

To: Mark I. Harrison, Chair
ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

From: David L. Hagen, 4th Watch, 61485 CR 13, Goshen IN 46526.
Date: August 3, 2005

Re: Comments on Preliminary Draft, Model Judicial Code Canon 5 Rule 5.01-c), Comment [1].

Summary:

Delete Rule 5.01-c) as destroying a key protection to the Rule of Law and breaching unalienable rights to religion and free speech.

Rule 5.01 Comment [1]:

“The ~~state has~~ **People have** a compelling interest in maintaining **the Rule of Law, with justice and separation of powers, including** the integrity, independence, and impartiality of the judiciary . . .”

“In order to advance the state’s **People’s** compelling . . .”

Rule 5.01 Comment [1]

“... influence, ~~taking~~. **This needs take** into account the various method of selecting judges, and the constitutional ~~provisions governing~~ **preservation of unalienable rights of freedom of religion,** free speech and expressive association.”

1) Delete Canon 5 Rule 5.01-c) as breaching unalienable rights to religion and free speech.

(Canon 5, p1 line 19)

Rule 5.01-c) ~~publicly endorse or oppose a candidate for any public office;~~

Discussion: Rule 5.01(c)’s prohibition on speaking out on candidates for public office is dangerously removes a critical protection to the Rule of Law and unnecessarily restricts a Judge’s unalienable rights to religion and to free speech.

These codes will likely be mirrored in other countries. It is particularly important in most former communist countries and developing countries to speak out against corruption. Judges must be free to publically uphold justice and oppose corruption, including to speak out against candidates that they know are corrupt or who breach foundational principles and abuse the rule of law.

In the 20th century alone, thirty three Democracies failed to uphold their constitutional protections and let tyrants take over. This resulted in the deaths of 125 million people. It is far safer to the Rule of Law to prevent corrupt persons from gaining office than to try to remove them from office. I strongly recommend deleting Rule 5.0 c) as an important protection to the Rule of Law.

2) Canon 5, Rule 5.01 Comment [1] (Canon 5 p 2 lines 22, 27)

Recommend rephrasing Rule 5.01 Comment [1] (Canon 5 p2 line 22) to state:

“The ~~state has~~ **People have** a compelling interest in maintaining **the Rule of Law, with justice and separation of powers, including** the integrity, independence, and impartiality of the judiciary . . .”

Similarly restate Rule 5.01 Comment [1] (Canon 5 p 2 line 27) to read:

“In order to advance the ~~state’s~~ **People’s** compelling . . .”

Discussion:

Change ~~state’s~~ to “**People’s**”

The phrase “the state has a compelling interest” sounds like the Soviet constitution, where power resides in the state. In the US constitution, power is entrusted to the People and exercised through their elected representatives.

Per the recommendations on Code 1 to include the highest goal, recommend inserting **“the Rule of Law with justice and separation of powers, including”** to highlight the ultimate goal, within which “integrity, independence and impartiality” are objectives.

3) Canon 5, Rule 5.01 Comment [1] (Canon 5 p 2 lines 26, 27) add **“unalienable rights”**

“... influence, ~~taking~~. **This needs take** into account the various method of selecting judges, and the constitutional ~~provisions governing~~ **preservation of unalienable rights** of **freedom of religion**, free speech and expressive association.”

Discussion:

The phrase “constitutional provisions governing free speech and expressive association.” sounds like the Constitution is the source of free speech and association. However, the Founders were very explicit in establishing the USA on the premise that the People were ‘endowed by their Creator with certain unalienable Rights . . .’ This principle is mutually required by all States for equal footing. The Constitution was explicitly amended to include the Bill of Rights to preserve these unalienable rights, not to establish them.