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When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules

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Abstract

On March 11, 2008, the Judicial Conference of the United States, the administrative policy-making body of the federal judiciary, approved the first set of nationally binding rules for dealing with accusations of misconduct by federal judges. The new rules implement recommendations made by a committee chaired by Supreme Court Justice Stephen Breyer. The Breyer Committee found that although the judiciary has been "doing a very good overall job" in handling complaints against judges, the "error rate" in "high-visibility cases" is "far too high."

The new regulatory regime comes into existence at a time when federal judges have been accused of ethical transgressions that span the spectrum of actionable misbehavior. Indeed, at least three judges face the possibility of impeachment proceedings.

This article examines the newly adopted misconduct rules against the background of these recent controversies. The underlying question is the same one that Congress grappled with when it established the current statutory framework in 1980: can federal judges be trusted to investigate and impose appropriate discipline for misconduct in their ranks?

The article begins with a brief account of the history that led to the promulgation of the new rules. Next, the article outlines the procedures established by Congress and the judiciary for handling allegations of misconduct by federal judges. The remainder of the article addresses the major issues raised by the new rules: the move toward greater centralization in the administration of the disciplinary system; the definition of misconduct; the possible need for greater procedural formality; the nature and timing of public disclosure; and efforts to make the process more visible.

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New Federal Judicial Misconduct Rules

Arthur D. Hellman*

On March 11, 2008, a low-key press release announced a milestone in the regulation of ethics in the federal judiciary. The Judicial Conference of the United States, the administrative policy-making body of the federal judiciary, approved the first set of nationally binding rules for dealing with accusations of misconduct by federal judges.[1]

The new regulatory regime comes into existence at a time when federal judges have been accused of ethical transgressions that span the spectrum of actionable misbehavior. A district judge in Louisiana faces a possible impeachment inquiry in the House of Representatives based on findings by his fellow judges that he engaged in fraudulent conduct in connection with his own bankruptcy.[2] A district judge in Texas has been disciplined for engaging in sexual harassment of a court employee; he too may face impeachment proceedings and

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* Professor of Law and Sally Ann Semenko Endowed Chair, University of Pittsburgh School of Law. Portions of this article are based on the author's testimony at a hearing of the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States on September 27, 2006. I am grateful to Russell Wheeler of the Brookings Institution and Tom Willging of the Federal Judicial Center for comments on earlier drafts. Errors that remain are my own.

[1] News Release, National Rules Adopted for Judicial Conduct and Disability Proceedings (2008), http://www.uscourts.gov/Press_Releases/2008/judicial_conf.cfm. As the title indicates, the rules also establish procedures for dealing with concerns about performance-affecting disability on the part of federal judges. See infra note 27.

[2] In re Complaint of Judicial Misconduct, Dkt. No. 07-05-351-0085 (5th Cir. Judicial Council Dec. 20, 2007).

perhaps a criminal prosecution.[3] A judge in Missouri was alleged to have made a public statement endorsing a candidate for Congress.[4] A judge in Los Angeles was publicly reprimanded for improperly intervening in a bankruptcy case to help a woman whose probation he was supervising after she was convicted of various fraud offenses; that judge is now under investigation for other alleged misconduct.[5] A judge in Denver has been identified in media reports as a client of a prostitution ring.[6]

This article examines the newly adopted misconduct rules against the background of these recent controversies and the concerns they have generated in Congress as well as the media. The underlying question is the same one that Congress grappled with when it established the current statutory framework in 1980: can federal judges be trusted to investigate and impose appropriate discipline for misconduct in their ranks?

The article begins with a brief account of the history that led to the promulgation of the new rules.[7] Next, the article outlines the procedures established by Congress and the judiciary for handling allegations of misconduct by federal judges.[8] The remainder of the article addresses the major issues raised

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[3] See Lise Olsen, 3 House Members Call Kent Case Shocking, Houston Chronicle, Nov. 14, 2007 (available on LEXIS, Nexis library).

[4] See infra Part V-B.

[5] See infra Part VI; infra note 62 and accompanying text. .

[6] See Sara Burnett, Complaint vs. judge probed, Rocky Mountain News, Mar. 13, 2008, available at 2008 WLNR 5026723.

[7] For a more detailed account of the background, see Arthur D. Hellman, The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors, 69 U. Pitt. L. Rev. No. 2 (forthcoming 2008).

[8] For a brief description of the procedures as they existed before adoption of the new rules, see Arthur D. Hellman, Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report, 28 Just. Sys. J. 426 (2007).

by the new rules: the move toward greater centralization in the administration of the disciplinary system; the definition of misconduct; the possible need for greater procedural formality; the nature and timing of public disclosure; and efforts to make the process more visible.

I. The Road to the New National Rules

From the beginning of the nation's history through the administration of Jimmy Carter, the only formal mechanism for dealing with misconduct by federal judges was the cumbersome process of impeachment.[9] That era ended with the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (1980 Act). This law, codified in a single subsection of the Judicial Code, established a new set of procedures for judicial discipline and vested primary responsibility for implementing them in the federal judicial circuits.

The 1980 Act was quite specific on some matters (for example, consideration of the possibility of impeachment), but on others (notably the procedures to be followed in the early stages of routine cases) it spoke only in general terms. In 1986 a committee of chief circuit judges prepared a set of Illustrative Rules Governing Judicial Misconduct and Disability. These Rules, accompanied by an extensive commentary, addressed many procedural and substantive issues that were not resolved by the statute itself. A revised set of Illustrative Rules was promulgated by the Administrative Office of United States Courts in 2000.[10] Most of the circuits adopted rules based on the Illustrative Rules.

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[9] The judicial councils of the circuits had some statutory authority to issue orders addressed to individual judges, but the extent of their authority was ill-defined and controversial. See, e.g., Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74 (1969).

[10] Administrative Office of the United States Courts, Illustrative Rules Governing Complaints of Judicial Misconduct and Disability (2000) [hereinafter Illustrative Rules].

Two decades after the enactment of the law, Congress passed a revised version in the Judicial Improvements Act of 2002.[11] This legislation retained the framework of the 1980 Act but added some procedural details drawn from provisions adopted by the judiciary through rulemaking. The new law also gave the judicial misconduct provisions their own chapter in the United States Code, Chapter 16.

In revising the law in 2002, Congress had the benefit of research and analysis carried out under the auspices of the National Commission on Judicial Discipline and Removal. The Commission, created by an Act of Congress in 1990, published a thorough report as well as an extensive compilation of working papers.[12] These studies constitute a rich source of detailed information that is enormously useful in showing how the 1980 Act was being implemented at the everyday operational level during its first decade. Overall, they suggested that the judiciary was doing a good job of handling the complaints that were being filed under the Act.

