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STATEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY

Commenting on the Draft Rules Governing Judicial Conduct and Disability Proceedings

October 15, 2007

This statement is submitted by the Center for Judicial Accountability, Inc. (CJA), a national, non-partisan, nonprofit citizens' organization, whose purpose is to ensure that the processes of judicial selection and discipline are effective and meaningful. Since 1993, we have been documenting the corruption of federal judicial discipline, including the federal judiciary's corruption of the Judicial Conduct and Disability Act, now codified under 28 U.S.C. §§351-364. Our website, www.judgewatch.org, posts a mountain of documentary proof, readily accessible *via* the sidebar panel "Judicial Discipline-Federal". Our written statements and testimony before the National Commission on Judicial Discipline and Removal (1993) the Long-Range Planning Committee of the Judicial Conference (1994), the Second Circuit Task Force on Gender, Racial, and Ethnic Fairness in the Courts (1995), and the Commission on Structural Alternatives to the Federal Courts of Appeals (1998) are similarly accessible.

On September 27, 2007, the Judicial Conference Committee on Judicial Conduct and Disability, chaired by Judge Ralph Winter, held a hearing on its Draft Rules governing proceedings under 28 U.S.C. §§351-364. We had requested to testify more than three weeks before the hearing, but were denied.[1] At the hearing itself, Judge Winter closed presentations after only three persons had given public comment, denying our orally-made reiterated request to be heard.

As known to the highest echelons of the federal judiciary, including Judge Winter, CJA's advocacy has long highlighted the federal judiciary's gutting of the Judicial Conduct and Disability Act, accomplished by its Illustrative Rules which materially changed the Act's statutory provisions. Among the most prejudicial of these changes: making mandatory the dismissal of "merits-related" complaints, although the statute makes dismissal discretionary, and shrouding the dismissed complaints in confidentiality, thereby preventing them from being independently examined by the public and by Congress. The Draft Rules replicate these violations.

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[1] Our exchange of correspondence pertaining to our September 4, 2007 request to testify is accessible from our "Judicial Discipline-Federal" webpage, *via* the link to correspondence with the "Administrative Office of the United States Courts/Judicial Conference".

The Commentary to Draft Rule 1 (p. 2) identifies the genesis of the Draft Rules. They are the response of the Judicial Conference Committee on Judicial Conduct and Disability to the Report of the Judicial Conduct and Disability Act Study Committee, chaired by Associate Supreme Court Justice Stephen Breyer. The Commentary describes the Breyer Committee as having been formed by Chief Justice William Rehnquist in 2004 "in response to criticism from the public and the Congress regarding the effectiveness of the Act's implementation". Although the specifics of this "criticism" are not identified, examination of the documentary proof underlying CJA's February 12, 2004 letter to Chief Justice Rehnquist and related correspondence to the Associate Justices, including Justice Breyer, and key members of Congress,[2] would support a view that if such did not force the Chief Justice to set up a committee to evaluate the federal judiciary's implementation of the Act, it certainly should have.

According to the Commentary,

> "The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards...and that a major problem faced by chief circuit judges in implementing the Act was the lack of authoritative interpretive standards.... The Breyer Committee then established standards to guide its evaluations, some of which were new formulations and some of which were taken from the 'Illustrative Rules Governing Complaints of Judicial Misconduct and Disability,'... The principal standards used by the Breyer Committee are in Appendix E of its Report...
>
> Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under the Act to fashion standards to provide guidance to the various officers and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer Report and the Illustrative Rules."

Unexplained by this Commentary – as likewise by the Breyer Report – is why the federal judiciary, whose bread-and-butter work is interpreting constitutional, statutory, and rule provisions and embodying these interpretations in caselaw, did not build "authoritative interpretive standards" for the Act in the quarter century since Congress passed it in 1980. As 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)), published ten years ago, the explanation is that the federal judiciary intentionally kept the rules vague so as to more freely dump judicial misconduct complaints on "merits-related" grounds. A copy of that important article is attached.

