CENTER for JUDICIAL ACCOUNTABILITY, INC.

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DATE: April 18, 2008

TO: United States Judicial Conference Committee on Codes of Conduct
c/o: codecomments@uscourts.gov

FROM: Elena Ruth Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: Comment on Proposed Revisions to the Code of Conduct for United States Judges

This memorandum responds to the March 7, 2008 notice, posted on the website of the Administrative Office of the United States Courts, that the Judicial Conference's Committee on Codes of Conduct seeks public comment on its proposed revisions to the Code of Conduct for United States Judges.

According to the notice:

> "The proposed revisions are based in large part on revisions adopted by the American Bar Association in February 2007, amending the ABA Model Code of Judicial Conduct".

This is misleading. The Committee has not incorporated into its proposed revisions the most significant and salutary of the ABA's changes geared to clarity and enforcement. Rather, the Committee has essentially retained the existing Code of Conduct, which, when adopted by the Judicial Conference in 1992, was unacceptably inferior to the 1990 ABA Model Code by its near-total substitution of "should", in place of "shall", in describing expected judicial conduct, with the result that it established no enforceable standards. The Committee has provided no explanation for its proposed "New Code" other than what appears in the March 7, 2008 notice:

> "The Committee concluded that the ABA Model Code reflects many valuable clarifications, expansions, updates, and improvements, which the Committee proposes to incorporate into the Code of Conduct, although the Committee does not propose to adopt the overall organization and numbering format of the revised ABA Model Code."

The notice, which hyperlinks to both the proposed "New Code" and "Current Code (with proposed revisions)", offers no link to the 2007 ABA Model Code. Examination of the Model Code and related ABA documents describing the 39 months of public hearings, discussion,

comments, and suggestions that produced it, accessible from the ABA's website at http://www.abanet.org/judicialethics/home.html, raises overwhelming questions as to the basis upon which this Committee has materially rejected the 2007 ABA Model Code.[1]

The Center for Judicial Accountability, Inc. (CJA) is a national, nonpartisan, nonprofit citizens' organization whose purpose is to ensure that the processes of judicial selection and discipline are effective and meaningful. For nearly two decades, CJA has been documenting, by independently-verifiable documentary evidence, the worthlessness of the Code of Conduct for United States Judges, specifically relating to Canons 3C and 3D ("Disqualification" and "Remittal of Disqualification") and Canon 3B ("Administrative Responsibilities" as it pertains to supervisory oversight and discipline).

Additionally, we have chronicled that the 1993 Report of the National Commission on Judicial Discipline is false in its claim that although Supreme Court Justices are not "formally" bound by the Code of Conduct for U.S. Judges, they "use it for guidance on applicable ethical standards" (at p. 122). In fact, the Justices flout Canons 3C, D, and B with impunity to cover up systemic corruption in the lower federal judiciary and in state and District of Columbia courts, involving judges and government lawyers, abetted by their own misbehaving Supreme Court staff.

As for the Justices, there is no reason why the Code should not be "formally binding" on them – and there appears to be no constitutional bar.[2] The revised Code is ambiguous. Although its

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[1] According to Mark I. Harrison, chair of the ABA Joint Commission which produced the 2007 Model Code:

> "The revised [Model] Code is the product of a completely transparent process during which the Joint Commission held nine public hearings, met in-person twenty times, had more than thirty teleconferences, and regularly posted its work on this website with requests for feedback and comment."

By contrast, this Committee operates without the most basic transparency. Indeed, in an unsuccessful attempt to know who are the Committee's members, I have sent three e-mails to the address identified on the notice, codecomments@ao.uscourts.gov, and phoned twice to the Administrative Office to speak with Assistant General Counsel Bob Deyling, who serves as liaison to the Committee, and for whom I left two messages, both unreturned. The response to the third e-mail, deflecting the inquiry, is annexed.

[2] In addition to Congress' authority to impose same by statute – just as it included the Justices within the disqualification statute, 28 U.S.C §455, and the Ethics Reform Act of 1989 pertaining to honoraria – it appears that the Judicial Conference, headed by the Chief Justice, could bind the Justices to the Code and, certainly, upon resolution of the Justices. Report of the National Commission on Judicial Discipline and Removal, p. 122; see also "*The Role of Judicial Ethics in the Discipline and Removal of Federal Judges*", Beth Nolan, Research Papers of the National Commission on Judicial Discipline and

"Introduction" section does not include the Justices in its list of federal judicial officers to whom the Code applies, its section entitled "Compliance with the Code of Conduct" would seem to encompass the Justices by its language:

> "Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code."[3]

This should be clarified so that, if necessary, appropriate remedial steps may be taken.

As for Canons 3C and D relating to judicial disqualification and disclosure, these largely echo the language of the federal disqualification statutes, 28 U.S.C. §§144 and 455, and are governed by their judicial interpretation.[4] As CJA has pointed out time and time again, including by advocacy to the Administrative Office, to the Judicial Conference, and to the Justices[5], judicial interpretation of 28 U.S.C. §§144 and 455 has rendered these disqualification statutes ineffectual:

> "While the text of sections 144 and 455 appear to create a relaxed standard for disqualification that would be relatively easy to satisfy, judicial construction has limited the statutes' application, so that recusal is rare, and reversal of a district court refusal to recuse, is rarer still.", Charles Gardner Geyh, "*Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. Section 372(c)*", Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, at p. 771 (1993).[6]

Removal, Vol. 1, pp. 880, 893.

[3] What is clear from the "Compliance" section is that just as its three subsections specify the degree to which the Code is applicable to "Part-time", "Pro Tempore", and "Retired" judges, a further subsection could be added for the Justices were any portions of the Code deemed inapplicable to them

[4] Such follows from the Commentary to Canon 1 that the Canons "should be applied consistent with…statutes…and decisional law…"

[5] See, most recently, our March 6, 2008 Critique of The Report to the Chief Justice on the Implementation of the Judicial Conduct and Disability Act of 1980 (at pp. 4-6, 63). Copies were hand-delivered, on March 7, 2008, to the Executive Secretariat of the Judicial Conference and to the Supreme Court, under a March 6, 2008 coverletter to Chief Justice Roberts. These are also posted on our website, www.judgewatch.org, accessible *via* the sidebar panel "Judicial Discipline-Federal".