In this light, it is not surprising that the Judicial Improvements Act of 2002 moved through Congress with bipartisan support and no indication of any serious dissatisfaction with the way the judiciary was carrying out its responsibilities under existing law.[13] Soon afterwards, however, rumblings of discontent began to be heard from Congress. At a meeting of the Judicial Conference in March 2004,

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[11] The legislation was enacted as part of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273. The standalone version was passed by the House in July 2002 as H.R. 3892. For the legislative history, see H.R. Rep. 107-459 (2002). I testified at the hearing that preceded the introduction of the bill.

[12] See Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265 (1993) [hereinafter National Commission Report].

[13] This can be seen in the brief transcript of the markup of the bill in the House Judiciary Committee. H.R. Rep. 107-459 at 79-80 (2002) (statements of Reps. Coble, Conyers, and Berman).

Representative F. James Sensenbrenner of Wisconsin, the chairman of the House Judiciary Committee, lectured the judges about what he viewed as the "decidedly mixed record" of the judiciary in investigating alleged misconduct in its ranks.[14] He hinted that if the judiciary did not do a better job, Congress might reassess "whether the judiciary should continue to enjoy delegated authority to investigate and discipline itself."

Two months after the Sensenbrenner speech, Chief Justice William H. Rehnquist announced that he had appointed a committee to evaluate how the federal judicial system was dealing with judicial misbehavior and disability.[15] The committee was chaired by Justice Stephen G. Breyer; the other members were four experienced federal judges and the administrative assistant to the Chief Justice. A spokesman for the Chief Justice confirmed that the panel had been created in response to Sensenbrenner's comments at the Judicial Conference meeting.[16]

The Breyer Committee issued its report in September 2006.[17] Justice Breyer and his colleagues reached two major conclusions. First, they found that "chief circuit judges and judicial councils are doing a very good overall job in handling complaints filed under the Act."[18] Specifically, after reviewing a sample

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[14] F. James Sensenbrenner Jr., Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (March 16, 2004) (transcript available at http://judiciary.house.gov/legacy/news031604.htm).

[15] Chief Justice Appoints Committee To Evaluate Judicial Discipline System, Third Branch, May 2004, at 8.

[16] Mike Allen & Brian Faler, *Judicial Discipline to Be Examined; Rehnquist Names Panel in Response to Ethics Controversies*, Wash. Post, May 26, 2004, at A-2 (available on LEXIS, Nexis library).

[17] Judicial Conduct and Disability Act Study Committee, Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116 (2006) [hereinafter Breyer Committee Report].

[18] Breyer Committee Report, supra note 17, at 206.

encompassing almost 700 complaints terminated over a three-year period, the Committee identified fewer than 30 as even arguably "problematic."[19] Moreover, "problematic" generally meant "problematic for procedural reasons," not because the Committee thought that the complaints were meritorious.[20] But in separately assessing a set of "high-visibility cases" – cases that received press coverage or were filed by members of Congress – the Committee found "mishandling" in 5 out of 17. This "error rate," the Committee said, is "far too high."[21] The report included a lengthy set of recommendations for improving the administration of the 1980 Act.

By the time the Breyer Committee issued its report, Chief Justice Rehnquist had died. His successor, Chief Justice John G. Roberts, Jr., took steps to assure that the Committee's recommendations would be implemented – and sooner rather than later. In March 2007, with the Chief Justice presiding, the Judicial Conference adopted a package of proposals aimed at strengthening the regulatory regime established by the 1980 Act. The proposals came from the Conference's Committee on Judicial Conduct and Disability (Conduct Committee).[22] Specifically, the Conference:

- directed the Conduct Committee "to develop … comprehensive guidelines and, as necessary, additional rules" to implement the 1980 Act "in a consistent manner throughout the federal court system;"
- called upon the Committee to provide the circuits with "specific binding guidance on an array of … issues identified in the Breyer Committee report;" and

[19] Id. at 153, 173.

[20] Id. at 153.

[21] Id. at 123.

[22] The committee was formerly known as the Committee to Review Circuit Council Conduct and Disability Orders. See infra note 44 and accompanying text.

- instructed the Committee to require the circuits "to transmit specified material to the Committee so that it has a sufficient basis for monitoring implementation" of the Breyer Committee report.[23]

The Conduct Committee acted swiftly to carry out the Conference mandate. In July 2007 it published a draft of a comprehensive set of "Rules Governing Judicial Conduct and Disability Proceedings."[24] The draft drew heavily on the Breyer Committee report, adopting much of its language in the rules and, even more, in the commentaries. The committee invited public comments on the draft and heard testimony at a public hearing. A revised draft was published in December 2007, and in January 2008 the Committee released a draft with further revisions. Although the January draft stated that it was "Recommended for Adoption by the Judicial Conference," it proved not to be the Committee's last word. Instead, in February 2008, the Committee published a final draft making one important change in the proposed rules.[25] As already noted, the draft was approved at the Conference's regular meeting in March 2008.

II. Procedures Under Chapter 16 and the New Rules

Under Chapter 16 and the implementing rules, the primary responsibility for identifying and remedying possible misconduct by federal judges rests with two

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[23] Report of the Proceedings of the Judicial Conference of the United States, Mar. 13, 2007, at 20.

[24] Judicial Conference of the United States, Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant to 28 U.S.C. §§ 351-364 – Draft for Public Comment (6/13/2007) [hereinafter Misconduct Rules July Draft]. Although the draft bears the date of June 13, 2007, it was not made available for public comment until July 16.

[25] Judicial Conference Committee on Judicial Conduct and Disability, Rules for Judicial-Conduct and Judicial-Disability Proceedings (March 2008) [hereinafter Misconduct Rules 2008], available at http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf. Although the cover of the document bears the date of March 2008, the internal notations identify this as the draft of Feb. 19, 2008. For discussion of the important change made by the final draft, see infra Part III-B. (The final draft also made a few other changes.)

sets of actors: the chief judges of the federal judicial circuits and the circuit judicial councils. A national entity – the Judicial Conference of the United States – becomes involved only in rare cases, and only in an appellate capacity.[26] Before turning to the issues raised by the new Rules, it will be useful to provide a brief overview of the process.[27]

There are two ways in which a proceeding may be initiated to consider allegations of misconduct by a federal judge. Ordinarily, the process begins with the filing of a complaint about a judge with the clerk of the court of appeals for the circuit. "Any person" may file a complaint; the complainant need not have any connection with the proceedings or activities that are the subject of the complaint, nor must the complainant have personal knowledge of the facts asserted.[28] But the Act also provides that the chief judge of the circuit may "identify a complaint" and thus initiate the investigatory process even when no complaint has been filed by a litigant or anyone else.[29]

When a complaint has been either "filed" or "identified," the chief judge must "expeditiously" review it. The chief judge "may conduct a limited inquiry"

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[26] Chapter 16 also authorizes the circuit judicial councils to "refer" complaints to the Judicial Conference of the United States and to "certify" determinations that a judge has engaged in serious misconduct. See 28 USC § 354(b). Technically this section of the statute does not establish a channel of appellate review, but even here the council makes the initial decision, and the Judicial Conference becomes involved only after that decision has been made.

