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

**Public Comments**

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| **#10** | Elena Ruth Sassower, Director, Center for Judicial Accountability, Inc., New York | 04/18/2008 |

This memorandum responds to the March 7, 2008 notice, posted on the website of the Administrative Office of the United States Courts, that the Judicial Conference's Committee on Codes of Conduct seeks public comment on its proposed revisions to the Code of Conduct for United States Judges.

According to the notice:

> "The proposed revisions are based in large part on revisions adopted by the American Bar Association in February 2007, amending the ABA Model Code of Judicial Conduct".

This is misleading. The Committee has not incorporated into its proposed revisions the most significant and salutary of the ABA's changes geared to clarity and enforcement. Rather, the Committee has essentially retained the existing Code of Conduct, which, when adopted by the Judicial Conference in 1992, was unacceptably inferior to the 1990 ABA Model Code by its near-total substitution of "should", in place of "shall", in describing expected judicial conduct, with the result that it established no enforceable standards. The Committee has provided no explanation for its proposed "New Code" other than what appears in the March 7, 2008 notice:

> "The Committee concluded that the ABA Model Code reflects many valuable clarifications, expansions, updates, and improvements, which the Committee proposes to incorporate into the Code of Conduct, although the Committee does not propose to adopt the overall organization and numbering format of the revised ABA Model Code."

The notice, which hyperlinks to both the proposed "New Code" and "Current Code (with proposed revisions)", offers no link to the 2007 ABA Model Code. Examination of the Model Code and related ABA documents describing the 39 months of public hearings, discussion, comments, and suggestions that produced it, accessible from the ABA's website [redacted] raises overwhelming questions as to the basis upon which this Committee has materially rejected the 2007 ABA Model code.[1]

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[1] According to Mark I. Harrison, chair of the ABA Joint Commission which produced the 2007 Model Code:

> "The revised [Model] Code is the product of a completely transparent process during which the Joint Commission held nine public hearings, met in-person twenty times, had more than thirty teleconferences, and regularly posted its work on this website with requests for feedback and comment."

The Center for Judicial Accountability, Inc. (CJA) is a national, nonpartisan, nonprofit citizens' organization whose purpose is to ensure that the processes of judicial selection and discipline are effective and meaningful. For nearly two decades, CJA has been documenting, by independently-verifiable documentary evidence, the worthlessness of the Code of Conduct for United States Judges, specifically relating to Canons 3C and 3D ("Disqualification" and "Remittal of Disqualification") and Canon 3B ("Administrative Responsibilities" as it pertains to supervisory oversight and discipline).

Additionally, we have chronicled that the 1993 Report of the National Commission on Judicial Discipline is false in its claim that although Supreme Court Justices are not "formally" bound by the Code of Conduct for U.S. Judges, they "use it for guidance on applicable ethical standards" (at p. 122). In fact, the Justices flout Canons 3C, D, and B with impunity to cover up systemic corruption in the lower federal judiciary and in state and District of Columbia courts, involving judges and government lawyers, abetted by their own misbehaving Supreme Court staff.

As for the Justices, there is no reason why the Code should not be "formally binding" on them - and there appears to be no constitutional bar.[2] The revised Code is ambiguous. Although its "Introduction" section does not include the Justices in its list of federal judicial officers to whom the Code applies, its section entitled "Compliance with the Code of Conduct" would seem to encompass the Justices by its language:

> "Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for the purpose of this Code."[3]

<u>This should be clarified so that, if necessary, appropriate remedial steps may be taken.</u>

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By contrast, this Committee operates without the most basic transparency. Indeed, in an unsuccessful attempt to know who are the Committee's members, I have sent three e-mails to the address identified on the notice, codecomments@ao.uscourts.gov, and phoned twice to the Administrative Office to speak with [redacted], and for whom I left two messages, both unreturned. The response to the third e-mail, deflecting the inquiry, is annexed.

[2] In addition to Congress' authority to impose same by statute -just as it included the Justices within the disqualification statute, 28 U.S.C 5455, and the Ethics Reform Act of 1989 pertaining to honoraria - it appears that the Judicial Conference, headed by the Chief Justice, could bind the Justices to the Code and, certainly, upon resolution of the Justices. Report of the National Commission on Judicial Discipline and Removal, p. 122; see also *"The Role of Judicial Ethics in the Discipline and Removal of Federal Judges"*, Beth Nolan, Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, pp. 880, 893.

