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the effective  
administration  
of justice*

# JUDICIAL CONDUCT REPORTER

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## Proposed Revisions to the ABA Model Code of Judicial Conduct *by Cynthia Gray*

**T**he American Bar Association Joint Commission to Evaluate the Model Code of Judicial Conduct has released a final report proposing changes in both format and substance to the 1990 ABA Model Code of Judicial Conduct. The ABA House of Delegates will consider the recommendations at its February 2007 meeting. The final report, previous drafts, comments, and other background are available at [www.abanet.org/judicialethics/](http://www.abanet.org/judicialethics/).

### **Organizational Changes from the 1990 Code**

The final report reorganizes the canons to provide what the Joint Commission “considers a more logical, functional

and helpful arrangement of topics.” Proposed Canon 1 and its rules combine the subjects of current Canons 1 and 2, establishing the obligations of judges to uphold the independence, integrity, and impartiality of the judiciary, to avoid impropriety and the appearance of impropriety, and to avoid abusing the prestige of judicial office. Canon 2 and related rules cover a judge’s professional duties, which constitute most of Canon 3 in the current model code. Canon 3 and its rules address extra-judicial and personal conduct, corresponding to the current Canon 4. Finally, proposed Canon 4 and its rules establish standards for the political conduct of judges and judicial

candidates like the current Canon 5.

### **Judicial Duties (proposed Canon 2; current Canon 3)**

The Joint Commission recommends the addition of ethnicity, marital status, gender, and political affiliation to the list of prohibited grounds for discrimination by judges (Rule 2.3(B)). “Harassment” is prohibited in black letter language (Rule 2.3(B)). New comments give examples of improper bias and define harassment.

[2] Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames;

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## Federal Judicial Discipline


**T**he Judicial Conduct and Disability Act Study Committee, chaired by Justice Stephen Breyer, released its report on the federal judiciary’s application of the Judicial Improvements Act. The report can be found at [www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf](http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf). The Committee had been appointed by the late Chief Justice William Rehnquist in 2004; Chief Justice John


Roberts asked the Committee to continue its task of determining whether the judiciary “has failed to apply the Act strictly as Congress intended.” The report noted that “a system that relies for investigation solely upon judges themselves risks a kind of undue ‘guild favoritism’ through inappropriate sympathy with the judge’s point of view or de-emphasis of the misconduct problem.” (See box on page 8.)


The Committee reviewed three samples of complaints: from the 2,000 filed in the three years before the Committee was established, 593 of the complaints most likely to have merit (those filed by attorneys, for example); 100 cases drawn completely at random; and 17 “high-visibility” complaints, complaints that had received


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# Recent Advisory Opinions


 A judge may conduct settlement conferences in cases where the judge is also the assigned trial judge, but, before the conference, the parties' request for and consent to the trial judge's participation should be established in writing or on record, the judge should be aware that recusal may be required if the case fails to settle and the judge has learned information that might undermine objectivity or create the appearance of impropriety, the judge should not state how he or she intends to rule on disputed legal issues, and the judge should take particular care in cases involving unrepresented parties. *Alaska Opinion 06-1.*

 A judge may inquire sua sponte whether a collection action is time barred under the Fair Debt Collection Practices Act. *Maryland Opinion 06-5.*


 A judge may contribute to an organization that supports or opposes a constitutional amendment that would limit the terms of appellate judges, may speak to civic groups about the measure, and write editorials opposing or promoting it. *Colorado Opinion 06-7.*


 A judge may not advertise future availability as a mediator or arbitrator when he or she leaves office at the end of the term. *Illinois Opinion 06-3.*


 An Hispanic judge may give her photograph and a short biography to the YWCA as a depiction of a positive role model for young Latinas during "Hispanic Heritage Month." *Kansas Opinion JE 145 (2006).*

 A judge may not participate


in a television commercial ("infomercial") for a type of surgery. *Maryland Opinion 06-11.*


 A judge may speak at public hearings and write to elected officials about a proposed power line that will be located near the judge's house as long as the judge expresses views solely as a private citizen, does not use official stationery, and does not refer to his/her office. *New York Opinion 06-93.*


 A judge should not serve as a member of a domestic violence task force that seeks to promote offender accountability. *New York Opinion 06-108.*


 Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on personal knowledge, serve as a reference or provide a letter of recommendation but should not, for example, initiate letters supporting someone's efforts to have their civil rights restored or to renew permits such as those allowing the possession of concealed weapons, send a letter to someone's former employer recommending that the employer reinstate that person, or recommend someone engaged in a business venture if the primary purpose is to advance that person's business. When using court stationery for letters of reference, the judge should indicate that the opinion expressed is personal and not an opinion of the court. A judge generally should send such letters directly to the institution or group that is accepting the letters and should have reasonable assurance that the recommendation will be treated confidentially and the recipient will not distribute it. A judge should not initiate a recom-


mendation by telephone call unless the judge is reasonably certain that the call will not be perceived as coercive or improper. A judge should limit a recommendation to what the judge personally has observed about the individual and should not provide an opinion about the individual's reputation or convey what others have told the judge. *Virginia Opinion 06-1.*