[27] The procedures in Chapter 16 and the newly adopted rules also provide the channel for addressing concerns about mental or physical disability on the part of a judge. However, such concerns are generally addressed through informal and totally private measures. For a vivid and revealing account of how failing judges have been "ease[d] … off the bench" in the Ninth Circuit, see John Roemer, Judges Talk About When to Hang Up Their Robes, Daily J. (S.F.), Mar. 13, 2008, at 1. Further discussion of that aspect of the statutory scheme is outside the scope of this article.

[28] For discussion of this aspect of the statutory scheme, see Hellman, supra note 7, Part II-F-1.

[29] For further discussion of this aspect of the process, see infra Part IV-B.

but must not "make findings of fact about any matter that is reasonably in dispute."[30] Based on that review and limited inquiry, the chief judge has three options. He or she can: (a) dismiss the complaint; (b) "conclude the proceeding" upon finding that "appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events;" or (c) appoint a "special committee" to investigate the allegations.[31]

From a procedural perspective, options (a) and (b) are treated identically. The statute can thus be viewed as establishing a two-track system for the handling of complaints against judges. What I call Track One is the "chief judge track;" Track Two is the "special committee track."[32] All but a tiny fraction of complaints are disposed of on the chief judge track.[33]

If the chief judge dismisses the complaint or terminates the proceeding, a dissatisfied complainant may seek review of the decision by filing a petition addressed to the judicial council of the circuit.[34] The judicial council may order further proceedings, or it may deny review.[35] If the judicial council denies review, that is ordinarily the end of the matter; in Track One cases, the statute states that there is no further review "on appeal or otherwise."[36] However, the new rules provide that under limited circumstances the Conduct Committee of the Judicial

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[30] 28 USC § 352(a).

[31] Id. §§ 352(b), 353(a).

[32] More precisely, Track Two is the "chief judge/special committee track." For ease of reference I will use the shorter label.

[33] See Breyer Committee Report, supra note 17, at 132.

[34] 28 USC § 352(c). The judicial council may refer petitions to a panel composed of at least five members of the council. See 28 USC § 352(d).

[35] Misconduct Rules 2008, supra note 25, at 43 (Rule 19(b)).

[36] In fact, the statute says this twice. See 28 USC §§ 352(c), 357(c).

Conference may require the appointment of a special committee even when the chief judge and the circuit council have declined to take such action. This is a controversial aspect of the new rules, and it will be discussed later in this article.[37]

If the chief judge does not dismiss the complaint or terminate the proceeding, he or she must promptly appoint a "special committee" to "investigate the facts and allegations contained in the complaint."[38] A special committee is composed of the chief judge and equal numbers of circuit and district judges of the circuit. Special committees have power to issue subpoenas; sometimes they hire private counsel to assist in their inquiries.

After conducting its investigation, the special committee files a report with the circuit council. The report must include the findings of the investigation as well as recommendations. The circuit council then has a variety of options: it may conduct its own investigation; it may dismiss the complaint; or it may take action including the imposition of sanctions.[39]

Final authority within the judicial system rests with the Judicial Conference of the United States. A complainant or judge who is aggrieved by an order of the circuit council can file a petition for review by the Conference;[40] in addition, the circuit council can refer serious matters to the Conference on its own motion.[41] If the Conference determines that "consideration of impeachment may be warranted," it may so certify to the House of Representatives.[42]

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[37] See infra Part III-B.

[38] 28 USC § 353(a).

[39] Id. § 354.

[40] Id. § 357(a).

[41] Id. § 354(b).

[42] Id. § 355(b).

Congress has authorized the Conference to delegate its review power to a standing committee, and the Conference has done so.[43] Until 2007, the committee was known as the Committee to Review Circuit Council Conduct and Disability Orders. The name was changed in 2007 in order to reflect the Committee's more active role in overseeing the Act's implementation; it is now the Committee on Judicial Conduct and Disability.[44] I refer to it in this article as the "Conduct Committee."

III. Self-Regulation – But Somewhat Less Decentralized

The 1980 Act created a regime that has been aptly described as one of "decentralized self-regulation."[45] Under the 2008 National Rules, self-regulation continues, but the decentralization has been cut back to a considerable degree. This development is manifested in three aspects of the new arrangements: the imposition of mandatory national rules; the implementation of an oversight function for the Conduct Committee; and the expansion of the Committee's jurisdiction to review orders of the circuit councils. I shall discuss each of these points in turn.

A. From "illustrative" to mandatory rules

The first signal of a shift toward greater centralization comes in Rule 2. The Rule itself states that its provisions "are to be deemed mandatory" and that they "supersede any conflicting … rules" adopted by the judicial councils of the

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[43] See 28 USC § 331; In re Complaint of Judicial Misconduct, 37 F.3d 1511 (U.S. Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders 1994).

[44] See Report of the Proceedings of the Judicial Conference of the United States, Mar. 13, 2007, at 5.

[45] Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 29 (1993) [hereinafter Barr & Willging].

circuits.[46] This is a significant departure from prior practice. The commentary elaborates: "Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act."[47]

This is a sensible change. The federal judiciary is part of the national government, and although the judges retain their state identities and their state attachments, they operate as part of a single system. If allegations of misconduct are not dealt with in appropriate fashion, the fault can easily be imputed to the judiciary as a whole, not just to the circuit where the matter was handled. In addition, most of the circuits have already adopted rules that closely track the Illustrative Rules.[48] This experience suggests that there are no substantial differences in the conditions that confront the chief judges and judicial councils in the various circuits. By the same token, there is little if any reason to continue the minor discrepancies in the rules that existed under the prior regime.

To be sure, there is room for some regional variation in the day-to-day administration of the Act. Congress must have recognized this when it vested primary authority for implementing the Act in the chief judges and judicial councils of the circuits. But even apart from the effect on public perceptions, it is worthwhile to aim for uniformity in procedure to ensure that the rights that

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[46] The Rule carves out a small exception for "exceptional circumstances" that "render the application of a Rule in a particular proceeding manifestly unjust or contrary to the purposes of" the underlying laws and the Rules.

[47] Misconduct Rules 2008, supra note 25, at 9.

[48] See Breyer Committee Report, supra note 17, at 132.