[3] What is clear from the "Compliance" section is that just as its three subsections specify the degree to which the Code is applicable to "Part-time", "Pro Tempore", and "Retired" judges, a further subsection could be added for the Justices were any portions of the Code deemed inapplicable to them

As for Canons 3C and D relating to judicial disqualification and disclosure, these largely echo the language of the federal disqualification statutes, 28 U.S.C. §§144 and 455, and are governed by their judicial interpretation.[4] As CJA has pointed out time and time again, including by advocacy to the Administrative Office, to the Judicial Conference, and to the Justices[5], judicial interpretation of 28 U.S.C. §§144 and 455 has rendered these disqualification statutes ineffectual:

> "While the text of sections 144 and 455 appear to create a relaxed standard for disqualification that would be relatively easy to satisfy, judicial construction has limited the statutes' application, so that recusal is rare, and reversal of a district court refusal to recuse, is rarer still.", Charles Gardner Geyh, "Means of Judicial Discipline Other Than Those Prescribed by the Judicial Discipline Statute, 28 US.C. Section 372(c)", Research Papers of the National Commission on Judicial Discipline and Removal, Vol. I, at p. 771 (1993)."[6]

The proposed revisions to the Code of Judicial Conduct for U.S. Judges do NOT change this. The proposed two revisions to Canon 3C and proposed single revision to Canon D are minor[7], omit, from the Commentary, the obligation of disclosure, contained in both the 1990 and 2007

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[4] Such follows from the Commentary to Canon 1 that the Canons "should be applied consistent with.. .statutes.. .and decisional law.. ."

[5] See, most recently, our March 6, 2008 Critique of The Report to the Chief Justice on the Implementation of the Judicial Conduct and Disability Act of 1980 (at pp. 4-6, 63). Copies were handdelivered, on March 7, 2008, to the Executive Secretariat of the Judicial Conference and to the Supreme Court, under a March 6, 2008 coverletter to Chief Justice Roberts. These are also posted on [redacted].

[6] Also, "There is general agreement that §144 has not worked well." Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d §3542, at 555, citing law review articles and quoting from Statutory Disqualification of Federal Judges, David C. Hjelmfelt, Kansas Law Review, Vol. 30: 255-263 (1982): "Section 144 has been construed strictly in favor of the judge ... Strict construction of a remedial statute is a departure from the normal tenets of statutory construction."; Because of this strict construction, "disqualification under this statute has seldom been accomplished", initially and upon review, Richard E. Flamm, Judicial Disqualification: Recusal and Disqualification of Judges (1996), at 737, ''...§144's disqualification mechanism has proven to be essentially ineffectual." Flamm, at 738.

[7] The single revision in Canon 3D, substituting the word "should" for "shall", is not based on any ABA revision. The 2007 ABA Model Code maintains "shall" in directing that the agreement to waive disqualification be "incorporated in the record of the proceeding". The Committee's change is objectionable as it erodes the Canon and certainly for purposes of imposing discipline for its violation.

ABA Model codes[8], and leave untouched the interpretive hurdles that have reduced the disciplinary statutes to empty shells. These interpretive hurdles are that the judge whose disqualification is sought is not disqualified from consideration of the motion's timeliness and sufficiency, the latter of which is interpreted as requiring "extrajudicial" matter and to exclude evidence relating to the merits of decisions and procedural rulings. This is 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)) - a copy of which is annexed. The documentary substantiation for the article is posted on [redacted]. Most relevant and comprehensive is the "Test Case-Federal [redacted]", embodying, in a single perfect case, eight applications for judicial disqualification/disclosure, the particulars of which are summarized by the cert petition in the case, with an additional application for disqualification of, and disclosure by, the Justices, summarized by the subsequent petition for rehearing.

As that "Test Case" proves, federal judges, at all levels, face NO obstacle in disposing of judicial disqualification issues by either ignoring them entirely or by authoring decisions denying disqualification without reasons or by reasons which are demonstrably false. The result of this threshold problem, infesting both the "normal adjudicative processes", as well as the disciplinary process under the 1980 Act, is that interpretive hurdles cannot be overcome and caselaw cannot develop, either as to disqualification/disclosure or discipline.