 A judge who assisted in the preparation of the by-laws and articles of incorporation for his or her homeowners association prior to taking the bench may not assist in amending the by-laws and covenants, conditions, and restrictions. *Nevada Opinion JE06-19.*

 A press release for a novel written by a judge may mention the judge's position, and the book cover may identify the author as a judge of a particular court; the judge may participate in book-signings and public discussions and, in response to questions, state what his or her employment is, but may not comment on any pending or impending cases. *New York Opinion 06-105.*

 A judge who presides over felony matters should not serve on a committee that will ask the legislature to mandate drug testing for all middle and high school students. *New York Opinion 06-120.*

 A judge may serve as a member of a bar association task force on the mandatory retirement of judges. *New York Opinion 06-121.*

\* *The Center for Judicial Ethics web-site has links to judicial ethics opinions at [www.ajs.org/ethics/eth\\_advis\\_comm\\_links.asp](http://www.ajs.org/ethics/eth_advis_comm_links.asp).* 

# Developments Following *Republican Party of Minnesota v. White*

This article up-dates information on developments following the decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). Previous articles were published in the summer 2002, winter 2005, summer 2005, spring 2006, and summer 2006 issues of the *Judicial Conduct Reporter*. A cumulative description is at [www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf](http://www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf), which is up-dated frequently.

## Questionnaires

The Arizona Judicial Ethics Advisory Committee issued an advisory opinion stating that a judge standing for election may respond to a political interest group questionnaire seeking the candidate's views on disputed political and legal issues or judicial philosophy if the responses do not constitute commitments and that a judicial candidate may publicly discuss an initiative measure to amend the Arizona Constitution also appearing on the bal-

lot. *Arizona Advisory Opinion 06-5* ([www.supreme.state.az.us/ethics/Judicial\\_Ethics\\_Advisory\\_Committee.htm](http://www.supreme.state.az.us/ethics/Judicial_Ethics_Advisory_Committee.htm)). However, the Committee stated that a sitting judge who is not campaigning for election or retention may not publicly express his or her views on disputed political or legal issues.

Granting preliminary injunctions, two more federal court decisions have held that groups that had sent questionnaires to judicial candidates were likely to prevail in their claim that the pledges, promises, and commitments clauses, if interpreted to prohibit judicial candidates from responding to those questionnaires, were unconstitutional. *Indiana Right to Life v. Shepard*, Memorandum Opinion and Order (U.S. District Court for the Northern District of Indiana November 14, 2006); *Kansas Judicial Watch v. Stout*, 440 F. Supp. 2d 1209 (2006). The Kansas decision is on appeal to the 10th Circuit.

In April 2006, the Kansas Judicial

Ethics Advisory Panel had issued an opinion stating that a judicial candidate may not answer a questionnaire sent by Kansas Judicial Watch. *Kansas Advisory Opinion JE-139* (2006). (Subsequently, in a note appended to the advisory opinion, the Kansas Commission on Judicial Qualifications "respectfully" rejected the conclusion, citing *White* and noting it is not bound by advisory opinions.) Based on that advisory opinion, the federal court concluded that the pledges and promises and commit clauses had been interpreted as "a defacto announce clause."

None of the statements on the Questionnaire in this case require the candidate to pledge, promise, or commit to any position in contravention of the pledges and promises and commit clauses. These statements merely require the candidates to announce their views on disputed legal and political issues. Prohibiting judicial candidates from announcing their

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## Judge's Response

In response to the questionnaire from the Florida Family Policy Council, Judge Peter D. Webster wrote:

My experiences lead me to conclude without reservation that questionnaires such as that which I have received from your organization are ill-conceived. Over the long term, their impact cannot be anything but bad – bad for the judiciary as an institution; bad for the rule of law; and bad for the people of Florida. I say this because such questionnaires create the impression in minds of voters that judges are no different from politicians – that

they decide cases based on their personal biases and prejudices. Of course, nothing could be further from the truth. By virtue of the oath they take, judges are obliged to decide cases based exclusively on the facts and the controlling law, without regard to their personal feelings. This principle forms the very foundation of the concept of a rule of law, rather than of people. If ever our citizens conclude that judges are deciding cases based on their personal predilections rather than the facts and controlling law, our system of justice (which is the envy of the world)

will be at an end. Such questionnaires also create the impression that the answers will provide clues as to how a judge is likely to decide cases. This, too, is not true. We need only look to the careers of Chief Justice Earl Warren and Justice David Souter on the United States Supreme Court for proof.