Congress has created for complainants and for accused judges are not honored differently from circuit to circuit.[49]

Although the Judicial Conference has not previously promulgated nationally binding rules for the handling of misconduct complaints, there can be no doubt of its authority to do so. Section 358(a) of Title 28 empowers the Conference to "prescribe such rules for the conduct of proceedings under [Chapter 16] … as [it] considers to be appropriate."[50] Section 358(c) adds that any rule prescribed by a circuit council under Chapter 16 "may be modified by the Judicial Conference." This latter provision eliminates any doubt that that the statute creates a hierarchical arrangement for its administration, with the Conference at the top. Indeed, the legislative history makes clear that the provision was designed in part "to add … uniformity to the judicial councils' disciplinary mechanisms."[51]

In the initial draft of the National Rules, Rule 2 stated that "the accompanying Commentaries [to the Rules] are to be deemed authoritative."[52] This language disappeared from subsequent drafts, and it has no counterpart either in the Rules as promulgated or in the Commentaries to those Rules. The implication is that the Commentaries are *not* authoritative and are *not* binding on chief judges and circuit councils. Depending on how material is allocated between Rules and Commentaries, this could frustrate the Judicial Conference's desire to

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[49] Congressman Kastenmeier, the principal drafter of the 1980 Act, commented: "The proposed legislation … provides for consistency in circuit rules." 126 Cong. Rec. 25369 (1980) (remarks of Rep. Kastenmeier).

[50] This grant of authority is reinforced by section 331, which states that the Judicial Conference may "prescribe and modify rules for the exercise of the authority provided in chapter 16."

[51] H.R. Rep. 96-1313 at 14 (1980).

[52] Misconduct Rules July Draft, supra note 24, at 3.

implement the 1980 Act "in a consistent manner throughout the federal court system."[53] This is not an abstract concern; as will be seen, on one of the key aspects of the Chapter 16 process – whether a complaint will be handled on Track One or Track Two – virtually all of the guidance is found in the Commentary.[54]

B. An oversight role for the Conduct Committee

In its September 2006 report, the Breyer Committee urged the Judicial Conference to authorize the Conduct Committee to take on a "more aggressive advisory role" so that it could "address and ameliorate the kinds of problematic terminations that" the Breyer Committee identified.[55] But the report left some ambiguity as to how "aggressive" a role it contemplated. Would the Conduct Committee keep a watchful eye on proceedings in the circuits and intervene on its own initiative if it thought that a matter was not being handled properly? Or would the committee offer "advice and information"[56] only when asked?

A perusal of the Rules adopted by the Judicial Conference suggests that the Conduct Committee plans to implement what might be called a moderately robust version of the Breyer Committee recommendation. The effect is to lay the groundwork for a regime of oversight by the Conduct Committee of the administration of the Act within the circuits.

The tools that enable the Committee to undertake this new function are provided by five parallel provisions in the Rules:

- Under Rule 11(g)(2), if the circuit chief judge dismisses the complaint or concludes the proceeding – which is what happens in the

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[53] See supra text accompanying note 23.

[54] See infra Part V-B.

[55] Breyer Committee Report, supra note 17, at 209.

[56] Id. at 208.

overwhelming majority of cases – the chief judge's order and supporting memorandum must be provided to the Conduct Committee.

- Under Rule 11(g)(1), if the chief judge appoints a special committee – which is what happens in the (rare) other cases – the order appointing the special committee must be sent to the Conduct Committee.[57]

- Under Rule 18(c)(3), when a complainant or subject judge petitions the circuit judicial council for review of a chief judge order dismissing the complaint or concluding the proceeding, the petition must be sent to the Conduct Committee.[58]

- Under Rule 19(c), the circuit council's order disposing of the petition for review, along with any supporting memoranda or separate statements by council members, must be provided to the Conduct Committee.

- Under Rule 20(f), when the chief circuit judge has appointed a special committee, any action by the circuit council based on the special committee's report "must be by written order," and the order and supporting memorandum must be provided to the Conduct Committee.

In short, the Rules require that at each important stage in the handling of a misconduct complaint within the circuit – after the initial determination by the chief judge – the relevant documents must be provided to the Conduct Committee through its staff in Washington. This includes documents filed by complainants (petitions for review) and documents filed by the judges (orders and memoranda).

When the Conduct Committee released its initial draft of the Rules in July 2007, it also included a provision requiring the clerks of the various circuits to

[57] This provision was not part of the initial draft. It was added in the Dec. 13, 2007 draft.

[58] Unlike the initial draft, the final version of the Rules does not require the clerk to send to the Conduct Committee "the materials obtained by the chief circuit judge" in connection with the chief circuit judge's inquiry. See infra note 63 and accompanying text.

send copies of all complaints to the Conduct Committee upon filing. The Commentary explained:

> The provision requiring clerks to send copies of all complaints to the [Conduct Committee] is new. It is necessary to enable the Committee to monitor administration of the Act, to anticipate upcoming issues, and to carry out its new jurisdictional responsibilities under Article VI.[59]

The provision remained in the Rules for two more drafts, but in the February 2008 revision – the last to be issued before the Judicial Conference meeting – it disappeared completely, along with the commentary just quoted. There was nothing to indicate that it had ever been part of the proposed Rules.[60]

What are the implications of this change? For the vast bulk of complaints, the implications are probably minimal. If the provision had been retained, the Conduct Committee's staff would review the filing and would readily determine that the complaint is a routine challenge to the merits of a judicial ruling or an allegation of bias or other misbehavior that is almost certainly frivolous. There would be no reason for Committee members themselves to become involved in any way with the handling of these complaints.

The implications may be different for the handful of complaints that are, or could become, what the Breyer Committee calls high-visibility complaints. These complaints can generally be identified without great difficulty. Most of them will have been filed by public officials or by advocacy groups like Community Rights

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[59] Misconduct Rules July Draft, supra note 24, at 13.

[60] In an apparent effect to blunt the impact of this deletion, the final draft added a new sentence to Rule 23, the rule that deals with confidentiality. Rule 23(d) now includes the following provision: "For auditing purposes, the circuit clerk must provide access to the [Conduct] Committee to records of proceedings under the Act at the site where the records are kept." But on-site audits, presumably conducted sometime after the proceedings have concluded, are hardly a substitute for the contemporaneous transmittal requirement that the final draft eliminated.

Counsel or Judicial Watch. Occasionally they will be litigants' or citizens' complaints that have generated attention from the media or on web sites – or which, because of their nature, will arouse media interest once they become known.

If the now-deleted provision had been retained, the staff could alert the members of the Committee to the filing of a complaint in matter of this kind. The staff could keep a watching brief. If, after a period of months, no further orders or other documents were received, the chairman of the Committee might communicate informally with the circuit chief judge to ascertain the status of the complaint. Now, the Committee will not receive any information from the circuit until the chief judge has decided whether to terminate the matter or to appoint a special committee.

To be sure, the Committee's staff will undoubtedly track media and web reports about federal judges, and some potential misconduct matters will come to the Committee's attention through those channels before the chief judge has acted. But not all. One reason is that some complainants – particularly lawyers and court employees – will deliberately opt *not* to "go public" at the initial stages of pursuing a grievance. The sexual harassment complaint against Judge Samuel B. Kent is one example of this phenomenon.[61] A more extreme example may be the complaint against Judge Manuel Real alleging repeated failure to provide reasons for his decisions.[62] This complaint did not become public at all until it reached the

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[61] The first newspaper story about the sexual harassment complaint was published on Sept. 23, 2007. Marty Schladen, Sources: Judge Took Leave After Complaint, Daily News (Galveston), Sept. 23, 2007. Less than a week later, the Fifth Circuit Judicial Council issued its order reprimanding Judge Kent. See supra note 2.

