From: judgewatchers@aol.com
To: JudicialConductRules@ao.uscourts.gov
Subject: Comments on Draft Rules Governing Judicial Conduct & Disability Proceedings
Date: Mon, 15 Oct 2007 8:08 pm
Attachments: 10-15-07-statement.pdf (12119K)

Attached is the Center for Judicial Accountability's Statement to the Judicial Conference Committee on Judicial Conduct and Disability Commenting on the Draft Rules Governing Judicial Conduct & Disability Proceedings.

Our mailing address is: Box 8220, White Plains, New York 10602.

Thank you.

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Exhibit T

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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".