

A Look at Federal Judicial Disciplinary Developments

2008 brings rule amendments and a ruling of note

Howard J. Bashman

Special to Law.com

March 12, 2008

In September 2006, the Judicial Conduct and Disability Act Study Committee chaired by Supreme Court Justice Stephen G. Breyer [issued a report](#) that has now resulted in a lengthy document entitled "[Rules for Judicial-Conduct and Judicial-Disability Proceedings.](#)" Just this Tuesday, the [Judicial Conference of the United States voted to adopt these rules.](#) Available online for review, the rules -- all 67 pages of them -- make clear that decisions on judicial misconduct complaints should be publicly accessible. Several federal appellate courts have already begun to ensure this by making their judicial misconduct rulings freely available over the Internet. The [7th Circuit](#), the [9th Circuit](#) and the [10th Circuit](#) have all recently begun posting these decisions online, and I am optimistic that additional federal appellate courts will recognize the wisdom of doing the same thing.



And just last week, the Administrative Office of the U.S. Courts issued for public comment [proposed revisions to the Code of Conduct for United States Judges.](#) The proposals address in detail whether federal judges may belong to clubs that appear to practice invidious discrimination because their exclusionary membership practices are arbitrary, irrational or the result of hostility or animus toward an identifiable group. The deadline for public comment on these rule changes is April 18, 2008, and comments may be submitted via e-mail.

In my view, yet another development was the most interesting of this series of recent events related to federal judicial misconduct. In mid-January 2008, the five-member Judicial Conference Committee on Judicial Conduct and Disability, which oversees the federal courts' disciplinary review process, [issued two opinions in proceedings involving U.S. District Judge Manuel L. Real of the Central District of California.](#) The first ruling addressed whether a federal district judge's "pattern and practice of not providing reasons [in support of judicial decisions] when he was required to do so" constitutes judicial misconduct.

That topic reminded me of the subject of my column from 10 months ago, "[When Should a Judge Face Discipline for What an Opinion Says?](#)" In that column, I criticized disciplinary charges that a Florida judge faces as a result of statements in a concurring opinion issued in the course of deciding a case on appeal. That state court disciplinary proceeding remains unresolved, and [just last week the charges against that judge were expanded](#) to include a charge of making false statements.

In the matter of the federal judicial disciplinary proceeding against Judge Real, the Judicial Conference Committee on Judicial Conduct and Disability disagreed with both the 9th Circuit Judicial Council's finding of misconduct and its proposal to issue a private reprimand.

The committee concluded that "[t]he giving or not giving of reasons for a particular decision, like the reasons themselves, should not be the subject of a misconduct proceeding." Rather, according to the committee, in order to impose discipline, there must exist "clear and convincing

evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law."

The committee's ruling returns the proceeding to the 9th Circuit Judicial Council for application of this newly announced standard to Judge Real's case. But the committee's decision goes on to explain that if that council finds that Real is subject to discipline under that standard, the council should impose discipline more severe than a private reprimand.

According to the Judicial Conference Committee's opinion: "[T]he conduct alleged here, if found willful, is very serious indeed. A private reprimand for such conduct in the wake of a previous public reprimand for other misconduct is not a sanction commensurate with the totality of recent misconduct by this judge. Therefore, if the Council finds willfulness, it should consider a more severe sanction, such as a public censure or reprimand and an order that no further cases be assigned to the judge for a particular period of time."

Because many have criticized the 9th Circuit itself for disregarding applicable U.S. Supreme Court precedent, some may find it appropriate that it was the 9th Circuit that generated a nationally applicable decision that habitual or willful failure to follow governing legal principles may constitute judicial misconduct. In any event, the importance of the Judicial Conference Committee's ruling should not be overlooked. The decision is likely to have its greatest impact at the federal district court level, where an individual judge serves as the initial decisionmaker, although on rare occasion [even an appellate judge may express unwillingness to adhere to binding precedent](#).

[Chief Justice John G. Roberts Jr., in his 2007 Year-End Report on the Federal Judiciary](#), wrote that "[t]he Judiciary cannot tolerate misconduct. The public rightly expects the Judiciary to be fair but firm in policing its own." The recent developments discussed above allow the public to consider whether the federal judiciary is pursuing the correct course of action in this important yet relatively underpublicized arena.

Howard J. Bashman operates his own appellate litigation boutique in Willow Grove, Pa., a suburb of Philadelphia. He can be reached via e-mail at hjb@hjbashman.com. You can access his appellate Web log at <http://howappealing.law.com/>.