*Judge Webster sits on the Florida First District Court of Appeals. A copy of the letter is available on the Center web-site at [www.ajs.org/ethics/eth\\_judicialcampaign.asp](http://www.ajs.org/ethics/eth_judicialcampaign.asp).*

## Failure to Supervise

Accepting agreements for discipline by consent, the South Carolina Supreme Court has suspended two judges for one year without pay for, in addition to other misconduct, their failure to supervise court employees, which permitted those employees to embezzle court funds.

For example, a secretary in one judge's office admitted embezzling over \$637,000 from February 2003 to May 2006, by having the judge sign blank checks with her as payee drawn from the court account, ostensibly for legitimate disbursements. 89 checks were drawn on the account payable to the secretary. To cover her embezzlement, the secretary made false entries in the ledger concerning the payee and amount. The judge conceded that he made no meaningful review of the cancelled checks and bank statements and that the secretary's misappropriation would have been easily discovered by reviewing the records. *In the Matter of Evans* (November 20, 2006).

The court suspended a second judge for failing to review bank statements monthly, as required by an administrative order from the Chief Justice, which allowed a court employee's embezzlement to go undiscovered, and for attempting to influence other magistrates to limit the scope of the questions they would answer during the investigation. *In the Matter of Cantrell* (November 20, 2006).

Toni Cole's responsibilities included compiling the deposit and taking it to the treasurer's office when other employees were absent or unavailable. The judge only made "spot checks" to make sure the deposit slips coincided with the bank statements. Despite two instances in which cash was discovered missing from the safe, the judge did not change the procedures or Cole's duties. After two more instances, the sheriff was asked to investigate, and Cole con-

fessed to stealing several deposits, totaling over \$18,000, by taking the deposits to her vehicle rather than to the treasurer's office, removing the cash, and discarding the checks and other non-cash payments.

In November 9, 1999, the Chief Justice had entered an administrative order that provides:

While the Court recognizes that magistrates must utilize employees of their office to assist in the handling of the monies of their office, each magistrate is personally responsible for compliance with all procedures for the handling of the monies of their magisterial office and

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proper record keeping related thereto and shall regularly, but no less than monthly, review bank statements and other records to insure such compliance.

The judge acknowledged that his oversight did not comply with the Chief Justice's administrative order and did not contest the contention that the misappropriations would have been deterred or minimized had the procedures been in place.

## Participation in Fund-raising Event

The Nebraska Commission on Judicial Qualifications publicly reprimanded a judge for serving as honorary co-chair of a fund-raising dinner for the state chapter of the National Multiple Sclerosis Society. *In the Matter of Coffey*, Public Reprimand (September 29, 2006) ([court.nol.org/PublicReprimand/](http://court.nol.org/PublicReprimand/)).


As honorary co-chair, the judge asked a friend if he would be honored at the dinner although the judge was aware that the honoree would be required to make a financial contribution to the MS Society. In addition, letters regarding the fund-raiser sent to members of the gen-

eral public identified "Judge J. Michael Coffey" as one of the senders and included a solicitation of funds. At the dinner, the judge was introduced as co-chair and identified as a judge, and he introduced the honoree.

The Commission concluded that the judge should have declined to participate in any capacity in the event as soon as he became aware it was a fund-raiser and it was incumbent upon him to learn the details" of what serving as co-chair might entail. The Commission stated that, although the judge may not have discovered the specific contents of the letters until after they were mailed, he should have

taken steps to advise the MS Society that he was unable to participate in any fund-raising or solicitation efforts and that his name and judicial position could not be used. The Commission recognized the judge did not intend to abuse his judicial position and noted that the judge's own family is affected by multiple sclerosis but stated the code prohibits the judge's conduct regardless "how worthy the cause, or how sympathetic the circumstances."

## Unauthorized Practice of Law

Accepting the recommendation of the Judiciary Commission to which the judge consented, the Louisiana Supreme Court censured a non-lawyer justice of the peace for performing services that may only be undertaken by a person licensed to practice law. The judge admitted that she had typed divorce pleadings for her constituents to file pro se in 16 cases, explaining she thought her notarial commission authorized her to do so. The judge stopped the practice immediately upon receipt of the complaint. *In re Crawford* (November 9, 2006). 

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negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others an appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

[3] Harassment . . . is verbal or physical conduct that denigrates or shows hostility or aversion toward a person on bases such as race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation.

[4] Sexual harassment includes but is not limited to sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature that is unwelcome.

