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TO: Committee on Judicial Conduct and Disability
Judicial Conference of the United States

FROM: Denise A. Cardman, Acting Director
Governmental Affairs Office
American Bar Association

RE: Comments of the American Bar Association Regarding Draft
Rules Governing Judicial Conduct and Disability Proceedings
Undertaken Pursuant to 28 U.S.C. §§ 351-364

Date: October 15, 2007

On behalf of the American Bar Association, please accept these comments regarding the Draft Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant to 28 U.S.C. §§ 351-364, released on July 16, 2007, by your Committee for public review. Pursuant to your directive, these comments are being transmitted electronically for your consideration as you prepare the draft rules for Judicial Conference deliberation.

We wish to commend you for making your working draft available to the public and providing the opportunity for comment. We believe that such actions provide an invaluable opportunity to increase public knowledge of, and confidence in, the federal judicial system.

COMMENTS
of the
AMERICAN BAR ASSOCIATION
Regarding
DRAFT RULES GOVERNING JUDICIAL CONDUCT AND DISABILITY
PROCEEDINGS UNDERTAKEN PURSUANT TO 28 U.S.C. §§ 351-364

The American Bar Association commends the Judicial Conference Committee on Judicial Conduct and Disability for proposing these draft rules in response to one of the core findings of the Judicial Conduct and Disability Act Study Committee that a major problem faced by chief circuit judges in implementing the Judicial Conduct and Disability Act of 1980 (hereinafter “the Act”) was the lack of authoritative interpretive standards. By providing definitive guidance to the circuits, these mandatory draft rules will promote greater uniformity and transparency in the implementation of Act. We wish to commend the Committee not only for the development of the draft rules, but also for the process by which these draft rules are being vetted; no doubt both actions will boost public confidence in the ability of the judiciary to investigate complaints of misconduct and disability and to take appropriate action.

Relevant entities within the Association reviewed the draft rule, including the Judicial Division, the Standing Committee on Federal Judicial Improvements and the ABA Standing Committee on Professional Discipline.

The Association adopted policies in 1993 and 1994, which reaffirmed its support in principle for the Judicial Discipline and Disability Act of 1980 and offered three recommendations for strengthening the Act: increasing public awareness and understanding of the Act; adopting procedures to permit anonymous complaints to be brought to the attention of the Chief Judge; and urging the development of a system for the dissemination of information about complaint dispositions with the goals of developing a body of precedent and enhancing public education about judicial disciplinary mechanisms. We are pleased that the draft rules are responsive to each of these concerns. We particularly wish to commend Draft Rule 24, which supports publication on the court’s public website of all final orders and supporting memoranda, thereby expanding expands the Act’s directive that they be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals. It also expands on the guidance in the current Illustrative Rules by authorizing and encouraging the chief circuit judge to publicize orders that appear to have precedential value and requiring the publication of selected illustrative orders on the judiciary website at

www.uscourts.gov to “provide additional information to the public on how complaints are addressed under the Act.”

The Association’s primary concern with the draft rules involves the definition and explanation of what constitutes misconduct in Draft Rule 3(b)(1) and the accompanying commentary.

Draft Rule 3(b)(1) defines misconduct as (emphasis added):

Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to, use of the judge’s office to obtain special treatment for friends and relatives, acceptance of bribes, gifts, or other personal favors related to the judicial office, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, treating litigants or attorneys in an unnecessarily hostile manner, engaging in partisan political activity or statements, participating in organizational fundraising, and other violations of the standards of judicial conduct, regulation of gifts, restrictions on outside income, financial disclosure obligations, or abuses of judicial office. Conduct occurring outside the performance of official duties is not excluded if it might have a prejudicial effect on the administration of the business of the courts, including, but not limited to, a lowering of public confidence in the courts among reasonable persons.

....

The relevant portion of the Commentary to Draft Rule 3 explains that:

The term “prejudicial to the effective and expeditious administration of the business of the courts” is not subject to precise definition, and the Rule therefore provides some specific examples. The Code of Conduct for United States Judges may provide standards of conduct applicable to proceedings under the Act, although it is not intended that disciplinary action be appropriate for every violation of the Code’s provisions. As noted in the Introduction to the Code:

“Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a patter of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not conduct is proscribed. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the purpose of the Code would be subverted if the Code were invoked by lawyers for mere tactical advantage in a proceeding.”

The ABA recommends that Rule 3(b)(1) be amended to define misconduct to include violations of the Code of Conduct for United States Judges. The accompanying Commentary, likewise, should be amended to state: “The Code of Conduct for United States Judges **should** provide the standards of conduct applicable to proceedings under the Act (recommended amendment in bold font). The Commentary should still explain that “it is not intended that disciplinary action be appropriate for every violation of the Code’s provisions.”

Another problem is that Draft Rule 3(b)(1) offers as an example of misconduct, “treating litigants or attorneys in an unnecessarily hostile manner.” This is a vague standard that is inconsistent with the other specific examples of misconduct in the draft rule. Regardless of your acceptance or rejection of our first recommendation, this example of misconduct should, at a minimum, be re-written for greater clarity.

We would like to take this opportunity to make one additional recommendation because of its core relevance to the promulgation of mandatory and nationally uniform standards to govern the substantive and procedural aspects of misconduct and disability proceedings under the Act. We recommend that the Judicial Conference request that the Committee on Codes of Conduct consider revising the Code of Conduct for United States Judges in light of the rules-based approach in the new Model Code of Judicial Conduct (http://www.abanet.org/judiciaethics/approved_MCJC.html), adopted by the ABA in 2007. In the new Model Code of Judicial Conduct, black letter rules are limited to statements regarding what a judge shall, shall not, or may do. Statements as to what a judge should do are confined to comments. The purpose of this change was not to devalue the critical role that the Code plays in guiding judges on how they should behave. Rather, the purpose was to make absolutely clear the distinction between enforceable standards – the provisions that can subject judges to discipline if violated – and the aspirational guidance of the Comments. The rules-based approach in the new 2007 ABA Model Code of Judicial Conduct can provide clear guidance to judges and to those who allege misconduct.

The American Bar Association appreciates the opportunity to submit these comments for your consideration.