[6] Also, "There is general agreement that §144 has not worked well." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3542, at 555, citing law review articles and quoting from *Statutory Disqualification of Federal Judges*, David C. Hjelmfelt, Kansas Law Review, Vol. 30: 255-263

The proposed revisions to the Code of Judicial Conduct for U.S. Judges do NOT change this. The proposed two revisions to Canon 3C and proposed single revision to Canon D are minor[7], omit, from the Commentary, the obligation of disclosure, contained in both the 1990 and 2007 ABA Model Codes[8], and leave untouched the interpretive hurdles that have reduced the disciplinary statutes to empty shells. These interpretive hurdles are that the judge whose disqualification is sought is not disqualified from consideration of the motion's timeliness and sufficiency, the latter of which is interpreted as requiring "extrajudicial" matter and to exclude evidence relating to the merits of decisions and procedural rulings. This is highlighted by CJA's article "*Without Merit: The Empty Promise of Judicial Discipline*" (The Long Term View (Massachusetts School of Law), Vol. 4, No. 1 (summer 1997)) – a copy of which is annexed. The documentary substantiation for the article is posted on CJA's website, www.judgewatch.org, accessible *via* the sidebar panel "Judicial Discipline-Federal". Most relevant and comprehensive is the "Test Case-Federal (*Mangano*)", embodying, in a single perfect case, eight applications for judicial disqualification/disclosure, the particulars of which are summarized by the cert petition in the case, with an additional application for disqualification of, and disclosure by, the Justices, summarized by the subsequent petition for rehearing.

(1982): "Section 144 has been construed strictly in favor of the judge...Strict construction of a remedial statute is a departure from the normal tenets of statutory construction."; Because of this strict construction, "disqualification under this statute has seldom been accomplished", initially and upon review, Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges (1996), at 737, "...§144's disqualification mechanism has proven to be essentially ineffectual." Flamm, at 738.

[7] The single revision in Canon 3D, substituting the word "should" for "shall", is not based on any ABA revision. The 2007 ABA Model Code maintains "shall" in directing that the agreement to waive disqualification be "incorporated in the record of the proceeding". The Committee's change is objectionable as it erodes the Canon and certainly for purposes of imposing discipline for its violation.

[8] "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.", 1990 ABA Model Code, Canon 3E, Commentary

"A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.", 2007 Model Code, Rule 2.11, Comment 5.

Rule 2.11 also adds a Comment (2) that did not appear in the 1990 ABA Model Code, *to wit*, "A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."

The Committee has included neither of these Comments from the 2007 Model Code in its proposed Revised Code.

As that "Test Case" proves, federal judges, at all levels, face NO obstacle in disposing of judicial disqualification issues by either ignoring them entirely or by authoring decisions denying disqualification without reasons or by reasons which are demonstrably false. The result of this threshold problem, infesting both the "normal adjudicative processes", as well as the disciplinary process under the 1980 Act, is that interpretive hurdles cannot be overcome and caselaw cannot develop, either as to disqualification/disclosure or discipline.

Consequently, if Canon 3C and D are to be more than the window-dressing they currently are – and will otherwise continue to be[9] – a provision must be added stating that it is misconduct *per se* for federal judges to wilfully fail to adjudicate or to deny, without reasons, a judicial disqualification/disclosure application, or to falsify and conceal the material facts and law presented by the application in support of disqualification and disclosure. Moreover, to ensure that a disciplinary venue is available for review of such misconduct *per se*, a further provision must be added that a judicial misconduct complaint based thereon is reviewable under the 1980 Act, 28 U.S.C. §§351 *et seq.*

These insertions to the Code are properly made. The existing Commentary to Canon 1 states:

> "...The Code may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§332(d)(1), 351 to 364), although it is not intended that disciplinary action would be appropriate to every violation of its provisions... Many of the proscriptions of the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed." (p. 2).

Federal judges should not be "uncertain" about the disciplinary consequences of their wilful and deliberate misconduct. There is no reason for the Committee to "cast in general terms" what it can specify, unless its intent is to exempt readily-definable misconduct from disciplinary action.

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[9] It must be noted that the Brennan Center for Justice, to which, as far back as 1998, CJA provided a copy of "*Without Merit*" and the Supreme Court submissions in "Test Case-Federal (*Mangano*)", and which, throughout the past decade, refused our repeated entreaties, for its scholarship and advocacy pertaining to disqualification/disclosure issues, for which we provided it with further cases, has now issued a report entitled "*Fair Courts: Setting Recusal Standards*". It concludes, albeit in somewhat elliptical fashion, that judicial recusal is largely illusory and makes ten recommendations to invigorate such remedy. Among the recommendations giving resonance to CJA's long-standing advocacy: "enhanced disclosure"; "independent adjudication of disqualification motions", "transparent and reasoned decision-making"; "de novo review of interlocutory appeals" and "expanded commentary in the canons". Neither these nor any of the other recommendations are embodied in the Committee's proposed revisions to Canons 3C and D.

Canon 1 is particularly vague and rhetorical – especially with respect to the phrase "independence of the judiciary" which is part of its title. Neither in the Canon itself, nor in the Commentary, is this defined so as to make clear that the "essential independence of judges in making judicial decisions" means their independence from pressures and influences impinging on their duty to decide based on the facts and law.[10]

No rhetoric is necessary for the federal judiciary to plainly state that a judge's duty is to adjudicate based on the facts and law. Yet, nowhere in the Code is there any statement that this is the essence of the judicial function and the purpose of "judicial independence". Nor is there any statement that it is misconduct *per se* for a judge to knowingly ignore, falsify, distort, or conceal the material facts of the case and/or to knowingly disregard controlling, black-letter law by his decisions and rulings. Inclusion of this more general proscription could adequately substitute for the more specific proscription, hereinabove proposed, relative to disqualification/disclosure applications, so long as there is a further proscription against wilful failure to decide such applications.[11]

The Commentary to Canon 1 should be revised to affirmatively state "The Code provides standards of conduct for application" in disciplinary proceedings under the 1980 Act", as such is sufficiently qualified by the clause "although it is not intended that disciplinary action would be appropriate to every violation of its provisions". That the Committee did not do so reflects its determination to undercut the Code as a source for disciplinary enforcement. Certainly, this is clear from the Committee's systematic retaining of the word "should" in Canon titles and subsections, describing what is and is not expected of a judge, instead of the word "shall" which is how they appear in the ABA Model Codes.