Several new comments reflect developments in court practices and policies since the model code was most recently revised in 1990. For example, using electronic research is identified as falling within the prohibition on independent investigations of facts (Comment 6, Rule 2.9). A new comment cautions judges who hold discussions with jurors following trial to “be careful not to discuss the merits of the case” (Comment 3, Rule 2.8). A comment designed for judges “serving on therapeutic or problem-solving courts, mental health courts, or drug courts” notes that the exception to the prohibition on ex parte communications authorized by law may permit certain ex parte communications in those courts where “judges may assume a more interactive role with parties, treatment providers, probation officers, social workers, and others” (Comment 4, Rule 2.9). Finally, a new comment

indicates that a judge may “make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard” without violating the rule requiring impartiality (Comment 4, Rule 2.2).

A new rule (Rule 2.16) requires a judge to “cooperate and be candid and honest with judicial and lawyer disciplinary agencies” and prohibits a judge from “retaliat[ing], directly or indirectly, against a person known or suspected to have assisted or cooperated with an investigation of a judge or a lawyer.”

The Joint Commission proposes a new rule (Rule 2.14) dealing with the “difficult and extremely important issue” of impaired judges.

A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

Comment:

[1] “Appropriate action” means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include but is not limited to speaking directly to the impaired person, notifying an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge’s responsibility under this Rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate health care professionals. Depending upon the gravity of the conduct that has come to the judge’s

attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body.

### **Personal and Extra-judicial Activities (proposed Canon 3; current Canon 4)**

The report proposes adding organizations that invidiously discriminate on the basis of gender, ethnicity, and sexual orientation to the list of organizations in which membership by judges is prohibited (Rule 3.6(A)).

Several new exceptions are created to the prohibition on soliciting contributions for charitable organization. One new exception allows a judge to solicit members of the judge’s family. (Rule 3.7(A)(2)). In addition, under the proposed rules, a judge could speak or receive an award at, be featured on the program of, and permit his or her title to be used with a fundraising event for an organization that concerns the law, the legal system, or the administration of justice (Rule 3.7(A)(4)). Finally, a new rule allows judges to “encourage lawyers to provide pro bono publico legal services,” including “providing lists of available programs, training lawyers to do pro bono publico legal work, and participating in events recognizing lawyers who have done pro bono publico work” (Rule 3.7(B)).

The final report proposes a rule that expressly prohibits a judge from using “court premises, staff, stationery, equipment, or other resources” for personal and extra-judicial activities, “except for incidental use for activities that concern the law, the legal system, or the administration of justice, or unless such additional use is permitted by law” (Rule 3.1(E)).

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### Political and Campaign Activity (proposed Canon 4; current Canon 5)

The Joint Commission debated extensively what changes if any should be made to the restrictions on political and campaign activity in light of the United States Supreme Court decision in *Republican Party of Minnesota v. White*. The report explains:

Throughout its deliberations, the Joint Commission has sought to find a balance that accommodates the political realities of judicial selection and election while ensuring that the concepts of judicial independence, integrity, and impartiality are not undermined by the participation of judges and judicial candidates in political activity.

The structure of proposed Canon 4 establishes general restrictions on campaign and political activity and then creates exceptions depending on the selection method, differentiating between judicial candidates seeking appointment and those running in elections and, further, between partisan, non-partisan, and retention elections.

The final report retains the current restriction on a judicial candidate making “in connection with cases, controversies, or issues that are likely to come before the court, . . . pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office” (Rule 4.1(A)(13)). A comment explains:

The role of a judge is different from that of a legislator or executive branch official, even when the judge is subject to public election. Campaigns for judicial office must be conducted differently from campaigns for other offices. The narrowly drafted restrictions upon political and campaign activities of judicial candidates provided in Canon 4 allow candidates to conduct campaigns that provide voters with sufficient information to permit them

to distinguish between candidates and make informed electoral choices.


Moreover, additional comments emphasize that pledges, promises, or commitments are distinguishable from “statements or announcements of personal views on legal, political, or other issues, which are not prohibited” but “a judge should acknowledge the overarching judicial obligation to apply and uphold the law, without regard to his or her personal views.” Further, a comment describes the types of promises that are appropriate in a judicial campaign.

A judicial candidate may make campaign promises related to judicial organization, administration, and court management, such as a promise to dispose of a backlog of cases, start court sessions on time, or avoid favoritism in appointments and hiring. A candidate may also pledge to take action outside the courtroom, such as working toward an improved jury selection system, or lobbying for more funds to improve the physical plant and amenities of the courthouse.

There is also a proposed new requirement that judicial candidates personally approve the contents of

campaign literature and other election materials (Rule 4.2(A)(3)) and a new prohibition on judges using “court staff, facilities, or other court resources in a campaign for judicial office” (Rule 4.1(A)(10)).

The Joint Commission proposes deleting the requirement that judicial candidates maintain “appropriate dignity,” finding “the phrase both unhelpful and less effective at capturing the fundamental characteristics of proper judicial conduct, independence, integrity, and impartiality, than using the terms themselves.”