Consequently, if Canon 3C and D are to be more than the window-dressing they currently are - and will otherwise continue to be[9] - a provision must be added stating that it is misconduct *per se*

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[8] "A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.", 1990 ABA Model Code, Canon 3E, Commentary

"A judge should disclose on the record information that the judge believes the parties or their lawyers might reasonably consider relevant to a possible motion for disqualification, even if the judge believes there is no basis for disqualification.", 2007 Model Code, Rule 2.11, Comment 5.

Rule 2.11 also adds a Comment (2) that did not appear in the 1990 ABA Model Code, to wit, "A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed."

The Committee has included neither of these Comments from the 2007 Model Code in its proposed Revised Code.

[9] It must be noted that the Brennan Center for Justice, to which, as far back as 1998, CJA provided a copy of "Without Merit'' and the Supreme Court submissions in "Test Case-Federal [redacted]", and which, throughout the past decade, refused our repeated entreaties, for its scholarship and advocacy pertaining to disqualification/disclosure issues, for which we provided it with further cases, has now issued a report entitled "Fair Courts: Setting Recusal Standards". It concludes, albeit in somewhat elliptical fashion, that judicial recusal is largely illusory and makes ten recommendations to invigorate such remedy. Among the recommendations giving

for federal judges to wilfully fail to adiudicate or to deny, without reasons, a iudicial disqualification/disclosure application, or to falsify and conceal the material facts and law presented by the application in support of disqualification and disclosure. Moreover, to ensure that a disciplinary venue is available for review of such misconduct *per se*, a further provision must be added that a judicial misconduct complaint based thereon is reviewable under the 1980 Act, 28 U.S.C. §§351 *et seq.*

These insertions to the Code are properly made. The existing Commentary to Canon 1 states:

> "...The Code may also provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§332(d)(l), 351 to 364), although it is not intended that disciplinary action would be appropriate to every violation of its provisions ... Many of the proscriptions of 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 the conduct is proscribed." (p. 2).

Federal iudges should not be "uncertain" about the disciplinary consequences of their wilful and deliberate misconduct. There is no reason for the Committee to "cast in general terms" what it can specify, unless its intent is to exempt readily-definable misconduct from disciplinary action.

Canon 1 is particularly vague and rhetorical - especially with respect to the phrase "independence of the judiciary" which is part of its title. Neither in the Canon itself, nor in the Commentary, is this defined so as to make clear that the "essential independence of judges in making judicial decisions" means their independence from pressures and influences impinging on their duty to decide based on the facts and law."[10]

No rhetoric is necessary for the federal judiciary to plainly state that a judge's duty is to adjudicate based on the facts and law. Yet, nowhere in the Code is there any statement that this

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resonance to CJA's long-standing advocacy: "enhanced disclosure"; "independent adjudication of disqualification motions", "transparent and reasoned decision-making"; "de novo review of interlocutory appeals" and "expanded commentary in the canons". Neither these nor any of the other recommendations are embodied in the Committee's proposed revisions to Canons 3C and D.

[10] By contrast, the ABA's 2007 Model Code, Comment 1 to its Rule 2.4 (External Influences on Judicial Conduct) states:

> "An independent judiciary requires that judges decide cases according to the law and facts, without regard to whether particular laws or litigants are popular or unpopular with the public, the media, government officials, or the judge's friends or family. Confidence in the judiciary is eroded if judicial decision making is perceived to be subject to inappropriate outside influences." (underlining added).

is the essence of the judicial function and the purpose of "judicial independence". Nor is there any statement that it is misconduct *per se* for a judge to knowingly ignore, falsify, distort, or conceal the material facts of the case and/or to knowingly disregard controlling, black-letter law by his decisions and rulings. Inclusion of this more general proscription could adequately substitute for the more specific proscription, hereinabove proposed, relative to disqualification/disclosure applications, so long as there is a further proscription against wilful failure to decide such applications."[11]

The Commentary to Canon 1 should be revised to affirmatively state "The Code provides standards of conduct for application" in disciplinary proceedings under the 1980 Act", as such is sufficiently qualified by the clause "although it is not intended that disciplinary action would be appropriate to every violation of its provisions". That the Committee did not do so reflects its determination to undercut the Code as a source for disciplinary enforcement. Certainly, this is clear from the Committee's systematic retaining of the word "should" in Canon titles and subsections, describing what is and is not expected of a judge, instead of the word "shall" which is how they appear in the ABA Model Codes.

