

Moreover, incorporating those values in the code of judicial conduct – which is adopted by the state supreme courts -- announces to citizens that judges are willing to hold themselves to very demanding ethical standards in light of the power they are given over others' lives. (On the other hand, eliminating the standard would appear to announce a slackening of those standards.) The appearance of impropriety standard does not unfairly assume that judges lack integrity, but the alternative requires the public simply to trust that judges are upright despite appearances. All public servants are as a practical matter held to an appearance of impropriety standard by the press and public if not by a code of conduct. Reflecting that unofficial gauge, the appearance of impropriety standard reminds judges to think carefully about what they say and do and to consider the perspective of a reasonable person who does not know them well. That is not bad advice for everyone, and it is a critical factor in maintaining public confidence in an individual judge and the judiciary in general.

Holding judges to the highest standards of conduct is not flattery but their part of the bargain in which the public has granted them independence. At a time when judges are accused of being unaccountable, the judiciary must be answerable to the public's ethical expectations. To counteract accusations of arrogance, judges must be humble in ethical matters and eschew any claims of entitlement. At a time when judges are

defending their freedom to make decisions regardless of clamor by the public or pressure from politicians, judges must demonstrate their commitment to maintaining public confidence in the integrity and impartiality of those decisions by considering how the public might reasonably view their conduct. The appearance of impropriety standard, both as a symbol and an enforcement tool, is an essential component of that effort and perfectly comprehensible by a thoughtful judge and readily embraced by an upright judge.

- In addition to general principles, however, the code must be as clear and specific as possible in those rules that are used primarily as the basis for disciplinary standards. AJS believes that the preliminary draft does not go far enough to clarify the model code, does not completely reflect current standards in judicial ethics, and lags behind caselaw, state codes, and the rules of professional responsibility. AJS has already made numerous proposals to fill in those gaps and reiterates them. To give a few examples, AJS trusts the Joint Commission will consider:
  - Addition of language providing that “A judge shall not engage in sexual harassment and shall require the same standard of conduct of others subject to the judge’s direction and control” and a definition of sexual harassment.
  - Addition of language providing that “A judge, including a respondent judge, shall cooperate and be candid with the judicial conduct commission or attorney disciplinary board, shall not intentionally misrepresent a material fact or engage in willful concealment during disciplinary proceedings, and shall not retaliate directly or indirectly by words or conduct at any time against a complainant, courthouse employee, witness, or any person known or suspected to have assisted or cooperated with an investigation of the judge.”
  - Addition of language providing that “A judge shall not at any time engage in conduct involving dishonesty, fraud, deceit, or misrepresentation or reflecting adversely on the judge’s impartiality or fitness to serve as a judge.”
  - Addition of language providing that “A judge shall not use court staff, resources, stationery, equipment, or premises for personal, business, family, or political activities except for incidental or de minimis use for non-political activities or for matters concerning the law, the legal system, or the administration of justice.”
  - Addition of language providing that “A judge may make procedural accommodations to provide pro se litigants the opportunity to have their cases fully heard, and such an exercise of judicial discretion does not raise a reasonable question about the judge’s impartiality or constitute inappropriate legal advice.”
  - Elimination of the provision allowing judges to attend “widely attended events” without charge.
- AJS believes that each jurisdiction should adopt commentary as suggested by the Joint Commission. However, commentary is most helpful and accessible if it is succinct and does not simply restate what is already in the rule. Therefore, AJS indicates in the accompanying comments numerous places where repetitive

commentary should be deleted. Moreover, as the Preamble to the 1990 model code states, Commentary should “by explanation and example, provide[] guidance with respect to the purpose and meaning of the Canons and Sections” and not state additional rules. Therefore, some of the commentary announcing significant, specific standards should be moved to the text of the rule. Finally, some of the commentary intended to explain the rationale for rules is not convincing or does not reflect existing caselaw. The problems with commentary are particularly obvious in Canon 5. AJS’s proposals point out these problems and suggest alternate language.

- The recent federal decisions on the constitutionality of several campaign restrictions makes it imperative that Canon 5 contain aspirational provisions that will encourage candidates to refrain from conduct that, while protected by the First Amendment, is inconsistent with engendering public confidence in the judiciary.