The proposed rules retain the current prohibition on judicial candidates personally soliciting campaign contributions and the current requirement that candidates establish campaign committees for fund-raising (Rule 4.1(A)(8)). The current prohibition on candidates personally seeking “publicly stated support,” however, is eliminated in the final report. 

*To review an AJS editorial describing the important changes the report proposes as well as several unwise suggestions the report makes, go to [www.ajs.org/ethics/eth\\_ABA\\_commission.asp](http://www.ajs.org/ethics/eth_ABA_commission.asp).*

### The Evaluation Process

Created in July 2003, with a grant from The Joyce Foundation, the Joint Commission was appointed by and operated under the auspices of the ABA Standing Committees on Ethics and Professional Responsibility and on Judicial Independence. The members are 10 judges and lawyers and a public member. The Joint Commission also included in its discussion 11 advisors, many of whom served as formal liaisons from organizations, including the American Judicature Society.

Over 39 months, the Joint Commission met in person or by conference call over 50 times. The Joint Commission heard comments from several dozen individuals at public hearings. Representatives of the Joint Commission met several times with the Conference of Chief Justices and with entities within the Judicial Division of the ABA. The Joint Commission posted drafts of portions of the code on a web-site with requests for comments and suggestions. Thirty-nine entities and 300 individuals filed written comments on the 1990 Model Code, a preliminary report distributed in June 2005, or a proposed final draft in December 2005.

## Developments Following *Republican Party of Minnesota v. White* (continued from page 3)

views on disputed legal and political issues is in contravention of the Supreme Court's holding in *Republican Party of Minnesota v. White*.

Similarly, in the Indiana case, the court stated that the defendants' advice to judicial candidates not to answer questions in a questionnaire demonstrated that the pledges, promises, and commitments clauses are "essentially de facto 'announce clauses' which were found unconstitutional" in *White*. Moreover, the court also found that the clauses were unconstitutionally vague because candidates had to seek advice from the Judicial Qualifications Commission each time there was a question about the permissibility of a campaign statement. The court concluded that, because judicial candidates cannot ascertain the meaning of the canon, the "Canon lacks the 'reasonable degree of clarity' required by the Constitution and impermissibly delegates questions about free speech to the Commission on an ad hoc and subjective basis." The court emphasized that nothing in its order "should be read to compel, or even encourage, judges or judicial candidates to answer questions put to them by these plaintiffs or any other group."

### Disqualification

However, both the Indiana and Kansas federal courts and the U.S. District Court for the Northern District of Florida held that the recusal clause is narrowly tailored to serve a compelling state interest. For example, in *Florida Family Policy Council v. Freeman* (U.S. District Court for the Northern District of Florida October 10, 2006), the court stated that whether candidates have a right to "commit themselves, that is, to pledge or promise rulings they will make on specific issues, they clearly have no right to sit on cases in which they have made such

commitments."

[The disqualification canon] prohibits speech not at all, and burdens speech only a trifle, allowing a judge to keep the same job at the same pay and to perform the same type of work with the same perquisites while giving up only the right to preside over cases (presumably few if any) in which the judge reasonably appears not to have an open mind. A judge has no First Amendment right to sit in such cases, and any right plaintiff has to hear speech of this type clearly does not encompass a right to have judges sit on cases in which they have made commitments. There is no right to a biased judge, nor to a judge with a closed mind.

### Solicitation

The Kansas court and U.S. District Court for the Eastern District of Kentucky also enjoined the enforcement of the clause that prohibited judicial candidates from personally soliciting campaign contributions and publicly stated support. *Carey v. Wolnitzek* (U.S. District Court for the Eastern District of Kentucky October 10, 2006). The Kentucky court noted that, even with the prohibition against direct solicitations, judges would be able to find out who contributed to their campaigns, and, therefore, if a judge was predisposed to favor parties who made contributions, the prohibition against personal solicitation would not prevent actual partiality. Moreover, the court held, the requirement that funds be raised through a committee does not serve the state's interest in preserving the appearance of judicial impartiality.

If the public does not believe that elected judges favor their contributors, then the committee serves no purpose in preserving that appearance of impartiality. If, on the other hand, the public believes that elected judges favor their contributors, then the

fact that contributions are solicited by a committee instead of the judge himself does nothing to dispel that perception. In fact, many members of the general public are likely unaware that judges are not permitted to personally solicit contributions to their campaigns. Those who are aware of the prohibition are likely also aware that, despite the prohibition, judges can still find out who contributed to them and who did not.

The court also rejected the defendants' argument that the solicitation clause serves the state's interest in protecting the actual and apparent impartiality of judges because it precludes one-on-one contact between the judge and potential donor, making "it easier for potential donors to 'just say no.'"