As illustrative, revised Canon 3 of the Code of Judicial Conduct for U.S. Judges, entitled "A Judge **Should** Perform the Duties of the Office, Fairly, Impartially and Diligently" – the sole revision therein being the addition of the word "Fairly". Its subsection A "Adjudicative Responsibilities", unchanged from the current Code, includes:

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[10] By contrast, the ABA's 2007 Model Code, Comment 1 to its Rule 2.4 (*External Influences on Judicial Conduct*) states:

> "An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." (underlining added).

[11] The ABA's 2007 Model Code has a Rule 2.7 entitled "*Responsibility to Decide*", which states:

> "A judge **shall** hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.*" (bold and underlining added).

> "(1) A judge **should** be faithful to and maintain professional competence in the law, and **should** not be swayed by partisan interests, public clamor, or fear of criticism;
>
> (2) A judge **should** hear and decide matters assigned, unless disqualified…".

Its section B "Adjudicative Responsibilities", modestly changed from the current Code, includes:

> "(1) A judge **should** diligently discharge the judge's administrative responsibilities…and facilitate the performance of administrative responsibilities of other judges and court officials;
>
> (2) A judge **should** require court officials, court personnel, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligation under this Code;
>
> (3) A judge **should** take appropriate action when the judge becomes aware of reliable evidence indicting the likelihood of unprofessional conduct by a judge or lawyer;
> …
> (5) A judge with supervisory authority over other judges **should** take reasonable measures to assure the timely and effective performance of their duties."

All these "shoulds" are "shalls" or "shall nots" in the 1990 and 2007 ABA Model Codes. Thus, the 2007 ABA Model Code, Canon 2: "A Judge **Shall** Perform the Duties of Judicial Office Impartially, Competently, and Diligently". Its Rule 2.2, "*Impartiality and Fairness*", states:

> "A judge **shall** uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*"[12]

Its Rule 2.4, "*External Influences on Judicial Conduct*, states:

> "(A) A judge **shall not** be swayed by public clamor or fear of criticism.
>
> (B) A judge **shall not** permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

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[12] The asterisks in the 2007 ABA Model Code are to terms, being used for the first time in their "defined sense" – for which interpretations appear in its "Terminology" section.

> (C) A judge **shall not** convey or permit others to convey the impression that any person or organization is in a position to influence the judge. "

Its Rule 2.12, "*Supervisory Duties*", states:

> "(A) A judge **shall** require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.
>
> (B) A judge with supervisory authority for the performance of other judges **shall** take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them."

Its Rule 2.15, *Responding to Judicial and Lawyer Misconduct*, states:

> "(A) A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects **shall** inform the appropriate authority.*
>
> (B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects **shall** inform the appropriate authority.
>
> (C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code **shall** take appropriate action.
>
> (D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct **shall** take appropriate action."

The 1990 Model Code had emphasized the distinction between "shall" and "should" this way:

> "When the text uses 'shall' or 'shall not,' it is intended to impose binding obligations the violation of which can result in disciplinary action. When 'should' or 'should not' is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When 'may' is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by

specific proscription…." (Preamble, p. 8).

The 2007 ABA Model Code similarly states:

> "Where a Rule contains a permissive term, such as 'may' or 'should,' the conduct being addressed is committed to the personal and professional discretion of the judge…and no disciplinary action should be taken for action or inaction within the bounds of such discretion." (Scope, p. 2, ¶2).

There is not the slightest justification for the federal judiciary to promulgate lesser and unenforceable standards for its powerful judges than state judiciaries promulgate for the judges of their courts, including their states' highest courts, based on the ABA Model Codes of Judicial Conduct. Yet, the Judicial Conference did precisely this in promulgating its 1993 Code of Conduct for U.S. Judges, changing the mandatory "shalls" of the 1990 ABA Model Code to discretionary "shoulds", which this Committee has perpetuated by its proposed Code. Indeed, it appears that the only "shall" not changed is the one at the outset of Canon 3C, presumably because that "shall" – "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" – is statutorily-based and firmly embedded in the popular mind.

Once the "shoulds" are restored to "shalls", the Committee might consider the suggestion of Professor Geyh, who was co-reporter for the ABA's 2007 Model Rules. In testimony before the House Judiciary Committee, on two separate occasions in 2006, Professor Geyh recommended that the Code of Conduct for United States Judges be linked with the 1980 Act:

> "A core failure of the existing disciplinary regime in the federal courts is the hopelessly vague standard that it brings to bear in disciplinary actions. Under the statute, judicial conduct is assessed with reference to whether it is prejudicial to the administration of justice. So general a standard offers no clear guidance as to what does or does not constitute misconduct, and contributes to non-enforcement, because judicial councils are understandably reluctant to impose sanctions on judges for conduct that the judges may not know violates the statute.
>
> There is an easy and obvious solution. The American Bar Association has a Model Code of Judicial Conduct, some variation of which has been adopted by virtually every system in the United States, including the federal judiciary in its Code of Conduct for United States Judges. In almost every state, the disciplinary process is tethered to the Code of Conduct, which provides judges with detailed and explicit guidance as to the conduct that is permitted, required, and forbidden. When a judge is disciplined, the disciplinary authority will cite the specific provision of the Code that the judge violated.