[62] See Committee on Judicial Conduct and Disability, Memorandum of Decision, available at http://www.ce9.uscourts.gov/misconduct/orders/committee_memorandum_89020.pdf.

national level. In situations like these, media tracking will not alert the Conduct Committee to the existence of a potential high-visibility misconduct matter. And the Committee would not be able to offer advice or information unless the chief judge chose to ask for it. Nor could the Committee engage in any kind of oversight.

The withdrawal of the complaint-transmittal requirement was not the first pullback in Rule provisions designed to enable the Conduct Committee to carry out its new oversight functions. The initial draft of the Rules provided that when a complainant or subject judge petitions the circuit council for review of a final order of a chief judge, the clerk would provide the Conduct Committee not only with the petition but also with "the materials obtained by the chief circuit judge" in connection with the chief judge's inquiry.[63] This provision was dropped in later drafts. Instead, the Rule as adopted provides: "Unless the [Conduct] Committee requests them, the clerk will *not* send materials obtained by the chief judge."[64]

The upshot is that the Conduct Committee will not undertake any oversight of pending proceedings until after the chief judge has completed his or her review of a complaint. Even then, the Committee will not intervene unless it sees, within the four corners of the chief judge's disposition, some evidence of possible mishandling.

This is certainly a defensible approach. In implementing the Breyer Committee's recommendations, the Judicial Conference has inaugurated a new era in the administration of the 1980 Act. It is appropriate for the Conduct Committee to give the circuit chief judges and circuit councils time to adjust to the new

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[63] Misconduct Rules July Draft, supra note 24, at 28.

[64] Misconduct Rules 2008, supra note 25, at 42 (emphasis added).

regime before deciding how extensively, if at all, it wants to second-guess the application of the Rules in individual cases.

In this connection, it is plausible to speculate that the Conduct Committee withdrew the filing-transmittal provision in response to complaints from the circuits that the requirement was both unnecessary and burdensome.[65] The circuits were saying, in effect, that they do not need the kind of monitoring that the Conduct Committee apparently contemplated as part of its new role. If chief judges and circuit councils fall short of the standards suggested by the Breyer Committee, the Conduct Committee can revive the disputed provision and embark upon a more vigorous program of oversight – and the circuits will not be in a position to object.

C. Expanded review jurisdiction of the Conduct Committee

One of the "high-visibility" complaints discussed by the Breyer Committee was the complaint filed by attorney Stephen Yagman alleging misconduct by District Judge Manuel L. Real of the Central District of California.[66] The complaint asserted that Judge Real had improperly intervened in a bankruptcy case to help a woman whose probation he was supervising after she was convicted of various fraud offenses. After lengthy proceedings, the Ninth Circuit Judicial Council affirmed the order of the circuit chief judge dismissing the complaint.[67] Three judges dissented from that order. Yagman asked the Judicial Conference of

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[65] See John Roemer, Judicial Conference Withdraws Controversial Discipline Rule, Daily Journal (San Francisco), Feb. 26, 2008, at 1.

[66] See Breyer Committee Report, supra note 17, at 184-89. Consistent with its practice, the report does not identify the judge or the complainant.

[67] In re Complaint of Judicial Misconduct, 425 F.3d 1179 (9th Cir. Judicial Council 2005).

the United States to review the Council's action. The Conference referred the matter to the Conduct Committee.[68]

By a 3-to-2 vote, the Committee found that it had no jurisdiction "to address the substance of the complaint."[69] The majority explained: "[T]he statute gives the Committee no explicit authority to review the Judicial Council's order affirming the chief judge's dismissal of the complaint. We believe it inappropriate to find that we have implicit authority."[70] The panel also noted the language of 28 USC § 352(c): "The [circuit council's] denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."[71]

The Conduct Committee and the Judicial Conference now take a different view. Rule 21(b) authorizes limited review of circuit council decisions affirming chief orders that dismiss a complaint or conclude the proceeding.[72] Specifically,

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[68] At that time the Committee was still operating under its former name as the Committee to Review Circuit Council Conduct and Disability Orders.

[69] In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106, 108 (Judicial Conference of the U.S. 2006) [hereinafter Conduct Committee Real Opinion].

[70] Id. at 109.

[71] As the text indicates, Chapter 16 refers to the circuit council's "*denial* of a petition for review" (emphasis added). But as the Conduct Committee's decision stated, the Ninth Circuit Judicial Council "affirmed" the order of the chief judge dismissing the complaint. The new Rules follow the same approach, and indeed the Commentary to Rule 19 states explicitly: "The council should ordinarily review the decision of the chief circuit judge on the merits, treating the petition for review for all practical purposes as an appeal." Misconduct Rules 2008, supra note 25, at 44 (Commentary). That makes sense as a description of what the Council should do, but it is a little odd to see the Rules providing for affirmance when the statute refers to the denial of a petition for review.

[72] The new rule also applies when a judicial council, after considering a petition for review of a chief judge order, takes "other appropriate action" in "exceptional circumstances." There is no explanation either in the Rules or in the Commentary as to what these "exceptional circumstances" might be. The initial draft of the proposed Rules said that the "exceptional circumstances" language "would … permit the council to deny review rather than affirm in a case

the Rule permits a dissatisfied complainant or subject judge to petition for review "if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed." The Rule also provides for review of other council affirmance orders "at [the Conduct Committee's] initiative and in its sole discretion." In either situation, the Committee's review is limited "to the issue of whether a special committee should be appointed."

The new Rule raises two principal issues. Is the new grant of reviewing authority consistent with Title 28? And if it is, does the Rule implement the policy in the most effective way?

1. Statutory authority

When the Conduct Committee concluded in 2006 that it had no jurisdiction to review the order of the Ninth Circuit Judicial Council in the Real matter, two members of the Committee dissented. They argued that the majority's holding "means that chief circuit judges and circuit judicial councils are free to disregard statutory requirements. In fact, by disregarding those requirements, they may escape review of their decisions."[73] Apparently this concern was shared by the Executive Committee of the Judicial Conference. That Committee asked the Conduct Committee to consider "possible legislative or other action to address the

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in which the process was obviously being abused." Misconduct Rules July Draft, supra note 24, at 30 (Commentary). (That of course would be the functional equivalent of affirmance.) It is hard to understand why this explanation was omitted in the final version.