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[2] This correspondence is accessible *via* our "Judicial Discipline-Federal" webpage, whose link entitled "Searching for Champions-Federal" leads to a further page of links for "Chief Justice Rehnquist and Associate Justices", "Senate and its Judiciary Committee", and "House and its Judiciary Committee".

Neither the Commentary to the Draft Rules, the Draft Rules, nor any prefatory notice explicitly identify that the Draft Rules will replace the Illustrative Rules and the circuit-modifications of the Illustrative Rules, presently in use. Instead, Draft Rule 2 (at p. 3) ambiguously states: "Notwithstanding any rule of a circuit to the contrary, these Rules are to be deemed mandatory". The only clarification in the Commentary is "Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act."

Insofar as formatting, the Draft Rules are a step backward. Unlike the Illustrative Rules, they are not "user-friendly" – at least not if the intended user is the complainant. This is immediately apparent by placing the draft rules alongside the Illustrative Rules. That the Illustrative Rules – and their modifications by the circuits – are geared to the complainant is evident from their explanatory "Preface" (p. 1) and the first two Illustrative Rules, respectively entitled: "Filing a Complaint" (pp. 3-4) and "How to File a Complaint" (pp. 7-9), containing the information of immediate interest to would-be complainants. Likewise the Commentary, whose first section heading bears the title "Advice to Prospective Complainants on Use of the Complaint Procedure" (p. 5).

By contrast, the Draft Rules begin with a technical one-sentence "Preface"(p. 1), followed by four rules respectively entitled "Scope" (p. 2), "Effect and Construction" (p. 3), "Definitions" (pp. 3-4), and "Covered Judges" (p. 7). These are all part of its Article I of "General Provisions" (pp. 2-8). It is not until Article II (pp. 8-14), entitled "Initiation of a Complaint", that much of the "how-to" information of the first two Illustrative Rules appears – and even then it preceded by a rule pertaining not to complainants, but to a chief judge's "Identification of a Complaint" (at p. 8). Adding to this, the Commentary to the Draft Rules is not broken down by any helpful section headings, thereby requiring a reader to wade through commentary in which he may not be interested so as to find, or not find, the commentary which he seeks.

Substantively, the most significant of the Draft Rules are Draft Rule 11, which is the sole rule in Article III, "Review of a Complaint by the Chief Circuit Judge" (pp. 14-20), followed by Draft Rules 18 and 19 of Article V, "Judicial Council Review" (pp. 27-30). This, because virtually 100% of complaints are dismissed by chief circuit judges, whose dispositions are upheld by the circuit judicial councils nearly 100% of the time. The other Draft Rules are simply irrelevant to the average complainant: Articles IV and VI pertaining to "Investigation and Report by Special Committee" (pp. 20-27) and "Review by Judicial Conference Committee on Conduct and Disability" (pp. 33-36), as, likewise, Draft Rule 20 (pp. 30-33) of Article VI pertaining to "Judicial Council Consideration of Reports and Recommendations of Special Committees". Certainly, too, the average complainant has little use for the "Miscellaneous Rules", contained in Article VII (pp. 36-47), except, possibly, for Draft Rules 25 and 26, "Disqualification" and "Transfer" (pp. 42-46).

Since the vast majority of complaints are dismissed by chief judges on grounds that they are "directly related to the merits of a decision or procedural ruling", the Draft Rules pertaining to "merits-relatedness" are the most important by far. They cannot be approved by the Judicial Conference, as they violate the Judicial Conduct and Disability Act.

28 U.S.C. §352(b)(1)(A)(ii), whose title is "Action by Chief Judge Following Review", does NOT require that a "merits-related" complaint be dismissed. Rather, it states:

> "...the chief judge, by written order stating his or her reasons, may – (1) dismiss the complaint – (A) if the chief judge finds the complaint to be – (ii) directly related to the merits of a decision or procedural ruling". (underlining added).

Yet, Draft Rule 11, entitled "Review by the Chief Circuit Judge", removes the discretion that the statute confers in using the word "may" by declaring, in mandatory language:

> "(c) Dismissal.
> A complaint must be dismissed in whole or in part to the extent that the chief circuit judge concludes that the complaint:
> (2) is directly related to the merits of a decision or procedural ruling"
> (underlining added).