> Unfortunately, the federal judiciary has resisted linking its Code to the disciplinary process. One study found that the Code was referenced in only 3% or (sic) federal disciplinary actions, and the Code of Conduct for U.S. Judges explicitly divorces the Code from discipline. It is laudable that the federal judiciary encourages ethical conduct among its judges by inviting them to inquire into the appropriateness of their conduct under the Code without the specter of discipline hanging over their heads. But nothing forecloses the judicial conference from continuing to employ a committee that provides such advice on a confidential basis at the same time as the judicial councils utilize the Code for disciplinary purposes. Indeed, this bifurcation of responsibility -- with one judicial entity offering advice about the Code on request, and another using the Code in disciplinary actions – is common practice among the state systems, and works quite well.
>
> ...
>
> The Judicial Conference could make its Code of Conduct for U.S. Judges applicable to disciplinary proceedings without enabling legislation by Congress. Alternatively, Congress could revise the disciplinary statute to link conduct prejudicial to the administration of justice to the specific provisions of the Code. I see no separation of powers impediment to such a move, insofar as the judiciary retains control over the terms of the Code itself. If this change is made by the Conference or Congress, some hortatory language in the Code would need to be changed to mandatory..." (September 21, 2006 hearing on the impeachment of U.S. District Judge Manuel Real, pp. 149-150, also , pp. 149-50, also, p. 139)[13]

Underscoring the need for the Committee to reinforce the Code as a standard for discipline is the 2006 Report to the Chief Justice on the Implementation of the Judicial Conduct and Disability Act of 1980 ("Breyer Committee Report"). It found that "only rarely" did chief judges cite the Code of Conduct for U.S. Judges in a sample of 593 complaints terminated (p. 35), which it specified: as 4% of the chief judges' orders, with only 2% citing advisory opinions of the Judicial Conference's Codes of Judicial Conduct Committee. Although this would appear to be a steep decline from the 1993 Report of the National Commission on Judicial Discipline and Removal, which had purported (p. 98) that chief judges and circuit councils had "frequently" sought guidance in the Code, the underlying research papers of the National Commission reveal that actually only 3% of orders had cited the Code.[14]

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[13] "...virtually every State in the United States links their disciplinary process – their judiciaries do – to their code of conduct...instead of saying judges should be disciplined for engaging in conduct that is contrary to the administration of justice, this vague standard that is currently there, to linking it to conduct that violates their – the code of judicial conduct that they already have in place." (June 29, 2006 hearing on the establishment of an Inspector General for the Judicial Branch, p. 57).

[14] Research Papers of the National Commission on Judicial Discipline and Removal, "*Administration*

The National Commission's Report had also noted:

> "...the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the [1980] Act. The same may be true of other statutes and rules establishing ethical norms for federal judges, particularly if they have their own enforcing mechanisms. The Commission believes the subject deserves continuing study and clarification, much of which can be expected to emerge on a case by case basis if dispositions under the Act are circulated and selectively published, as recommended. The Committee can also see room for fruitful study by various committees of the Judicial Conference charged with responsibility for ethics and discipline issues, and perhaps by appropriate congressional oversight committees." (pp. 98-99, underlining added).

Nearly 15 years have passed since the National Commission's Report. By now, this Committee should have achieved "clari[ty]" as to which provisions of the Code are "enforceable under the Act" and the circumstances thereof. These are not reflected, however, by the Code.

At minimum, the Code should enunciate the fundamental principle that disciplinary action is warranted where a judge's violations of the Code are knowing and deliberate. Such properly applies irrespective of the existence of "enforcing mechanisms" of "statutes...establishing ethical norms", as, for instance, the disqualification statutes. And the Code should give examples of the means by which a judge's code-violating conduct may be deemed knowing and deliberate, including where a party has moved for reargument and/or rehearing, alerting the judge to his violations – to which the judge thereafter adheres, without reasons or by reasons that are demonstrably false. Similarly, where a party moves for the judge's disqualification, based on the judge's violations – and which the judge thereafter denies without reasons, or by reasons that are demonstrably false.

As it is, the Committee's proposed new Commentary to Canon 3A(2) is a step backward[15]. It states:

> "Unwarranted disqualification may bring public disfavor to the court and to the

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of the Federal Judicial Conduct and Disability Act of 1980", Vol. I, p. 543, further noting that 7.5% of complainants had cited the Code.

[15] Canon 3A(2), to which no revisions have been proposed, reads:

> "A judge **should** hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings." (bold added). [*cf.* fn. 11, *supra*]

> judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular cases." (p. 9).

Implicit by this addition is that the federal judiciary suffers from "unwarranted disqualification". This is untrue. As hereinabove noted and documented by "Test Case-Federal (*Mangano*)", the disqualification of federal judges for bias, actual or apparent, is virtually impossible for litigants to achieve, either in the first instance or upon appellate review. This includes where the pervasive actual bias meets the "impossibility of fair judgment" standard of *Liteky v. United States*, 510 U.S. 540 (1994).

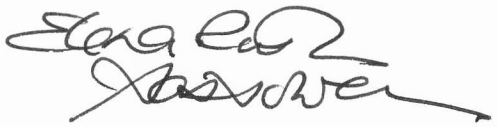
Federal judges already have an arsenal of tools for defeating applications for their disqualifications – including, as aforesaid, by ignoring the issue and rendering fraudulent judicial decisions that falsify and omit the material grounds upon which disqualification is sought. They do not need further rhetorical justification to deny warranted disqualification. Yet, assuredly, this proposed Commentary will become the most quoted of the Canon by judges denying disqualification, which they almost universally already do. As such, it is not merely superfluous, but dangerous.

The Committee offers no justification for this proposed Commentary, adapted from the ABA's 2007 Model Code.[16] But such Model Code is a template for modification, with provisions more applicable to state judiciaries, most of whose judges have time-limited elective or appointed terms that make them vulnerable to pressures of "difficult, controversial, or unpopular cases". Life-tenured federal judges are not so vulnerable, quite apart from the fact that the mechanisms for disciplining and removing federal judges are effectively disabled and non-functioning, thereby further insulating them.

According to the March 7, 2008 notice:

> "Any public comments may, at the Committee's discretion, be publicly disclosed on the judiciary's web site, www.uscourts.gov. At the close of the comment period, the Committee on Codes of Conduct will review and analyze the comments received and consider further revisions, as necessary. The Committee plans to forward its final recommendations to the Judicial Conference at its September 2008 meeting."

We hereby request that these comments be "publicly disclosed" on the U.S. Courts' website, along with our own invitation for responsive comment.



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[16] 2007 ABA Model Code, Comment to Rule 2.7.