[73] Conduct Committee Real Opinion, supra note 69, 449 F.3d at 116. The dissent's criticisms of the handling of this matter within the Ninth Circuit were certainly justified. At different stages the chief judge and the circuit council carried out investigations and resolved factual disputes, but without the safeguards of the special committee procedure. The Breyer Committee too found fault with the Ninth Circuit's actions. Breyer Committee Report, supra note 17, at 188-89.

jurisdictional problem" that the opinions in the Real matter had identified.[74] The Conduct Committee did so at its meeting in January 2007. By that time, the Committee membership had changed. The reconstituted Committee concluded that in cases where a circuit council has affirmed an order dismissing a misconduct complaint, the Judicial Conference does have the authority to determine "whether [the] complaint requires the appointment of a special investigating committee."[75] The Committee urged the Judicial Conference to "take action to explicitly authorize the Committee" to exercise this authority. The Conference endorsed this recommendation, and the results are embodied in the provisions of Rule 21 quoted above.

The new Rules do not discuss the question of statutory authority; the Commentary says only that the proposed Rules "are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints [within the circuit]."[76] For the Committee's explanation, we must turn to the report that the Committee submitted to the Judicial Conference in March 2007. There, in support of its conclusion that the Judicial Conference has a power of review even when no special committee has been appointed in the circuit, the Committee relied on two provisions of Title 28.[77] First, the Committee cited 28 USC § 331, the statute that defines the powers of the Judicial Conference. One sentence in the statute authorizes the Judicial Conference to "prescribe and modify rules for the exercise

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[74] See Report of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders at 3 (2007) [hereinafter Conduct Committee March 2007 Report] (on file with the author).

[75] Id. at 4.

[76] Misconduct Rules 2008, supra note 25, at 50 (Commentary). This language is unchanged from the initial draft.

[77] Conduct Committee March 2007 Report, supra note 74, at 4.

of the authority provided in chapter 16." The Committee also relied on 28 USC § 358(a). That section empowers the Conference to "prescribe such rules for the conduct of proceedings under [Chapter 16], including the processing of petitions for review, as [it] considers to be appropriate."

The Committee did not explain how its recommendation could be reconciled with the seemingly explicit prohibition in 28 USC § 352(c), quoted earlier: "The [circuit council's] denial of a petition for review of the chief judge's order shall be *final and conclusive* and shall not be judicially reviewable on appeal or otherwise." Nor did the Committee acknowledge equally emphatic language in § 357(c) that repeats the prohibition.[78] One possible explanation is that the Committee views the proposed exercise of authority as a separate proceeding rather than as a review of the circuit council's disposition.[79] Under this rationale, if the Judicial Conference (or its Conduct Committee) concludes that the circuit council was wrong in denying review of a chief judge dismissal order, it would not reverse the denial; rather, it would simply direct that a special committee be appointed.[80]

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[78] That section provides: "Except as expressly provided in this section and section 352(c), all orders and determinations, *including denials of petitions for review*, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." (Emphasis added.)

[79] Another possibility is that the Committee reads the reference to "judicial[] review[]" in section 352(c) as referring only to case-and-controversy adjudication by judges acting in their judicial capacity. But that rationale would not explain how its proposal allows the Conference (or a Conference committee) to take a second look at a disposition that Congress has said is "final and conclusive."

[80] The proceeding would thus be analogous to federal habeas corpus as a device for reviewing state criminal convictions. The federal habeas court does not "reverse" the judgment of conviction; it directs the state (typically through the warden) to release the defendant unless a new trial is held within a specified period.

Or would it? The new Rules are actually rather circumspect in defining the precise scope of the review power they contemplate. As already noted, the Rule states that Committee review is "limited to the issue of whether a special committee should be appointed."[81] But it does not say that the Committee would enter an *order* directing the circuit chief judge to appoint a special committee. It says only that "[i]f the committee determines that a special committee should be appointed, the Committee must issue a written *decision* giving its reasons."[82]

When this language appeared in the initial draft of the proposed Rules, I interpreted it to mean that the Conduct Committee would do no more than issue advisory opinions suggesting that a special committee be appointed. However, comments by Judge Ralph K. Winter, the chairman of the Conduct Committee, at the September 2007 hearing on the initial draft of the Rules make clear that my interpretation was incorrect. Judge Winter said:

> I think the intent of the committee was that it would issue orders that special committees be appointed, and the view of the committee, which I have to say is now unanimous, [is that] … interstitially there is authority [to do] that. … [The] way the act is structured it makes almost no sense to have a system in which you can avoid review by not doing what the statute directs you to do, and, worse than that, set up precedent that differ from circuit to circuit, [so] that something might be misconduct in one circuit but not in another. … I'm not authorized to speak for the rest of the committee, but I thought our deliberations indicated that this was not going to be an advisory opinion; this was going to be an act of the United States Judicial Conference ordering the special committee be appointed.[83]

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[81] The Rule uses slightly different language for situations in which there was a dissent in the judicial council and those in which the Committee engages in review on its own initiative in the absence of a dissent.

[82] Misconduct Rules 2008, supra note 25, at 49.

[83] Public Hearing Re: Draft Rules Governing Judicial Conduct and Disability Proceedings (Sept. 27, 2007) at *11-12 (punctuation added) (on file with the author).

Judge Winter could not have been more explicit: under the new Rules, the Conduct Committee will have power to issue *orders* requiring the appointment of a special committee. But in the drafts issued after the hearing, no change was made in the text of the Rules. There is no mention of "orders," nor does Rule 21 borrow the language of Rule 19, which provides that the Judicial Council of the circuit may "return [a] matter to the chief judge with *directions* to appoint a special committee."

As a practical matter, the ambiguity in the language of the Rule may not be of great significance. The Rule itself provides that before undertaking its review, the Conduct Committee "must invite [the] judicial council to explain why it believes the appointment of a special committee [is] unnecessary." I expect that in most instances the Conduct Committee chairman will communicate informally with the presiding judge of the circuit council before the Committee issues a decision of any kind.[84] Only if the circuit council adheres to its decision would the Committee even consider acting formally under the Rule.

Nevertheless, there may be occasions when informal communications fail to persuade. In that situation, I agree with the Committee that, as a policy matter, the Committee should have the authority to issue orders directing a circuit council or

[84] The presiding judge may or may not be the circuit chief judge, because the chief judge may choose not to participate in council consideration of petitions for review of orders that terminate complaint proceedings. For example, Chief Judge Schroeder did not participate in the review of her orders dismissing the complaint against Judge Real. See In re Complaint of Judicial Misconduct, 425 F.3d 1179 (9th Cir. Judicial Council 2005). The initial draft of the proposed rules included a provision prohibiting chief judges from participating in judicial council review of their orders. See Misconduct Rules July Draft, supra note 24, at 42. The final draft reverses course and provides that the chief judge is *not* disqualified. Misconduct Rules 2008, supra note 25, at 60 (Rule 25(c)).

chief judge to appoint a special committee.[85] But policy justifications do not adequately respond to the argument based on statutory language. The Rule as promulgated appears to stretch the language of Title 28, with the purpose of allowing the reopening of disciplinary proceedings that would otherwise have concluded.[86] In that setting, there should be no room for doubt as to the legitimacy of what is being done.[87]

2. Implementation of the new jurisdiction

The newly adopted Rule 21(b) creates two avenues of review for judicial council orders affirming a chief judge's dismissal of a complaint or termination of a proceeding. If one or more members of the council dissented from the order on

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[85] In June 2006 – a year before the Conduct Committee released its first draft of the proposed Rules – the House Judiciary Committee held a hearing on a bill to create an Inspector General for the federal judiciary. In my testimony at that hearing, I suggested that the proposed new office could serve to fill the "gap" in Chapter 16 that was revealed by the Conduct Committee's conclusion that it had no jurisdiction over the complaint involving Judge Real. The new Rules would fill that "jurisdictional gap" without new legislation.