As illustrative, revised Canon 3 of the Code of Judicial Conduct for U.S. Judges, entitled "A Judge **Should** Perform the Duties of the Office, Fairly, Impartially and Diligently" - the sole revision therein being the addition of the word "Fairly". Its subsection A "Adjudicative Responsibilities", unchanged from the current Code, includes:

> "(1) A judge **should** be faithful to and maintain professional competence in the law, and **should** not be swayed by partisan interests, public clamor, or fear of criticism;
>
> (2) A judge **should** hear and decide matters assigned, unless disqualified.. .".

Its section B "Adjudicative Responsibilities", modestly changed from the current Code, includes:

> "(1) A judge **should** diligently discharge the judge's administrative responsibilities.. .and facilitate the performance of administrative responsibilities of other judges and court officials;
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> (2) A judge **should** require court officials, court personnel, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligation under this Code;
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> **(3)** A judge **should** take appropriate action when the judge becomes aware of reliable evidence indicting the likelihood of unprofessional conduct by a judge or lawyer; . . .

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[11] The ABA's 2007 Model Code has a Rule 2.7 entitled "Responsibility to Decide", which states:

> "A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.*" (bold and underlining added).

(5) A judge with supervisory authority over other judges **should** take reasonable measures to assure the timely and effective performance of their duties."

All these "shoulds" are "shalls" or "shall nots" in the 1990 and 2007 ABA Model Codes. Thus, the 2007 **ABA** Model Code, Canon 2: "A Judge **Shall** Perform the Duties of Judicial Office Impartially, Competently, and Diligently". Its Rule 2.2, "Impartiality and Fairness", states:

"A judge **shall** uphold and apply the law,* and shall perform all duties of judicial office fairly and impartially.*"[12]

Its Rule 2.4, "External Influences on Judicial Conduct, states:

"(A) A judge **shall not** be swayed by public clamor or fear of criticism.

(B) A judge **shall not** permit family, social, political, financial, or other interests or relationships to influence the judge's judicial conduct or judgment.

(C) A judge **shall not** convey or permit others to convey the impression that any person or organization is in a position to influence the judge."

Its Rule 2.12, "Supervisory Duties", states:

**"(A)** A judge **shall** require court staff, court officials, and others subject to the judge's direction and control to act in a manner consistent with the judge's obligations under this Code.

(B) A judge with supervisory authority for the performance of other judges **shall** take reasonable measures to ensure that those judges properly discharge their judicial responsibilities, including the prompt disposition of matters before them."

Its Rule 2.15, Responding to Judicial and Lawyer Misconduct, states:

"(A) A judge having knowledge* that another judge has committed a violation of this Code that raises a substantial question regarding the judge's honesty, trustworthiness, or fitness as a judge in other respects **shall** inform the appropriate authority. *

(B) A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects **shall** inform the appropriate authority.

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[12] The asterisks in the 2007 ABA Model Code are to terms, being used for the first time in their "defined sense" - for which interpretations appear in its "Terminology" section.

(C) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this Code **shall** take appropriate action.

(D) A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct **shall** take appropriate action."

The 1990 Model Code had emphasized the distinction between "shall" and "should" this way:

> "When the text uses 'shall' or 'shall not,' it is intended to impose binding obligations the violation of which can result in disciplinary action. When 'should' or 'should not' is used, the text is intended as hortatory and as a statement of what is or is not appropriate conduct but not as a binding rule under which a judge may be disciplined. When 'may' is used, it denotes permissible discretion or, depending on the context, it refers to action that is not covered by specific proscription.. . ." (Preamble, p. 8).

The 2007 ABA Model Code similarly states:

> "Where a Rule contains a permissive term, such as 'may' or 'should,' the conduct being addressed is committed to the personal and professional discretion of the judge.. .and no disciplinary action should be taken for action or inaction within the bounds of such discretion." (Scope, p. 2,72).