Center for Judicial Accountability, Inc. (CJA)

From: CodeComments@ao.uscourts.gov
Sent: Friday, April 18, 2008 2:54 PM
To: Center for Judicial Accountability, Inc. (CJA)
Subject: Re: Third Written Request for Information -- Committee on Codes of Conduct

Thank you for your inquiry concerning the current members of the Judicial Conference Committee on Codes of Conduct. This mail box has been established for the receipt of comments from interested members of the public on the proposed revisions to the Code of Conduct for United States Judges. If you wish to file a comment, please use this email box to do so, and please be assured that each member of the committee will be provided with a copy of your comments. If you wish to contact the committee members individually for some other purpose, please explain so that your request for a list of committee members may be considered accordingly.

For further information about the Judicial Conference and its Committees, please see the following:

http://www.uscourts.gov/judconf.html

Thank you.

"Center for Judicial Accountability, Inc. (CJA)" <elena@judgewatch.org>

04/18/2008 10:50 AM

To codecomments@ao.uscourts.gov
cc
Subject Third Written Request for Information -- Committee on Codes of Conduct

This is now my third written request – and follows, additionally, my two phone calls to the Office of the General Counsel of the Administrative Office (202-502-1100: yesterday at 4:15 p.m. & this morning at 10:15 a.m.), leaving two messages for Bob Deyling. Assistant General Counsel & liaison to the Judicial Conference Committee on Codes of Conduct.

Please furnish me with the below requested information. Also, please advise as to how long each of the members of the Committee on Codes of Judicial Conduct has been on the Committee and confirm that the members are appointed and reappointed by the Chief Justice.

Thank you.

Elena Sassower

From: Center for Judicial Accountability, Inc. (CJA) [mailto:elena@judgewatch.org]
Sent: Thursday, April 17, 2008 9:04 AM
To: 'codecomments@ao.uscourts.gov'
Subject: Second Request for Information -- Committee on Codes of Conduct

I have received no response to my e-mail, sent two days ago. Please advise.

Thank you.

Elena Sassower

From: Center for Judicial Accountability, Inc. (CJA) [mailto:elena@judgewatch.org]
Sent: Tuesday, April 15, 2008 9:12 AM
To: 'codecomments@ao.uscourts.gov'
Subject: Request for Information -- Committee on Codes of Conduct

Please advise as to who are the members of the Judicial Conference's Committee on Codes of Conduct – and/or where that information may be found on the U.S. Courts' website.

Thank you.

Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)
914-421-1200

$3.95

THE LONG TERM VIEW

Volume 4 A Journal of Informed Opinion *Number 1*

JUDICIAL MISCONDUCT

ABUSE OF POWER ON THE BENCH

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Sharon Anne Lockhart
Co-founder, Citizens for Good Judges,
Johnson County, KS

THE QUESTION OF RACIAL DISCRIMINATION IN SENTENCING

Marc Mauer
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THE SELECTION OF JUDGES

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THE LONG TERM VIEW

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Judicial Misconduct

Without Merit:

The Empty Promise of Judicial Discipline

Elena Ruth Sassower

Judicial independence is predicated on "good faith" decision-making. It was never intended to include "bad faith" decision-making, where a judge knowingly and deliberately disregards the facts and law of a case. This is properly the subject of disciplinary review, irrespective of whether it is correctable on appeal. And egregious error also constitutes misconduct, since its nature and/or magnitude presuppose that a judge acted willfully, or that he is incompetent.

Editors' note: *This article is a critique of the judicial discipline system which should be aired. Publication of the critique does not constitute an endorsement of the Center for Judicial Accountability's claims about particular cases.*

THE most serious misconduct by judges is that which is the least likely to subject them to discipline. It is not what they do in their private lives, off the bench, but what they do on the bench in the course of litigation. The obvious image is the judge who runs his courtroom as if he owns it, who looks down from his elevated bench and treats litigants and their attorneys in an imperious and abusive fashion. But even where a judge is, as he is supposed to be, patient and dignified in demeanor, every court appearance, just like every written motion, involves a judge ruling on a procedural or substantive aspect of a case. And there are judges who, while presenting a veneer of fairness, are intellectually dishonest. They make rulings and decisions which are not only a gross abuse of discretion, but which knowingly and deliberately disregard "clear and controlling law" and obliterate, distort, or fabricate the facts in the record to do so.

Why would a judge be intellectually dishonest? He may be motivated by undisclosed bias due to personal or political interest. Judicial selection processes are politically controlled and closed, frequently giving us judges who are better connected than they are qualified. And once on the bench, these judges reward their friends and punish their enemies. Although ethical codes require judges to disclose facts bearing upon their impartiality, they don't always do so. They sit on cases in which they have undisclosed relationships with parties, their attorneys, or have interests in the outcome, and do so deliberately because they wish to advantage either one side over another or sometimes themselves.

They exercise their wide discretion in that side's favor. That's the side for whom deadlines are flexible and for whom procedural standards and evidentiary rules don't apply. A common thread running through judicial misconduct cases is litigation misconduct by the favored side. Meanwhile, the other side struggles to meet inflexible deadlines, and has its worthy motions denied. In extreme cases, a judicial process predicated on standards of conduct, elementary legal principles, rules of evidence, simply ceases to exist.

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Intellectual Dishonesty

Every case has many facts, any of which may be inadvertently "misstated" in judicial decisions. But judicial misconduct is not about innocent "misstatement" of facts, and certainly not about peripheral facts. It involves a judge's knowing and deliberate misrepresentation of the material facts on which the case pivots. These facts determine the applicable law. If the applicable law doesn't allow the judge to do what he wants to do, he's going to have to change the material facts so that the law doesn't apply. When judges don't want to put themselves on record as dishonestly reciting facts, they just render decisions without reasons or factual findings.

The prevalence of intellectually dishonest decisions is described by Northwestern Law Professor Anthony D'Amato in "*The Ultimate Injustice: When the Court Misstates the Facts.*" He shows how judges at different levels of the state and federal systems manipulate the facts and the law to make a case turn out the way they want it to. D'Amato quotes from a speech by Hofstra Law Professor Monroe Freedman to a conference of federal judges:

> Frankly, I have had more than enough of judicial opinions that bear no relationship whatsoever to the cases that have been filed and argued before the judges. I am talking about judicial opinions that falsify the facts of the cases that have been argued, judicial opinions that make disingenuous use or omission of material authorities, judicial opinions that cover up these things with no-publication and no-citation rules.[1]

Afterward, when Professor Freedman sat down, a judge sitting next to him turned to him and said, "You don't know the half of it."