[86] It is noteworthy that although the Breyer Committee was well aware of the views of the dissenting judges in the Real matter, its recommendations do not include creation of the review mechanism contained in the new Rule. The closest the Breyer Committee comes is in its recommendation that circuit council members should be able to "alert the chair of the [Conduct] Committee to complaints in which [they] believe appointment of a special committee may be warranted, for whatever advice, with whatever emphasis, the chair believes appropriate for the situation." Breyer Committee Report, supra note 17, at 210. This procedure, with the initiative coming from within the circuit, is a far cry from review initiated by the Conduct Committee.

[87] One possible rationale can be found in the dissenting opinion in the Real case. See Conduct Committee Real Opinion, supra note 69, 449 F.3d at 115-17. Judge Winter was the author of the dissent. His principal argument was that "appellate tribunals determine their jurisdiction by looking beyond the form of the proceedings to their substance." I do not think that that general proposition suffices to overcome the explicit prohibitions in §§ 352(c) and 357(c). In my view the most apt analogy is the district court order that erroneously remands a removed case to a state court under 28 USC § 1447(c). Section 1447(d) contains preclusion language similar to that of § 352(c), but it does not include the additional directive that the specified orders "shall be final and conclusive." Nevertheless, the Supreme Court has repeatedly held that "no matter how plain the legal error in ordering the remand," appellate review is not available. See *Kircher v. Putnam Funds Trust*, 126 S. Ct. 2145, 2154 (2006).

the ground that a special committee should have been appointed, the complainant may petition for review. In all other cases, review may occur only in the "sole discretion" of the Committee, and on the Committee's initiative.

If the Committee and the Judicial Conference had decided to allow review *only* in cases where one or more council members dissented, it would be difficult to quarrel with the new Rule. The fact that even one Article III judge has expressed dissatisfaction with the status quo created by a circuit council decision is surely sufficient to justify a second look by the Conduct Committee. (By the same token, it is not clear why review is limited to cases in which the dissenter asserts that a special committee should have been appointed. Any dissent should be sufficient.) At the same time, instances in which unanimous orders of affirmance would warrant further attention will be rare.[88] I would probably not fault the Committee if it had decided that the possibility of finding an occasional needle (a unanimous but perhaps flawed council affirmance) is not worth the burden of searching through a very large haystack (scores or hundreds of routine orders).

But that is not what the Committee has done. Instead, it has provided a second track in which review will be available "at [the] sole discretion" of the Committee and on the Committee's initiative. I see at least two problems with this aspect of the Rule.

First, the provision for review at the initiative of the Committee appears to conflict with the provisions of Rule 24 on the public availability of decisions.

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[88] "Rare" does not mean nonexistent. The Breyer Committee report includes at least one instance – the mishandling of the complaint against Chief Judge Boyce F. Martin, Jr., of the Sixth Circuit, by the acting chief judge. See Breyer Committee Report, supra note 17, at 180-83; Hellman, supra note 7, Part II-F-3.

Under Rule 24(a), the orders entered by the chief judge and the circuit council must be made public "[w]hen final action on a complaint has been taken and it is no longer subject to review." The commentary elaborates: "these orders and memoranda are to be made public only when final action on the complaint has been taken and any *right of review* has been exhausted."[89] If the circuit council unanimously affirms a chief judge's order of dismissal, there is no "right of review" by anyone, and it would appear that the clerk of the court of appeals would be required to release the order to the public immediately. But Rule 21 apparently contemplates that upon receiving a copy of the order pursuant to Rule 19(c), the Conduct Committee could reopen the matter and call for (or at least suggest) the appointment of a special committee. This outcome would frustrate the Committee's policy of "avoid[ing] public disclosure of the existence of pending proceedings."[90]

I suppose the Committee could deal with this situation by adding a provision to Rule 24 requiring the circuit council to withhold public disclosure of affirmance orders for a specified period – say 30 days – so that the Committee will have a chance to review them. But this points to a more fundamental problem with the Committee's implementation of the new review authority. It seems rather inefficient to bar petitions for review in all but the tiny number of cases with a dissent, while authorizing the Committee, on its own initiative, to take a second look at the full range of circuit council affirmances. If the Committee is not

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[89] Misconduct Rules 2008, supra note 25, at 58-59 (Commentary) (emphasis added).

[90] This language is from the Commentary to Rule 24. See Misconduct Rules 2008, supra note 25, at 59 (Commentary). For further discussion of this aspect of the Rules, see infra Part VI.

satisfied to limit its power of review to dissent cases, the better approach is to allow petitions for review across the board.

Consider the possibilities. If the complainant and the judge accept the decision and no council member dissents, that is strong evidence that the decision does not warrant further review. On the other hand, if the complainant or the judge does seek review, the petition can provide some guidance, however small, to aspects of the council decision that may be open to debate. And while it would be something of a burden for the Committee (or more accurately its staff) to sift through the many petitions for review, there would be no need to even look at the large number of cases in which no review is sought.

Based on this analysis, I believe that the Committee should modify Rule 21(b) to allow a complainant or judge to petition for review of all judicial council orders affirming dismissals of complaints or terminating misconduct proceedings. The Rule itself could warn that review "will be rare." But if the Rule leads to the reopening of even a single high-visibility case that was mishandled in the circuit, that might justify the modest additional judge time that it would require.[91]

IV. Defining Misconduct: the Act, the Rules, and the Code

Chapter 16 defines misconduct in terms that are undeniably vague and open-ended: "conduct prejudicial to the effective and expeditious administration of the business of the courts."[92] The new Rules elaborate on this definition by providing

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[91] I am thinking here of the complaint against Chief Judge Boyce Martin, Jr. See supra note 88.There is little doubt that if review by the Conduct Committee had been available, Judge Martin would have sought it. In an interview with a reporter some years after the proceedings were concluded he said, "I was never given a chance to put my side on." He added: "It is a pyrrhic victory when the case is dismissed and they never listen to your side." Pamela A. MacLean, The dicey nature of high-profile cases, National Law J., Feb. 18, 2008, at 19.

[92] 28 USC § 351(a).

a series of specific but non-exclusive examples of misconduct. These include "accepting bribes," "treating litigants or attorneys in a demonstrably egregious and hostile manner," and "soliciting funds for organizations."[93] The question is whether this goes far enough in giving ascertainable content to the statutory language.