The phase "must be dismissed" is even more emphatic than the improper "will be dismissed", which is how it appears in Illustrative Rule 4, adopted by most of the circuits.[3] Such mandatory language can only serve to mislead and discourage complainants as to the reach of the Act. Likewise, the categorical initial language of Draft Rule 3(b)(1) (p. 3), which is part of Article I. Its materially incomplete "Definition" of "Misconduct" is exacerbated by its subsection (A), entitled "Exclusions":

> "(i) Allegations that are directly related to the merits of a decision or procedural ruling are excluded from the definition of misconduct. Any allegation that calls into question the correctness of a ruling of a judge, including a failure to recuse, without more, is merits related. However, a complaint that involves both the merits and an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, is excluded only to the extent it attacks the merits." (p. 4, underlining added to "without more").

Just as the mandatory "must" in Draft Rule 11(c)(2) (p. 14) will have to be replaced with the discretionary "may" so as not to violate the Act, so, too, the first sentence of the "Exclusions" of Draft Rule 3(b)(1)(A)(i) (p. 4) will have to be revised to reflect that the Act does not compel dismissal of complaints "directly related to the merits of a decision or procedural ruling". As to the second sentence, the words "without more" are unnecessarily vague. They should be replaced by identifying what the "without more" consists of, namely, the "improper motive" referred to in the third sentence of 3(b)(1)(A)(i). The revised second sentence might then read:

> "Any allegation that calls into question the correctness of a ruling of a judge, including a failure to recuse, is merits related, absent an allegation of improper motive."

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[3] See Rule 4 of the Rules of the Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, District of Columbia, and Federal Circuits.

Additionally, if the intent of the Draft Rules is to provide guidance to complainants and judges with respect to when judicial decisions and rulings are cognizable under the Act, these rules should identify that where a complaint alleges that decisions and rulings are not merely "wrong", but fraudulent in knowingly and deliberately falsifying and omitting the material facts on which the outcome pivots and/or flying in the face of controlling, black-letter law, it is covered by the Act. It might further explain that such indefensible decisions and rulings, particularly when adhered to by the judge on reargument, are, if not a manifestation of incompetence, then a manifestation of improper motive and bias. This is appropriately included in Draft Rule 3(b)(1)'s examples of "Misconduct", whose closest match in the present list are as "violations of the standards of judicial conduct" and "abuses of judicial office" – which are too euphemistic to have any value.

Likewise the Commentary to Draft Rule 3(b)(1)(A)(i) and to Draft Rule 11(c)(2) needs to be appropriately revised and clarified. Thus, the Commentary to Draft Rule 3(b)(1)(A)(i) (pp. 6-7) is false in its opening assertion (p. 6) that the rule "tracks the Act in excluding from the definition of misconduct allegations '[d]irectly related to the merits of a decision or procedural ruling.'" It does not. As for the nebulous sentence "Any allegation that calls into question the correctness of an official action of a judge – without more – is merits-related." (p. 6, underlining added), it should be changed to the more specific:

> "Any allegation that calls into question the correctness of an official action of a judge is merits related, absent an allegation of improper motive."

The Commentary should state that complaints alleging that a judge's official actions were improperly motivated are required to be particularized as to the facts on which such allegation is based. This would include the situation misleadingly presented by the Commentary of "a circuit chief judge's determination to dismiss a prior misconduct complaint" (at p. 6). Such is certainly not "merits-related" where the issue is not one of the "correctness" of his determination, but his wilful and deliberate falsification and omission of the complaint's material facts in his supporting memorandum in order to dismiss it.

As for the Commentary to Draft Rule 11(c)(2), it is contained in a single paragraph (p. 17):

> "Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act and the Breyer Committee Report. 28 U.S.C. §352(b); Breyer Report, 239 F.R.D. At 239-45... Subsection (c)(2) permits dismissal of complaints related to the merits of a decision by a subject judge, also governed by Rule 3 and accompanying Commentary." (underlining added).