The Myth of Recusal

There's next to nothing you can do when you're before a dishonest judge. He's not going to respond to a recusal motion with "Hallelujah, you've shown me the light. I'll step down." His dishonesty will carry through to the recusal motion, which, while asserting his complete fairness and impartiality, he will deny from the bench, with no written decision or, if by a written decision, then one stating no reasons or misstating the basis for recusal. And just as making a formal recusal motion entails expense, as any motion does, so does taking an interim appeal, which may not be feasible.

How can you make any assessment of how judicial misconduct mechanisms are working unless you reach out to the victims of judicial misconduct who have used them?

— Elena Ruth Sassower

Of course, there's a problem even before making a recusal motion. Your lawyer may not want to make one because it means taking on the judge by accusing him of biased conduct. A lawyer's ethical duty is to zealously represent each client, but lawyers have other clients whose cases may come before that judge. And it is not just their relationship with that judge that they want to protect, but with his judicial brethren, who are part of the judge's circle of friends and may be quite defensive of his honor, which they see as an extension of their own.

Congress has passed two specific recusal statutes proscribing judicial bias and conflict of interest by federal judges. These have been gutted by the federal judiciary. One statute explicitly states that whenever a party files a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or preju-

dice either against him or in favor of an adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding . . . ." It seems pretty clear on its face. Yet the federal courts have interpreted this to mean that the judge who is the subject of the recusal affidavit determines its timeliness and sufficiency. The result is predictable. The complained-of judge acts as a censor, ruling that a timely and sufficient affidavit is untimely and/or insufficient so as to prevent its being heard on the merits by another judge.

On top of that, the federal courts have interpreted the recusal statutes to require that the basis for recusal be "extrajudicial." This means that the facts giving rise to recusal can't come from the case itself, but from something outside the case. Thus, if the basis of the recusal motion is that the judge has been oppressive, bullying, and insulting, has wilfully disregarded black-letter law and falsified the factual record—in other words, that he has engaged in all the misconduct properly believed to be biased—that judge need not step down when a recusal motion is made. The litigant or his lawyer has the impossible burden of trying to ferret out information about the judge's personal, professional, and political life so as to figure out the "why" behind the egregious misconduct. Parenthetically, the U.S. Supreme Court, having long ago generated the "extrajudicial" source doctrine out of thin air, has implicitly approved a "pervasive bias" exception to it. This, of course, means nothing to a biased judge, who will pretend he is unable to discern *any* bias, let alone "pervasive bias."

The Chimera of Judicial Discipline

You would think that where a judge consistently abuses his discretion and renders dishonest rulings, including on recusal motions, a formal judicial misconduct complaint would be taken seriously by a disciplinary body. Each of the 50 states and the District of Columbia has a commission, committee, council, or review board, whose purpose is to address complaints of judicial misconduct by state judges within its jurisdiction. There is also a mechanism for complaints against federal judges, which is set forth at 28 U.S.C. §372(c). Because it was enacted by Congress in 1980, it is commonly called "the 1980 Act."

These disciplinary mechanisms frequently dismiss, out-of-hand, complaints of on-the-bench misconduct, including abusive courtroom behavior and fabricated judicial decisions. They do this on the pretense that they have no authority to review the "merits of matters within a judge's discretion, such as the rulings and decision in a particular case," which they assert can only be reviewed by an appeal to an appellate court. The theory here is that doing otherwise infringes upon judicial independence, the important principle that judges be free to decide cases based on the facts before them and applicable law, without outside pressure and influences. However, judicial independence is predicated on "good faith" decision-making. It was never intended to include "bad-faith" decision-making, where a judge knowingly and deliberately disregards the facts and law of a case. This is properly the subject of disciplinary review, irrespective of whether it is correctable on appeal. And egregious error also constitutes misconduct, since its nature and/or magnitude presuppose that a judge acted willfully, or that he is incompetent.

Under the 1980 Act, one of the statutory grounds upon which a Chief Judge may dismiss a judicial misconduct complaint is if he finds it to be "directly related to the merits of a decision or procedural ruling." Although a complaint alleging bad-faith, biased judicial conduct—including legally insupportable and factually dishonest rulings—should not be dismissed as "merits-related," it invariably is. Adding insult to injury, Chief Judges sometimes tack onto their dismissal orders another statutory ground for dismissal, "frivolousness." In their view, a bias claim supported *only* by erroneous rulings and decisions, no matter how egregious, is "frivolous."

The Illusory Remedy of Appeal

Faced with a dishonest judge, litigants often cave in at the trial level and never make it to appeal. It's too emotionally and financially

draining to continue before a biased and dishonest judge. This is not to say that justice is obtainable on appeal. Even with a reversal, the onus of the appeal is on the aggrieved litigant, who, at best, gets what he was entitled to at the outset, only years later after spending untold amounts of money on legal fees and costs. Beyond that, the appellate decision, if it even identifies the "error" as judicial misconduct, will likely minimize it. Notwithstanding their ethical duty, appellate judges rarely, if ever, take steps to refer an errant trial judge for disciplinary action. And this is where the appellate process "works"!

In the federal system and in most state systems, you get only one appeal as of right. After that it's at a higher court's option. And what happens when you file misconduct complaints against appellate judges for their dishonest decisions? Just like the dishonest decisions of trial judges, they'll be tossed out as "merits related."

The Report of the National Commission on Judicial Discipline and Removal

Created by Congress, the National Commission on Judicial Discipline and Removal was supposed "to investigate and study the problems and issues" relating to judicial discipline and removal in the federal system and to evaluate more effective alternatives. In August 1993, it issued a report concluding that existing mechanisms were sufficient to deal with misconduct by federal judges. All that was necessary was a little tinkering. With that, at a cost to taxpayers of nearly $1,000,000, the Commission passed out of existence, indefinitely setting back the cause of meaningful judicial reform.

How did the Commission reach its conclusions? Not by making any significant outreach to those having direct, first-hand experience with the key "problems and issues," most of which it dodged. Indeed, the Commission's researchers never interviewed anyone who had filed a judicial misconduct complaint with the federal judiciary under the 1980 Act or with Congress to initiate its impeachment procedures. How can you make any assessment about how these mechanisms are working unless you reach out to the victims of judicial misconduct who have used them? Yet the researchers who reviewed §372(c) complaints were not ashamed to admit, "We know little about complainants and what they seek. We did not design this research to address those issues."[2] This admission is buried deep within their underlying research study.