While such a prohibition may reduce the solicitee's discomfort in refusing a personal solicitation, it does not prevent the judge from identifying those who refuse to contribute to his campaign. Because non-contributors can easily be identified either directly by committee members or indirectly through a process of elimination, a solicitee's fear of disfavor cannot be significantly reduced by solicitations through committees rather than by candidates.

The court also concluded that the ban on direct solicitations does not reduce "the potential for corruption" by eliminating that "moment when a judicial candidate can say, 'contribute money to my campaign and I will rule in your favor' or 'if you don't contribute to me, I'll never rule in your favor.'" Acknowledging "that requiring a committee to solicit campaign contributions prohibits such direct shakedowns by a corrupt judicial candidate," the court stated:

Such blatantly corrupt activity . . . is most certainly already prohibited by the Canon requiring that a judge or judicial

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candidate ‘maintain the dignity appropriate to judicial office’ as well as by various criminal statutes. Further, if the provision is aimed at preventing direct solicitations that amount to extortion, then the prohibition against all personal solicitations for campaign contributions is overbroad.

The federal court also held unconstitutional a provision in the Kentucky code of judicial conduct that provided

“a judge or candidate shall not identify himself or herself as a member of a political party in any form of advertising or when speaking to a gathering.” The court noted that the political party affiliations of many candidates are well known prior to the election, that the party affiliation of all candidates is readily discoverable through public records, and that the clause permits a candidate to state his political party

affiliation when asked. The court also rejected the defendants’ argument that the clause serves the state’s interest in non-partisan elections as mandated by the state constitution and the state’s interest in preserving the actual and apparent independence of judges, stating the defendants do not explain what they mean by “nonpartisan” election or judicial “independence.” 

## Federal Judicial Discipline (continued from page 1)

some public attention from 2001 through 2005.

With respect to the first two samples, the Committee concluded that the error rate was about 2% to 3% and, therefore, there was no serious problem with the judiciary’s handling of the vast bulk of complaints under the Act, noting “no human system operates perfectly; some error is inevitable.” However, the report summarized each of the cases found to be

improperly handled and made recommendations to reduce the number of errors further.

In contrast, the Breyer Committee found that the handling of five of the 17 high-visibility cases (or close to 30%) was problematic, stating the rate “was far too high.” The report summarized each of the 17 cases and makes additional recommendations. For example, the report emphasized the possibility of chief judges’ trans-

ferring to other circuits “a high-visibility complaint, whose local disposition might create a threat to public confidence in the process—the view that judges will go easy on colleagues with whom they dine or socialize.”

### Merits-related

Under the Act, any person may file a written complaint alleging that a judge has engaged in “conduct preju-

## The Judicial Improvements Act

Complaints against federal judges are filed under the Judicial Improvements Act of 2002. 28 U.S.C. §§ 351-364. (The Act replaced the Judicial Conduct and Disability Act of 1980, effective November 2, 2002. Although certain additions were made, the substance of the former Act remains intact.) Complaints are filed with the chief judge of the court of appeals in the circuit in which the judge sits. The chief judge either dismisses the complaint, concludes the proceeding if corrective action has been taken, or appoints a special committee to investigate. The complainant can petition for review to the circuit judicial council if the chief judge dismisses a complaint or concludes a proceeding.

After an investigation, a special committee files a written report with findings and a recommendation with the judicial council. The judicial council may dismiss the complaint, certify the disability of a judge, request that a judge voluntarily retire, order that temporarily no further cases be assigned to a judge, privately censure or reprimand the judge, publicly censure or reprimand the judge, or order other action it considers appropriate under the circumstances. The complainant and the subject of a complaint can petition the United States Judicial Conference for review of any action taken by a circuit judicial council. The Judicial Conference may also “after consideration of the prior proceedings and such additional investigation as it considers appropriate” order “that, on a temporary basis for a time certain, no further cases be assigned to the judge” or censure or reprimand the judge by means of private or public communication. Finally, “if the Judicial Conference concurs in the determination of the judicial council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary.”



## New Policies

In response to criticisms of federal judges' conduct, the U.S. Judicial Conference has approved two policies that address recusal for financial interests and expense-paid trips to educational programs. The policies can be found at [www.uscourts.gov/Press\\_Releases/judicialconference091906.html](http://www.uscourts.gov/Press_Releases/judicialconference091906.html).

One policy requires federal judges to institute automated conflict screening that will identify financial conflicts of interest and notify the judge. The Administrative Office will continue developing the necessary hardware and software for the screening. The clerk's office will administer the screening. Each judge will personally review cases for conflicts and develop a list of financial conflicts (using a checklist developed by the Judicial Conference), up-date the list regularly, and employ the list personally or with the assistance of court staff.