The wording "adapted from the Act" is false to the extent it implies that Subsection (c) is in conformity with the Act. It is not. As hereinabove shown, Draft Rule 11(c) rewrites the Act by improperly converting to a mandatory directive the discretion that the Act gives to a chief judge not to dismiss the various categories of complaints delineated at 28 U.S.C. §352(b)(1)(A) subdivisions (i), (ii), and (iii), including "directly related to the merits of a decision or procedural ruling". As for the Commentary's citation to the Breyer Report, such is

to its Appendix E of "Committee Standards for Assessing Compliance with the Act". The "Standards" skip the introductory language of 28 U.S.C. §352(b) with its "may" language, focusing instead on the meaning of the subdivisions thereunder. The Commentary to Draft Rule 3(b)(1)(A)(i) pertaining to "merits-relatedness" (pp. 6-7) largely replicates, often *verbatim*, these Breyer Report "Standards" (pp. 145-151) as to the meaning of "directly related to the merits of a decision or procedural ruling" in 28 U.S.C. §352(b)(1)(A)(ii).

CJA will separately critique the Breyer Committee Report – including its "Standards". Suffice to say that notwithstanding it enunciates, albeit without appropriate clarity, the "merits-relatedness" issue, the Breyer Report is just as methodologically-flawed and dishonest as the 1993 Report of the congressionally-established National Commission on Judicial Discipline and Removal, to which it refers (at p. 13) as the "one major inquiry" into the Act. Nor is the Breyer Report more honest than the subsequent 2002 Report of the Federal Judicial Center, which it identifies (at p. 13) as "follow-up research on chief circuit judge orders dismissing complaints", requested by the chair and ranking member of the House Judiciary Committee's courts subcommittee.

Both the 1993 National Commission Report and the 2002 Federal Judicial Center Report have been the subject of analytical critiques by CJA, highlighting their deceitful cover-up of the "merits-related" issue – and the Breyer Committee, assisted by their "experienced" staff of the Administrative Office and Federal Judicial Center, are charged with being conversant with these.

With respect to Draft Rule 23 (pp. 36-37), entitled "Confidentiality", which the Commentary (p.37) identifies as "adapted from the Illustrative Rules", it – like Illustrative Rule 16 – materially expands the confidentiality beyond what the statute requires. Indeed, the Commentary to Illustrative Rule 16 had acknowledged that the statutorily-required confidentiality "technically applies only in cases in which an investigatory committee has been appointed". Such candid admission, however, is gone from the Commentary to the Draft Rules.

Finally, with respect to Draft Rule 25 "Disqualification", its pertinent paragraph (f) "Substitute for Disqualified Chief Circuit Judge", (p. 43) is deficient. Like Illustrative Rule 18(f) – from which it derives – it assumes that a chief circuit judge and his substitutes will confront disqualification/transfer issues, but contains no requirement that they do so. That a chief circuit judge can – and did – knowingly and deliberately disregard threshold disqualification/disclosure issues, as likewise a circuit judicial council – is established by what Committee Chairman Winter did, as Chief Judge of the Second Circuit, when judicial misconduct complaints dated October 30, 1997 and November 6, 1997 came before him asserting his absolute disqualification for interest and the necessity that the complaints be transferred to a different circuit.[4]

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[4] These federal judicial misconduct complaints are accessible from our "Judicial Discipline-Federal" webpage which contains a link to "Archive of federal judicial misconduct complaints". See "Prefatory Notice" to November 6, 1997 complaint and its footnote 1; Also footnote 6 of October 30, 1997 complaint.