Instead, the Commission's researchers interviewed Circuit Chief Judges and Circuit Executives about their experience in administering the 1980 Act. And how did the Chief Judges explain the value of the 1980 Act when 95% of the complaints filed were dismissed, mostly on the statutory ground that they were "merits-related"? They made claims about how the Act served as a deterrent to misconduct, and that "informal" discipline was taking place behind the scenes, using phrases like "still water runs deep." The judges insisted on absolute anonymity and that their comments be camouflaged to prevent them from being traced back to their Circuit. The Commission gave scant recognition that judges' responses might be tainted by self-interest.

The judges' anonymous comments cannot be verified, nor can the Commission's conclusions about the judicial misconduct complaints it reviewed. This is because the complaints are inaccessible to the public.

The Commission's report fails to say that it was the federal judiciary which made §372(c) complaints confidential—not Congress—and does not explore how this has frustrated Congress' ability to exercise the "vigorous oversight" it promised when it passed the 1980 Act. There were fears that the federal judiciary would be unwilling to police itself. Yet not only does the report not alert Congress to its prerogative to amend the §372(c) statute to ensure public access to the complaints, but the Commission allowed the federal judiciary to undermine what was supposed to be the first real evaluation of the 1980 Act. It did this by permitting the federal judiciary to dictate the strict terms under which it would allow the Commission to review a sampling of §372(c) complaints: only designated court-connected researchers could review

them. The Commission should have objected, strenuously, so that the complaints could be independently reviewed by outside individuals. Instead, it capitulated to judicial interests, which were heavily represented on the Commission. As a result, its report is not based on a truly independent review of complaints filed under the 1980 Act.

As for complaints filed with Congress and referred to the House Judiciary Committee, the Commission's report states they "may be made available upon request." Quoting the report as authority, the Center for Judicial Accountability asked to examine the very complaints the Commission's researchers had reviewed. We were told that we would be notified when the Committee's policy for reviewing past complaints "was decided." That was *more than two years ago* and we're still waiting for word of the Committee's policy.

The House Judiciary Committee fully participated in the Commission's report. The list of members and counsel from the House Judiciary Committee involved in the Commission's work reads like a *Who's Who*. Its courts subcommittee held a hearing on the Commission's draft report. The natural assumption is that the report would be extremely accurate about the House Judiciary Committee's procedures. But accuracy would have exposed the Committee's dereliction.

The shameful facts about the House Judiciary Committee's operations are cut from the Commission's report. You see this when you compare it with the draft report that preceded it, and then compare them to the underlying research studies. The report depicts the House Judiciary Committee as professional and responsive. But a wholly different picture emerges when you turn back to the underlying research studies. Even the draft report discloses that over 80% of the complaints reviewed by the researcher had not even been responded to by the House Judiciary Committee. That statistic is gone from the final report. Likewise cut from the final report is the draft's statement that "well over 90% of the complaints [filed with the House Judiciary Committee] do not raise genuine issues pertinent to judicial discipline and impeachment." That means up to 10% do raise such issues. The obvious next question is what the House Judiciary Committee did with these serious complaints. The draft report doesn't have the answer. You have to turn back to an underlying study to find out that the Committee either did not respond to these complaints or, if it had, did nothing beyond that.

The Failure of the 1980 Act

Because the House Judiciary Committee does not investigate individual complaints, the 1980 Act is the only avenue for disciplining the federal judges. Yet the vast majority of complaints are dismissed on the Act's statutory ground that they are "directly related to the merits of a decision or procedural ruling." The Commission's report does not disclose this important fact.

Plainly, for Congress to exercise "vigorous oversight" over the federal judiciary's administration of the Act, which is what the Commission was supposed to facilitate, it needed to know how the federal judiciary was interpreting "merits-relatedness." This was all the more essential because the federal judiciary had made judicial misconduct complaints confidential. Most importantly, was the federal judiciary treating complaints alleging bias, including dishonest decisions, as "merits-related"? Additionally, because the statute does not actually require dismissal of "merits-related" complaints, but only that such complaints "may" be dismissed, Congress needed to know what factors the federal judiciary was considering in exercising its discretion.

Yet, the two paragraphs of the Commission's 150-page report devoted to "merits-relatedness" make it utterly impossible for Congress or anyone else to discern how the federal judiciary has interpreted that statutory ground or exercised its discretion. The first paragraph concedes confusion as to the relationship between "merits-relatedness" and an appellate remedy, which may or may not exist. The second paragraph then tries to minimize the fact that even where there is no appellate remedy, "merits-re-

lated" complaints are dismissed. It trumpets that the "core reason" for excluding such complaints from disciplinary review is "to protect the independence of the judicial officer in making decisions, not to promote or protect the appellate process. . . ." But this is rhetoric. "The independence of the judicial officer" does not extend to bad-faith conduct, including decisions motivated by bias or other illegitimate purposes. And disciplinary review is appropriate under such circumstances, whether or not there is an appellate remedy.

Not only did the Commission fail to articulate this appropriate standard, but the researchers did as well. Three of the Commission's separate underlying research studies quote from a 1987 memo by Patricia Wald, then Chief Judge of the D.C. Circuit, to Judge Elmo Hunter, who had been instrumental in developing the 1980 Act and was then chairman of the Court Administration Committee of the Judicial Conference, the federal judiciary's "top management":

> Since the vast majority of complaints we receive come out of judicial proceedings, some clarification . . .would be helpful. Is anything that arose in the course of a proceeding out of bounds for a complaint, or is behavior that might have been appealed as a fundamental deprivation of due process (i.e., the lack of an unbiased judge) still a permissible subject of a complaint?

Where is the answer to Judge Wald's straightforward question? The researchers, including those who had interviewed Chief Judges, do not refer to any answer from Judge Hunter or any other judge. Nor do they provide their own answer. How could the federal judiciary properly and consistently address §372(c) complaints if it was unable to answer that question *13 years* after passage of the 1980 Act?

