

Judging the Judges

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Ethics

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Illustration by Jim Frazier

The Judicial Conference of the United States is halfway home in its effort to revise the system for handling misconduct and disability complaints against federal judges.

In March, the Judicial Conference adopted the first set of uniform procedural rules that will apply to complaints against judges in all the federal circuits. Previously, each circuit could set its own rules for dealing with those complaints.

The new Rules for Judicial-Conduct and Judicial-Disability Proceedings went into effect on April 10.

Meanwhile, the Judicial Conference, which sets policy relating to the administration of the federal courts, is considering a package of revisions to the Code of Conduct for United States Judges. The conference's Committee on Codes of Conduct plans to finalize its recommendations for consideration by the full conference when it meets in September.

Many of the proposed revisions are based on the new version of the ABA Model Code of Judicial Conduct, which was adopted by the association's House of Delegates in February 2007. The ABA Model Code is also the basis for most state judicial disciplinary systems.

Some experts in the field say the Judicial Conference has taken an important first step by implementing uniform procedural rules for handling misconduct and disability complaints against federal judges.



But they also express concerns about whether the conference is doing enough to remedy some shortcomings in the conduct and discipline structure for federal judges.

SKIRTING SCRUTINY

One concern is that the shroud of secrecy that in the past has hidden from public scrutiny much of the disciplinary process for federal judges is not being lifted as much as it should be.

The Judicial Conference's review of the process for handling claims against federal judges dates back to 2004, when members of Congress began to question the federal judiciary's ability to police itself. U.S. Chief Justice William H. Rehnquist (who died the following year) appointed a special committee headed by Justice Stephen G. Breyer to study the effectiveness of the judicial disciplinary system.

In 2006, the Breyer committee issued a report stating that the system worked effectively in the vast majority of cases. (An estimated 700 claims are filed against federal judges each year; most allege misconduct rather than disability issues.) But the report also stated that too many of the "high visibility" cases it reviewed had been mishandled.

The new uniform procedural rules adopted by the Judicial Conference in March essentially reflect the recommendations of the Breyer committee.

In addition to replacing the hodgepodge of rules and practices that previously existed in the various federal circuits, the new uniform procedural rules give the conference's Committee on Judicial Conduct and Disability new authority to monitor each circuit's disciplinary process, review dismissals of complaints, and order the judicial council in each circuit to reconsider a decision or undertake additional investigation in a particular case.

The chief judges and judicial councils of the circuits will, however, continue to retain some power over the process of handling complaints against judges. Each circuit may implement its own rules governing procedural details of the complaint process as long as they don't conflict with the uniform procedures established by the Judicial Conference. In addition, the uniform procedures authorize each circuit's chief judge to conduct an inquiry into a case of possible misconduct or disability even if no complaint has been filed.

The new uniform rules require that final orders on complaints against judges be made public. But some aspects of the process will remain confidential in accordance with federal law. Under the new rules, most complaints against federal judges will remain confidential unless a complaint results in disciplinary action against a judge. Complaints that are dismissed will not identify either the judge or the complainant. The chief judge of a circuit may confirm the existence of a complaint against a judge, but may not comment on the merits.

That's a far cry from the prevailing practice in most states, where misconduct complaints are a matter of public record once a judge has been formally charged with wrongdoing.

The big problem with the new federal rules is that they don't bring enough transparency to the process, says Steven Lubet, director of the Program on Advocacy and Professionalism at

Northwestern University School of Law in Chicago. Identifying a judge only after he or she has been disciplined is not much of a concession to the public interest, he says.

Lubet says all disciplinary proceedings against federal judges should become a matter of public record once probable cause is established to open an investigation.

“I think the public has a right to know how their judges are behaving,” says Lubet. “How would anybody ever know whether the system is working if all we ever hear about are the cases that result in disciplinary action?”

Arthur D. Hellman, a law professor at the University of Pittsburgh, says the new uniform rules give chief judges of the circuits too much discretion to decide not to initiate inquiries into possible misconduct or disability involving judges.

“I don’t think the chief judge should need a smoking gun or blood on the floor to initiate an investigation into possible wrongdoing,” he says.

At the same time, Hellman says, the expanded oversight powers of the Judicial Conference’s Committee on Judicial Conduct and Disability could have a significant effect on the process.

“I think what they’re doing is starting out slowly and laying the groundwork now for greater oversight authority later if they feel it’s necessary,” he says.

POTSHOTS AT CANONS

Another concern is that the judicial conference apparently has no plans to turn the Code of Conduct for United States Judges from a series of largely aspirational canons into a set of black-letter rules for judges that spell out exactly what sort of conduct constitutes grounds for possible disciplinary action.

The new version of the ABA Model Code of Judicial Conduct incorporates aspirational canons and black-letter rules for judges. Most state conduct codes for judges also follow a rules-based approach.

But while the proposed new conduct code for federal judges adopts some of the substance from the new version of the ABA code, it continues to be organized into canons encouraging certain types of behavior by judges.

The commentary to Canon 1 notes that disciplinary action would not be appropriate for every violation of the code’s provisions. “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 pattern of improper activity, and the effect of the improper activity on others or on the judicial system,” states the commentary.

The definitions section of the new federal procedural rules defines misconduct in general terms as conduct prejudicial to the effective and expeditious administration of the business of the courts.

MISSING LINK

The crux of the problem is that the standards for judicial misconduct continue to be vague, and that the conduct code is not directly enforceable through the new procedural rules, says Charles Geyh, a law professor at Indiana University in Bloomington who served as co-reporter for the ABA Joint Commission to Evaluate the Model Code of Judicial Conduct. And, he says, there has been no attempt to link the conduct code with the procedural rules for handling misconduct and disability complaints.

The ABA expressed similar concerns when it submitted comments in October 2007 on the procedural rules being developed by the Breyer committee.

The ABA urged that the definitions section of the rules specifically state that misconduct includes violations of the conduct code for federal judges. The ABA also expressed its support for adopting a rules-based approach in the federal conduct code. The ABA stated that the purpose of that approach in its new judicial code “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.”

But Hellman says there may be too much emphasis on defining judicial misconduct. The important thing, he says, is that adequate procedures are in place to handle complaints against judges when they arise.

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