PROPOSED REVISIONS TO CODE OF CONDUCT FOR U.S. JUDGES

Public Comments

#9	Beverly Mann, Michigan	04/18/2008

The Supreme Court commented almost as an aside two years ago in Day v. McDonough, 127 S. Ct. 1394 (2006), that "[o]f course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions." Yet judges routinely act on their own initiative without according the parties fair notice and an opportunity to present their positions. Appellate judges do so citing case law that permits appellate courts to affirm the holding below upon the basis of anything in the record that supports affirmance on grounds other than those cited by the lower court.

Often, the stated sua sponte basis is erroneous as a matter of fact or law, and had prior notice in accord with basic due process requirements been accorded, the outcome of the case at the level at which the court acted on its own initiative would have been different. Yet, virtually without fail, motions for reconsideration are denied, either without comment or with an order citing some new sua sponte basis that also is erroneous. This has happened to me a number of times. In one instance, I was ordered to pay a $500 fine to the court of appeals because I had filed two motions for reconsideration of the court's sua sponte—absolutely out of the blue—dismissal of one of the appellants as a party to the appeal. The motions panel said its circuit rules permit only one motion for reconsideration; no matter that each motion for reconsideration was the only filing that addressed the most-recently-stated basis for the sua sponte action, and that the panel's decision in its second order to completely change its grounds for the sua sponte action constituted a tacit acknowledgment that the panel's first-stated ground indeed was erroneous.

It is hard to imagine a more blatant denial of procedural due process than when the district judge or appellate panel decides a case on the basis of sua sponte grounds without first providing notice of the ground and an opportunity to brief the issue. It also is hard to imagine a clearer denial of equal protection: after all, is there really any possible legitimate basis for denying procedural due process simply because it is the court rather than one of the parties that has raised the issue?

One particular appellate judge, [redacted] has an undeniable penchant for surprise sua sponte rulings, employing the tactic in bizarre ways. For this judge, the attraction of the device appears to be largely the fact of the element of surprise itself; this judge, who is known for as a sadistic personality, seems to derive pleasure simply from the astonishment it will cause the victim of it—astonishment stemming, of course, from the expectation that procedural due process, specifically prior notice and opportunity to address the issue, is an ironclad guarantee.

Please consider amending the Code of Conduct for United States Judges to make clear that "[o]f course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions," and that a failure to do so constitutes judicial misconduct.