In recommending the policy, the Conference's Committee on Codes of Conduct said it seeks to reassure the public of the judiciary's commitment to maintaining the highest standards of ethical conduct. According to the Committee, "a fair reading of the judiciary's record shows that federal judges take their recusal obligations very seriously, and this commitment will be underscored by adoption of a mandatory automated conflict screening policy."

The second new policy requires non-government educational program providers (other than bar and judicial associations and co-sponsors of programs offered by the Federal Judicial Center or National Judicial College) to disclose information about their programs and their sources of funding. Judges are barred from accepting reimbursements unless they first ascertain that the program providers have made the required disclosures. Judges also must report their attendance within 30 days of the conclusion of the program. Both disclosures will be publicly available on the Internet.

The Conference's Committee on the Judicial Branch said its overarching objective was "greater transparency and accountability." The Committee noted the importance of continuing education of judges in law, science, history, economics, sociology, philosophy, and other disciplines, stating "neither the Judicial Conference nor any other entity should seek to limit judges' access to knowledge or censor their right to increase their knowledge."

judicial to the effective and expeditious administration of the business of the courts." Noting the language does not appear susceptible to precise definition outside the context of particular fact situations, the report suggested chief judges' refer to the Code of Conduct for U.S. Judges to evaluate complaints.

The report described "Standards for Assessing Compliance with the Act" that it used in its analysis and that explain how the Act applies to specific allegations.

For example, under the Act, a chief judge has the authority to dismiss a complaint that is directly related to the merits of a decision or procedural ruling. This standard, the Committee stated, reflects the "core policy . . . that the complaint procedure cannot be a means for collateral attack on the substance of a judge's rulings. The interest protected is the independence of the

judge in the course of deciding Article III cases and controversies."

The merits-related ground for dismissal, however, is not designed to "protect or promote the appellate process."

A complaint alleging incorrect rulings is merits related even though the complainant—a non-party—has no judicial recourse. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (e.g., vacating a ruling that resulted from an improper ex parte communication).

The report stated that the merits-related standard would justify dismissal of complaints about, for example, a determination to dismiss a prior misconduct complaint, disapproval of a Criminal Justice Act voucher, a failure to recuse, or a delay in a single case. In contrast, the report concluded

that a merits-related dismissal would not be appropriate if a complaint alleged that a judge conspired with a prosecutor to reach a ruling, ruled against the complainant because the complainant was Asian, failed to recuse for illicit reasons, used an inappropriate term to refer to a class of people, was rude while on the bench, or engaged in an habitual pattern of delay or deliberate delay arising out of an illicit motive. Those allegations are not merits-related because they attack "the propriety of arriving at rulings with an illicit or improper motive," and go "beyond a mere attack on the correctness of the ruling itself."

The "special need to protect judges' independence in deciding what to say in an opinion or ruling" justifies a different standard for complaints about the language in a ruling, according to the Breyer Committee. "If the judge's

*(continued on page 10)*

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language was relevant to the case at hand, then the chief judge may presume the judge's choice of language was merits-related . . . absent evidence aside from the ruling itself to suggest improper motive."

### Standards for Assessing Complaints

The report also explained that a complaint may be dismissed if an allegation is "inherently incredible," in other words, "if no reasonable person would believe that the allegation, either on its

face or in the light of other available evidence, could be true" even if it is not literally impossible for the allegation to be true.

For example, an allegation that a judge accepted a bribe in return for permitting the filing of a timely response to a civil complaint that the defendant had a legal right to file, may not be literally impossible, but is sufficiently incredible that, even if the complaint named a witness to the transaction, the chief judge has no obligation to inquire of the named witness before dismissing the complaint.

Under the Act, a complaint that is not merits-related or inherently incredible may still be dismissed if it lacks "sufficient evidence to raise an inference that misconduct has occurred." (The report explains that "lacking sufficient evidence" is synonymous with "frivolous" but is the preferable term because, for example, "readers of a public order dismissing as frivolous groundless claims of racial bias might mistakenly conclude that the judiciary did not consider racial bias an important concern.") Stating there can be no

### High-Visibility Complaints

One of the five dismissals in high-visibility complaints that the Breyer Committee identified as problematic was a complaint that a chief circuit judge tried to affect the outcome of two cases (a capital habeas case and a university admissions/affirmative action case) by delaying the vote on petitions until two judges who might have been expected to have opposed the chief judge's view took senior status and became ineligible to vote. Concurring and dissenting opinions had complained about the chief judge's conduct, receiving national news attention. (Although the Committee does not identify the judge, from the cases described and newspaper reports, it is apparently Judge Boyce Martin, former chief judge of the 6<sup>th</sup> Circuit.) The acting chief judge concluded the proceedings based on the court's clarification of procedures governing en banc petitions and emergency capital appeals and the "imminent operation" of a statute limiting the term of the chief judge to seven years. The judicial council affirmed the dismissal.