Nothing in Draft Rule 25 or in Draft Rule 26 "Transfer to Another Judicial Council" (p. 45), as currently written, would prevent a repeat of the travesty and corruption of the Judicial Conduct and Disability Act that is manifested by the record of these judicial misconduct complaints, where Judge Winter, ignoring the disqualification/transfer issues, dumped the complaints by a knowingly false and conclusory February 9, 1998 order purporting they were "merits-related" and, therefore, not cognizable under the Act – a deceit all the more egregious as he had just participated in the Second Circuit's denial of a petition for *in banc* rehearing of the underlying "merits" decision.[5] The Second Circuit Judicial Council then put its imprimatur to Judge Winter's brazen misconduct. In face of a petition for review that demonstrated, *inter alia*, that Judge Winter's February 9, 1998 dismissal order had:

> "(1) failed to disclose facts bearing upon his lack of impartiality, as [was] his statutory *sua sponte* obligation under 28 U.S.C. §455(e) and his ethical obligation under Canon 3D of the Code of Conduct for U.S. Judges and Canon 3F of the ABA Code of Judicial Conduct;
>
> (2) ignored, *without* any adjudication, the threshold issue of his disqualification for bias and self-interest, as *explicitly* presented by [the] complaints;
>
> (3) ignored, *without* any adjudication, the threshold issue of the Circuit's disqualification for bias and self-interest, also *explicitly* presented by [the] complaints; and
>
> (4) flouted the directives of the Judicial Conference and National Commission on Judicial Discipline and Removal, as *explicitly* highlighted by [the] complaints, calling upon Chief Judges who dismiss §372(c) complaints to do so by non-conclusory orders which address 'the substantive ambiguity' of the 1980 Act and which build interpretive precedent." (April 3, 1998 petition for rehearing, pp. 1-2, italics in original),

the Second Circuit Judicial Council not only denied the petition for review, but did so "for the reasons stated in the order dated February 9, 1998."

Nine years ago, CJA furnished the record of the October 30 and November 6, 1997 judicial misconduct complaints to the Administrative Office of the United States Courts for action by

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[5] The denied October 6, 1997 petition for *in banc* rehearing had presented the Second Circuit with the alternative of addressing the judicial misconduct issues by appellate, rather than disciplinary, processes. It is posted on CJA's website, accessible *via* the sidebar panel "Test Cases – Federal (*Mangano*)", which posts the entire case record from which the October 30, and November 6, 1997 misconduct complaints emerged, culminating in the Supreme Court and CJA's November 6, 1998 impeachment complaint against Chief Justice Rehnquist and the Associate Justices, including Justice Breyer.

the Judicial Conference and its appropriate committees.[6] Such record, as likewise the previously-transmitted record of an earlier judicial misconduct complaint, also directly involving Judge Winter, this time as a member of a three-judge appellate panel[7], are decisive guideposts in evaluating the Draft Rules.

Elena Ruth Sassower

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[6] See our transmitting correspondence to the Administrative Office from November 24, 1997 through May 29, 1998, accessible from our "Judicial Discipline-Federal" webpage *via* its link to "Administrative Office of the United States Courts/Judicial Conference".

[7] The record of that earlier complaint, dated March 4, 1996, is also accessible from our "Judicial Discipline-Federal" webpage by its link to "Archive of federal judicial misconduct complaints". That complaint similarly requested transfer to another circuit (at p. 2) – to which the Acting Chief Judge's April 11, 1996 dismissal order asserted "The Act does not provide for transfer of a bias complaint to another circuit". Yet, as pointed out by the May 30, 1996 petition for review:

> "The Act does *not* preclude transfer – and recusal and transfer is always appropriate where judges are unable or unwilling to act impartially or where there is an 'appearance of impropriety' – as here." (at p. 9, italics in the original).

The Second Circuit Judicial Council's only response was to deny the petition for review "for the reasons stated in the order dated April 11, 1996". However, the fact that the Draft Rules now provide for transfer – and do so without any revision having been made in the statute to provide for same – underscores the validity of the argument in the May 30, 1996 petition for review.

CJA's correspondence to the Administrative Office from June 7, 1996 through September 20, 1996, transmitting the record of this earlier complaint is accessible from our "Judicial Discipline-Federal" webpage *via* its link to "Administrative Office of the United States Courts/Judicial Conference".

THE LONG TERM VIEW

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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.

Elena Ruth Sassower is co-founder and coordinator of the Center for Judicial Accountability, Inc. (CJA), a non-profit, non-partisan citizens' organization with members in more than thirty states. Its goal is to reform judicial selection and discipline on national, state, and local levels. Its website is at http://www.judgewatch.org.

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.