

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

Public Comments

#11	Denise Cardman, Acting Director, Governmental Affairs Office, American Bar Association, Washington, D.C.	04/18/2008
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Please accept the attached comments of the American Bar Association regarding proposed revisions to the Code of Conduct for United States Judges. Pursuant to the announcement posted on the website of the U.S. Courts at: <http://www.uscourts.gov>, we are electronically transmitting our comments for your consideration.

The Association is pleased to note that the Committee on Codes of Conduct concluded that the revised ABA Model Code of Judicial Conduct, adopted by the ABA House of Delegates in February 2007, "reflects many valuable clarifications, expansions, updates, and improvements, which the Committee proposes to incorporate into the Code of Conduct."

In our review of your Committee's proposed Code of Conduct, we respect -- and therefore do not comment on -- the numerous instances in which provisions that differ from parallel provisions in the ABA Model Code are dictated by federal statutory provisions or case law, or by inherent, and often unique, characteristics of the federal courts. Our comments instead are limited to those situations where the standards set forth in the ABA Model Code of Judicial Conduct could work effectively in all courts, including the federal courts.

An independent, impartial judiciary is indispensable to our system of justice. Equally important is the confidence of the public in the integrity and impartiality of our judiciary as an institution. These principles are best served by adoption of, and adherence to, a judicial code of conduct that embraces the highest standards of ethical conduct.

We commend your efforts and thank you for the opportunity to engage in this dialogue.

Please feel free to contact me or Stephen Gillers, Chair of the ABA Center for Professional Responsibility Policy Implementation Committee, if you have any questions.

COMMENTS of the AMERICAN BAR ASSOCIATION regarding PROPOSED REVISIONS TO THE CODE OF CONDUCT FOR UNITED STATES JUDGES

1. The "Introduction" to the Code of Conduct states that the Code "applies to United States Circuit Judges, District Judges, Court of International Trade Judges, Court of Federal Claims Judges, Bankruptcy Judges, and Magistrate Judges." We note, however, that the section of the Code entitled "Compliance With the Code of Conduct," states that "Anyone who is an officer of the federal judicial system authorized to perform judicial functions is a judge for purpose of this Code." We believe that a reasonable reading of the "Compliance" section would make the Code applicable to the Justices of the Supreme Court of the United States as well. Understanding that the Judicial Conference of the

United States might lack jurisdiction to adopt, or even to recommend, rules of conduct for the Supreme Court, the ABA nonetheless respectfully suggests that a recommendation that the Justices of the nation's highest court be subject to the same ethical precepts as other judges would be entirely appropriate. We believe that public confidence in the integrity and accountability of the unitary federal court system will be enhanced if a uniform set of ethical guidelines is in effect throughout that system.

2. The proposed Code of Conduct retains the format and most of the organization of the ABA's previous 1990 Code. We urge the Committee to reconsider the many advantages that the new "Restatement" format of the ABA Model Code of Judicial Conduct has introduced. These include: 1) much greater ease of use, due to the familiarity both judges and lawyers have with the various other restatements of law and to the simpler and more logical organization of the ABA's Code; 2) the desirability of having all future judicial disciplinary case law, state and federal, develop to the extent possible in a consistent fashion; and 3) greater ease in conducting judicial ethics and regulatory research.
3. We believe that the Committee's proposed Code would benefit from the inclusion of a "Terminology" section. Such a modification would serve two important purposes: it would provide greater guidance for judges who consult the Code for prospective advice to understand whether a particular provision were applicable; and it would reduce the burden on the Codes of Conduct Committee to expend time and effort in issuing Advisory Opinions that essentially constitute definitions of commonly-used terms.
4. The third paragraph of Commentary to Canon 1 of the proposed Code provides that "[M]any 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 the conduct is prohibited." We believe that this statement creates two potential problems. The first is that it suggests that if even a single reasonable judge were uncertain about the appropriate conduct under a certain set of circumstances, disciplinary action would not be appropriate. In light of the availability of advice from the Codes of Conduct Committee, judges who lack certainty with respect to particular potential ethical violation have the ability to resolve that uncertainty by actively seeking advice, and should indeed do so. The second problem presented by a reasonableness standard is that it will tolerate impermissible conduct, that is, it expands the scope of the permissible. We recommend that the language of the ABA Code, suggesting instead that "not every transgression should lead to the imposition of discipline," would be preferable.
5. Commentary to Canon 1 of the proposed Code states that the Code "may also provide standards of conduct for application in proceedings under the Judicial Council Reform and Judicial Conduct and Disability Act of 1980...." The Code, in other words, describes conduct for which a judge may be disciplined, yet the word "should" is universally employed throughout. We strongly recommend that this internal inconsistency, which is likely to create confusion, be resolved by replacing the term "should" with the mandatory "shall" throughout the Code.

6. Commentary to Canon 2C, which addresses judges' membership in discriminatory clubs, provides the following description of invidious discrimination: "Invidious discrimination will generally be demonstrated if an organization's exclusionary membership practices are arbitrary, irrational, or the result of hostility or animus toward an identifiable group." In order to prevent users of the Code from interpreting this language as a full definition of invidious discrimination (which we believe it is not), we recommend that the final sentence of the applicable Commentary be revised slightly and suggest for your consideration the following substitute sentence: "Invidious discrimination would be demonstrated, for example, if an organization's membership practices are arbitrary, irrational, or the result of hostility or animus toward an identifiable group."
7. Canon 3B(3), which parallels ABA Model Code Rule 2.15 (Reporting a judge's conduct), differs from Rule 2.15 in two significant ways, each of which we believe renders the provision less clear and forceful than it should be.

First, it employs the undefined and somewhat imprecise terms "unprofessional conduct" and "misconduct" to identify the type of judicial conduct that triggers another judge's obligation to make an appropriate report. We believe that the ABA Model Code language identifying a judge's knowledge of "a violation of the Code or Model Rules," or of the "reasonable likelihood that a violation has occurred" provides clearer direction, and recommend that Canon 3B(3) be revised accordingly.

Second, rather than requiring that judges "cooperate" with judicial disciplinary investigations, as does ABA Rule 2.15, Canon 3B(5) states that judges should "be candid and honest." We respectfully recommend that affirmative cooperation with all aspects of the judiciary's self-regulatory practices, which is a broader mandate that would nevertheless include both candor and honesty, compels its inclusion within this provision.

8. Finally, the language and purpose of the proposed Commentary to Canon 3C(1)(c) are difficult to understand. The Commentary focuses on a judge who, presiding over a criminal trial, has an (unidentified) interest in a person or entity who is an alleged victim of the defendant's criminal act, and seems intended to establish that such an interest is not a per se cause for disqualification of the judge. It goes on, however, to suggest that such an interest may create a cause for disqualification under two other Code provisions, Canon 3C(1) or 3C(1)(d)(iii). It would appear that a more straightforward manner of addressing this hypothetical would be simply to address it in Commentary to either of those other two sections. We recommend that you consider omitting the language entirely since it is hard to think of a situation where it would make an actual difference in the judge's ability to sit. Alternatively, such a situation does exist; we believe it would be useful to describe it.

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