There is not the slightest justification for the federal judiciary to promulgate lesser and unenforceable standards for its powerful judges than state judiciaries promulgate for the judges of their courts, including their states' highest courts, based on the ABA Model Codes of Judicial Conduct. Yet, the Judicial Conference did precisely this in promulgating its 1993 Code of Conduct for U.S. Judges, changing the mandatory "shalls" of the 1990 ABA Model Code to discretionary "shoulds", which this Committee has perpetuated by its proposed Code. Indeed, it appears that the only "shall" not changed is the one at the outset of Canon 3C, presumably because that "shall" - "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned" - is statutorily-based and firmly embedded in the popular mind.

Once the "shoulds" are restored to "shalls", the Committee might consider the suggestion of Professor Geyh, who was co-reporter for the ABA's 2007 Model Rules. In testimony before the House Judiciary Committee, on two separate occasions in 2006, Professor Geyh recommended that the Code of Conduct for United States Judges be linked with the 1980 Act:

> "A core failure of the existing disciplinary regime in the federal courts is the hopelessly vague standard that it brings to bear in disciplinary actions. Under the statute, judicial conduct is assessed with reference to whether it is prejudicial to the administration of justice. So general a standard offers no clear guidance as to what does or does not constitute misconduct, and contributes to non-enforcement, because judicial councils are understandably reluctant to impose sanctions on judges for conduct that the judges may not know violates the statute.

> There is an easy and obvious solution. The American Bar Association has a Model Code of Judicial Conduct, some variation of which has been adopted by virtually every system in the United States, including the federal judiciary in its Code of Conduct for United States Judges. In almost every state, the disciplinary process is tethered to the Code of Conduct, which provides judges with detailed and explicit guidance as to the conduct that is permitted, required, and forbidden. When a judge is disciplined, the disciplinary authority will cite the specific provision of the Code that the judge violated.
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> Unfortunately, the federal judiciary has resisted linking its Code to the disciplinary process. One study found that the Code was referenced in only 3% or (sic) federal disciplinary actions, and the Code of Conduct for U.S. Judges explicitly divorces the Code from discipline. It is laudable that the federal judiciary encourages ethical conduct among its judges by inviting them to inquire into the appropriateness of their conduct under the Code without the specter of discipline hanging over their heads. But nothing forecloses the judicial conference from continuing to employ a committee that provides such advice on a confidential basis at the same time as the judicial councils utilize the Code for disciplinary purposes. Indeed, this bifurcation of responsibility -- with one judicial entity offering advice about the Code on request, and another using the Code in disciplinary actions - is common practice among the state systems, and works quite well.
> . . .
>
> The Judicial Conference could make its Code of Conduct for U.S. Judges applicable to disciplinary proceedings without enabling legislation by Congress. Alternatively, Congress could revise the disciplinary statute to link conduct prejudicial to the administration of justice to the specific provisions of the Code. I see no separation of powers impediment to such a move, insofar as the judiciary retains control over the terms of the Code itself. If this change is made by the Conference or Congress, some hortatory language in the Code would need to be changed to mandatory. .." (September 21, 2006 hearing on the impeachment of U.S. District Judge Manuel Real, pp. 149-1 50, also , pp. 149-50, also, p. 139)[13]

Underscoring the need for the Committee to reinforce the Code as a standard for discipline is the 2006 Report to the Chief Justice on the Implementation of the Judicial Conduct and Disability Act of 1980 ("Breyer Committee Report"). It found that "only rarely" did chief judges cite the Code of Conduct for U.S. Judges in a sample of 593 complaints terminated (p. 39, which it specified: as 4% of the chief judges' orders, with only 2% citing advisory opinions of the Judicial Conference's Codes of Judicial Conduct Committee. Although this would appear to be

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[13] "...virtually every State in the United States links their disciplinary process - their judiciaries do - to their code of conduct. ..instead of saying judges should be disciplined for engaging in conduct that is contrary to the administration of justice, this vague standard that is currently there, to linking it to conduct that violates their - the code of judicial conduct that they already have in place." (June 29, 2006 hearing on the establishment of an Inspector General for the Judicial Branch, p. 57).