The Breyer Committee stated that the "the public would have benefited from an investigation and resolution of this highly visible controversy." The Committee concluded that the finding of corrective action was inappropriate because a rule change will not ordinarily be sufficient to remedy judicial conduct and "the posited corrective action did not involve the judge's voluntary action to correct his alleged misconduct." The Committee also noted that concluding the complaint in part on the grounds that the subject judge's term as chief judge was about to expire did not render unnecessary action on the complaint.

A second complaint the Breyer Committee found was improperly handled alleged a judge (apparently Judge Manuel Real, a judge sitting in the Central District of California) based on an ex parte letter, took over the bankruptcy case of a probationer whom he was supervising and enjoined a state court order evicting her from a house owned by a creditor. The chief judge of the 9th Circuit dismissed the complaint without appointing a special committee, and the judicial council dismissed the review petition. The U.S. Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders held that it did not have jurisdiction to review the judicial council's order.

The Breyer Committee concluded that the chief judge's finding that Judge Real had not received an ex parte communication was contrary to the Act's prohibition on a chief judge making "findings of fact about any matter that is reasonably in dispute" and that the chief judge should have appointed a special committee. Further, the Committee found that the judicial council's conclusion that the judge had taken adequate corrective action was also erroneous, noting the judge offered no meaningful apology, provided no redress in the form of words or otherwise to the creditor for its losses, and did not promise not to repeat such conduct but simply predicted it would not recur. The Committee also concluded that the council's reliance on the court of appeals' opinion vacating the judge's order was problematic because the Act is clear that only the council can impose a formal remedy or sanction in response to a complaint.

The chief judge of the 9th Circuit has recently appointed a special committee to investigate the complaint.

hard and fast rule about how much evidence is sufficient, the report explained that all a complaint “need do is assert that the complaint’s allegation is supported by the transcript or by a named witness.” Even if a complaint does not identify a particular transcript or witness, “if the complaint sets forth allegations that are capable of being verified by looking at identifiable transcripts or questioning identifiable witnesses,” the chief judge is required to consult the transcript or question the alleged witness. If a complaint raises an allegation about which only the judge is a practicable source, then a chief judge should question the judge “even if the chief judge, from personal knowledge of the judge complained against, is morally certain that this allegation is false.”

Following a limited inquiry, a chief judge may dismiss a complaint if the allegations lack any factual foundation or are conclusively refuted by objective evidence as long as the chief judge does not make “findings of fact about any matter that is reasonably in dispute.” The report emphasized that “an allegation is not ‘conclusively refuted by objective evidence’ simply because the judge complained against denies it. . . . If it is literally the complainant’s word against the judge’s . . . then there must be a special committee investigation.” The Committee noted that a complaint is incapable of being estab-

lished through investigation only when source for evidence is unidentified or unavailable.

The Act also authorizes the chief judge to conclude the proceedings on a finding that “appropriate corrective action has been taken.” The Committee emphasized that “corrective action” means “voluntary action taken by the judge complained against,” not a change in the procedural or court rule allegedly violated or a remedial action directed by the chief judge or by an appellate court without the participation of the subject judge. The report identified a judge’s actions “to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future” as examples of appropriate corrective action. The Committee emphasized that ordinarily corrective action will not justify conclusion of a complaint unless the complainant “is meaningfully apprised of the nature of the corrective action.”


### Recommendations

The report made recommendations in several areas: enhancing chief judges’ and council members’ ability to apply the Act; encouraging public and bar knowledge of the Act; promoting accurate understanding by legislators, press, public, and judges of how the Act should be administered; clarifying

the authority of the Judicial Conference; and making counseling available to all judges in all circuits. For example, the report recommended the creation of “an individual orientation program for each new chief circuit judge and an online compendium to provide guidance on the meaning of the Act’s provisions and how to apply them.”

The Committee also recommended that courts consider “local bar committees that could serve as conduits between members of the bar and chief judges concerning potential complaints.” In addition, the report encouraged “all courts covered by the Act to provide information about filing a complaint on the homepage of the court website and take other steps to publicize the Act.”

Finally, the Committee recommended that Judicial Councils in every circuit consider making available by phone (or otherwise) programs to assist chief judges “confronting problematic behavior and judges who may be disabled or have other problems affecting their work.” For example, the report described a Ninth Circuit program in which an independent contractor “is available by phone to speak with judges of the circuit who may be suffering the debilitations of advanced years or physical or emotional problems and to chief judges and others who must deal with such situations.”

Such a service is not a substitute for the remedial measures that may be imposed under the Act, but rather a means to foster informal resolution of problems. Furthermore, counseling with persons skilled in recognizing and dealing with behavioral problems is likely to get to the genuine sources of problematic behavior rather than deal only with its symptoms. 

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