The obvious conclusion, which the Commission chose to ignore and conceal, is that the federal judiciary had deliberately left the "merits-related" category vague in order to dump virtually every judicial misconduct complaint it receives. This is clear from the circuits' failure to develop and publish a body of decisional law relative to the 1980 Act, despite a 1986 recommendation by the Judicial Conference that it do so.

Direct, First-Hand Experience

The dishonesty of the National Commission is further exposed by the direct, first-hand experience of CJA and its personnel. Back in June 1993, when the Commission issued its draft report, purportedly for public comment, we responded to its conclusory claims that the appellate process constituted a "fundamental check" of judicial misconduct, as did "peer disapproval" among judges. To rebut such claims, we provided it with the appellate record of a case in which a district judge's factually-fabricated and legally insupportable decision was affirmed by a circuit court panel. Although the panel's decision rested on non-existent facts and was, on its face, aberrant, contradictory, and violated black-letter law of the circuit and the U.S. Supreme Court, attempts to obtain discretionary review by the full circuit and in the Supreme Court were futile.

We pointed out to the Commission that its draft report, expressing confidence in the formal mechanisms for discipline in the judicial branch, had stated that it would not recommend substantial change "absent a convincing demonstration of the inadequacy of the 1980 Act." We asked the Commission directly whether a complaint against the judicial authors of those fraudulent and lawless decisions was reviewable under the 1980 Act. If not, then there was no remedy in the judicial branch and the case should be designated by the Commission as providing the required "convincing demonstration" for a recommendation of more substantive changes.

But the Commission refused to answer whether such a complaint would be reviewable under the Act and directed us to seek review by the House Judiciary Committee. Three weeks later, the House Judiciary Committee's counsel—who was also its liaison to the National Commis-

sion—told us that "there has never been an investigation of an individual complaint in the history of the House Judiciary Committee," and that we shouldn't expect it to start now. It was then August 1993 and the Commission's final report was just published, touting the appellate process and "peer disapproval" as "fundamental checks," and the House Judiciary Committee as a proper recipient for complaints, with investigative capacity.

At that point the National Commission was defunct. So we wrote to the House Judiciary Committee, asking that it clarify what it does with the judicial misconduct complaints it receives. If it was not investigating them, why did the Commission's report not say that? For nearly two full years, the House Judiciary Committee ignored all our many follow-up letters and phone calls. Finally in June 1995, successor counsel reiterated that the House Judiciary Committee does not investigate complaints of judicial conduct filed with it, but confines itself to legislation. He explained that the Committee simply doesn't have the budget for investigations. The Committee might have had the money if the Commission's report had been more forthright, rather than dodging the issue with a vague recommendation that the House "ensure that its Committee on the Judiciary has the resources to deal with judicial discipline matters."

According to the Commission's report, the standard practice of the House Judiciary Committee is to direct complainants' attention to the 1980 Act. It cautioned the Committee to "tell complainants that the 1980 Act does not contemplate sanctions for judges' decisions or issues relating to the merits of litigation." Since the House Judiciary Committee had not directed us to file a complaint under the 1980 Act, we asked it whether this meant that it did not believe our complaint was reviewable under the Act. But the Committee, like the National Commission before it, would not tell us. Ultimately, it became obvious that it had not the foggiest idea. And, again, the reason is attributable to the Commission's report which is wholly uninformative on the subject of "merits relatedness."

Meanwhile, our growing expertise and persistence paid off with the House Judiciary Committee. In February 1996, its counsel met with us and agreed that if the federal judiciary rejected our complaint as "merits-related," the House Judiciary Committee would have to undertake an investigation. So we filed our complaint.

What happened? Our complaint was improperly dumped as "merits-related" in an order which itself was a prime example of a dishonest decision. For this reason, we sought review by the Circuit Council. Our petition demonstrated that the dismissal order was legally and factually insupportable and that it contemptuously disregarded the National Commission's recommendation that dismissal orders be reasoned and nonconclusory and that the circuits resolve ambiguity in the interpretation of the 1980 Act. We pointed out that the Judicial Conference had endorsed each of these recommendations and that our complaint was ideally suited for building interpretive precedent to make clear, once and for all, that complaints alleging biased, bad-faith conduct are not "merits-related," and additionally that even "merits-related" complaints are not required to be dismissed under the statute. The Circuit Council's response? It denied our petition in one sentence. The cover letter informed us that, under the Act, there was no further review.

But the Judicial Conference has oversight responsibility—and we turned to it. The Assistant General Counsel to the Administrative Office of the U.S. Courts is the liaison to the Judicial Conference's disciplinary committee. His refusal to take any steps on our documented showing that the circuit is subverting the Act and the recommendations of the National Commission and Judicial Conference bears directly on the integrity of the National Commission's review of §372(c) complaints, since he was one of the two court-connected researchers who examined those complaints for the National Commission. He was not Assistant General Counsel at the time he examined complaints for the Commission. He was promoted to that position afterwards, presum-

ably because the federal judiciary liked his conclusions so well.

In the end, we have empirically proven more than the "inadequacy of the 1980 Act" resulting from an over-expansive judicial interpretation of "merits-relatedness." We have demonstrated that the 1980 Act is a facade behind which the federal judiciary dismisses fully-documented complaints of dishonest judicial decisions by decisions which are themselves dishonest and which, properly, should be the subject of disciplinary review—if there were any place to go for redress.

That's yet another reason why we are trying again with the House Judiciary Committee. We are now preparing a formal presentation to it based on our §372(c) complaint, as well as the §372(c) complaints of our members. These, likewise, have been dishonestly dismissed as "merits related" in conclusory orders which similarly misrepresent the serious misconduct issues presented. Based on this evidence, and the first-hand testimony of people who have brought complaints, the House Judiciary Committee will get a good look at what the federal judiciary, working through the National Commission, did not want it to see: flagrant judicial misconduct and corruption which the federal judiciary was able to cover-up when it made §372(c) complaints confidential. We believe it will be the basis for ending that confidentiality and for creating an alternative disciplinary mechanism, one outside the federal judiciary, to review judicial misconduct.

References

[1] Anthony D'Amato, "The Ultimate Injustice: When the Court Misstates the Facts," *Cardozo Law Review*, 11:1313 (1989).

[2] Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, 625.