a steep decline from the 1993 Report of the National Commission on Judicial Discipline and Removal, which had purported (p. 98) that chief judges and circuit councils had "frequently" sought guidance in the Code, the underlying research papers of the National Commission reveal that actually only 3% of orders had cited the code.[14]

The National Commission's Report had also noted:

> "...the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the [I980] Act. The same may be true of other statutes and rules establishing ethical norms for federal judges, particularly if they have their own enforcing mechanisms. The Commission believes the subject deserves continuing study and clarification, much of which can be expected to emerge on a case by case basis if dispositions under the Act are circulated and selectively published, as recommended. The Committee can also see room for fruitful study by various committees of the Judicial Conference charged with responsibility for ethics and discipline issues, and perhaps by appropriate congressional oversight committees." (pp. 98-99, underlining added).

Nearly 15 years have passed since the National Commission's Report. By now, this Committee should have achieved "clari[ty]" as to which provisions of the Code are "enforceable under the Act" and the circumstances thereof. These are not reflected, however, by the Code.

At minimum, the Code should enunciate the fundamental principle that disciplinary action is warranted where a judge's violations of the Code are knowing and deliberate. Such properly applies irrespective of the existence of "enforcing mechanisms" of "statutes.. .establishing ethical norms", as, for instance, the disqualification statutes. And the Code should give examples of the means by which a judge's code-violating conduct may be deemed knowing and deliberate, including where a party has moved for reargument and/or rehearing, alerting the judge to his violations - to which the judge thereafter adheres, without reasons or by reasons that are demonstrably false. Similarly, where a party moves for the judge's disqualification, based on the judge's violations - and which the judge thereafter denies without reasons, or by reasons that are demonstrably false.

As it is, the Committee's proposed new Commentary to Canon 3A(2) is a step backward[15]. It states:

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[14] Research Papers of the National Commission on Judicial Discipline and Removal, *"Administration of the Federal Judicial Conduct and Disability Act of 1980",* Vol. I, p. 543, further noting that 7.5% of complainants had cited the Code.

[15] Canon 3A(2), to which no revisions have been proposed, reads:

> "A judge **should** hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings." (bold added). [*cf*. fn. 11, *supra*]

> "Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular cases." (p. 9).

Implicit by this addition is that the federal judiciary suffers from "unwarranted disqualification". This is untrue. As hereinabove noted and documented by "Test Case- Federal [redacted]", the disqualification of federal judges for bias, actual or apparent, is virtually impossible for litigants to achieve, either in the first instance or upon appellate review. This includes where the pervasive actual bias meets the "impossibility of fair judgment" standard of *Liteky* v. *United* States, *5* 10 U.S. 540 (1994).

Federal judges already have an arsenal of tools for defeating applications for their disqualifications - including, as aforesaid, by ignoring the issue and rendering fraudulent judicial decisions that falsify and omit the material grounds upon which disqualification is sought. They do not need further rhetorical justification to deny warranted disqualification. Yet, assuredly, this proposed Commentary will become the most quoted of the Canon by judges denying disqualification, which they almost universally already do. As such, it is not merely superfluous, but dangerous.

The Committee offers no justification for this proposed Commentary, adapted from the ABA's 2007 Model code.[16] But such Model Code is a template for modification, with provisions more applicable to state judiciaries, most of whose judges have time-limited elective or appointed terms that make them vulnerable to pressures of "difficult, controversial, or unpopular cases". Life-tenured federal judges are not so vulnerable, quite apart from the fact that the mechanisms for disciplining and removing federal judges are effectively disabled and non-functioning, thereby further insulating them.

According to the March 7, 2008 notice:

> "Any public comments may, at the Committee's discretion, be publicly disclosed on the judiciary's web site, www.uscourts.gov. At the close of the comment period, the Committee on Codes of Conduct will review and analyze the comments received and consider further revisions, as necessary. The Committee plans to forward its final recommendations to the Judicial Conference at its September 2008 meeting."

We hereby request that these comments be "publicly disclosed" on the U.S. Courts' website, along with our own invitation for responsive comment.

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[16] 2007 ABA Model Code, Comment to Rule 2.7.