In past writings, Professor Charles G. Geyh has argued that the "solution" to the "hopelessly vague standard" of 28 USC § 351(a) is to make the Code of Conduct for United States Judges applicable to disciplinary proceedings under Chapter 16.[94] I disagree with this suggestion and instead endorse the Committee's approach: the judiciary can and should look to the Code for guidance in Chapter 16 proceedings, but the Code should not be viewed as establishing binding law.[95] I reach this conclusion for two reasons.

First, I do not see evidence that uncertainty as to what constitutes misconduct has been a serious problem in the administration of the Act. For example, in the Real case, which Professor Geyh references, the circuit council did not disagree with the proposition that ex parte contact constitutes misconduct; rather, as the Breyer Committee explained, the council misunderstood the concept of "corrective

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[93] Misconduct Rules 2008, supra note 25, at 11.

[94] For a recent exposition of this view, see *Impeaching Manuel L. Real, a Judge of the United States District Court for the Central District of California, for High Crimes and Misdemeanors*: *Hearing on H. Res. 916 Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Committee on the Judiciary*, 109th Cong. 148-49 (2006) (statement of Professor Geyh).

[95] The current version of the Code can be found at http://www.uscourts.gov/guide/vol2/ch1.html. In March 2008, the Judicial Conference Committee on Codes of Conduct published the draft of a proposed new code and requested public comment on the revisions. See Request for Public Comments on Revisions to Code of Conduct for United States Judges, available at http://www.uscourts.gov/library/request_for_comments_030708.cfm.

action" under the Act.[96] At the other end of the spectrum, no definition, no matter how precise, will change the reality that the vast majority of complaints will be correctly dismissed because the allegations are frivolous or directly related to the merits of a judicial decision.

Second, the fact is that in administering the Act, chief judges and circuit councils have repeatedly looked to the Code for guidance in determining whether misconduct has occurred. In a recent article I have provided provide numerous examples of this practice, and I will refer the reader to that discussion.[97] Those decisions constitute a body of interpretive precedents that is – or could be – far more valuable in giving content to the statute than adoption of the Code. The problem is that most of these decisions have not been published, so that the benefits of elaborating standards over time have not been realized. The new Rules take some steps to encourage publication of misconduct orders, and in Part VII of this article I suggest additional actions the Committee can take. If the Committee follows that course, the judiciary will develop a body of law that will instruct everyone concerned – including judges, citizens, and the press – as to what does and does not constitute misconduct.

V. Toward Greater Procedural Formality

In the overwhelming majority of cases, the federal judiciary acts conscientiously and effectively to address complaints that judges have failed to

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[96] Breyer Committee Report, supra note 17, at 188-89. One recent order that appears to reflect misunderstanding of the statutory standard is the one dismissing a complaint against District Judge Charles Shaw. See discussion infra Part V-B.

[97] See Hellman, supra note 7, Part II-B.

comply with the high ethical standards we expect of them.[98] But as the Breyer Committee pointed out, it is the few high-visibility controversies that shape public perceptions, and as those, the record is more mixed.

If there is a single thread that runs through the various lapses chronicled by the Committee and other observers, it is this: at each stage of the process, the chief judge or circuit council opts for the action that is less structured and less public. The new National Rules address two aspects of this problem. These involve the power of the circuit chief judge to "identify a complaint" and the obligation of the chief judge to appoint a special committee.

A. Chief judge authority to "identify a complaint"

In the American legal system, judges ordinarily act only in response to a motion or pleading filed by one side in an adversary process. As already noted, Chapter 16 does not follow that model. Section 351(b) permits the chief judge to "identify a complaint" and thus initiate the investigatory process even if no complaint has been filed by a litigant or other "person."[99]

The Breyer Committee report encourages chief judges to make greater use of "their statutory authority to identify complaints when accusations become public."[100] This is a sound recommendation. If there is substance to the allegations, the public will be reassured that the judiciary is truly committed to policing misconduct in its ranks. If the allegations are without merit, the process

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[98] This conclusion is supported by the Breyer Committee report and also by earlier research conducted for the National Commission on Judicial Discipline and Removal. See Barr & Willging, supra note 45.

[99] See supra note 28 and accompanying text.

[100] Breyer Committee Report, supra note 17, at 209.

will help to remove the cloud that would otherwise hang over the judge's reputation.[101]

Rule 5 of the new National Rules defines the circumstances under which a chief judge may or must identify a complaint. Although the Commentary states that the Rule "is adapted from the Breyer Committee Report,"[102] the Rule itself contemplates a rather modest role for the exercise of the authority conferred by § 351(b). Three aspects of the Rule warrant discussion: the initial determination to consider the possibility of identifying a complaint; the relationship between § 351(b) and informal processes; and the standard to be applied in deciding whether to identify a complaint.

There can be no quarrel with the Rule's delineation of the threshold for considering the possibility of initiating proceedings under Chapter 16. All that is required is that the chief judge has received "information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct." The troublesome point is: what should happen when this threshold is satisfied? One might think that if the chief judge has "reasonable grounds for inquiry," the Rule would require that the chief judge conduct some sort of inquiry. But the Rule does not do that. Rather, it states that the chief judge "*may* conduct an inquiry, as he or she deems appropriate, into the accuracy of the information."

In my view, this language makes it too easy for the chief judge to do nothing in the face of evidence pointing to possible misconduct. It is important to emphasize that we are not dealing here with the standard for identifying a

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[101] For extended development of this point, with examples, see Hellman, supra note 7, Part II-F-2.

[102] Misconduct Rules 2008, supra note 25, at 16.

complaint and thus initiating the formal process under Chapter 16. The Commentary to the Rule explains persuasively why a chief judge should be accorded some discretion at that stage: "[t]he matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a [finding of misconduct]."[103] But that rationale does not apply at this earlier stage. On the contrary, in order to determine whether any of the specified circumstances exist, the chief judge must conduct some sort of inquiry. Thus, I would replace the "may" in the opening sentence of the Rule with "must" or "should." I would also make clear that the inquiry should encompass not only "the accuracy of the information," but also whether that information could lead a reasonable observer to think that misconduct might have occurred.

The next question is: what should the chief judge do if the initial inquiry does not dispel the "reasonable grounds" and the matter is not frivolous or trivial? Should the chief judge immediately identify a complaint and begin the formal process? The answer is "No," because in many instances it will make sense for the chief judge to pursue informal measures before initiating a formal process that will eventually result in an order – an order that (with or without the judge's name) will be a public document.[104] Thus, as stated by the Breyer Committee, "[a] chief judge may properly treat identifying a complaint as a last resort to be considered only after all informal approaches at a resolution have failed."[105]

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[103] Id. at 17.

[104] For discussion of informal measures, see Breyer Committee Report, supra note 17, at 201-06; Charles Gardner Geyh, Informal Methods of Judicial Discipline, 142 U. Pa. L. Rev. 243 (1993).

[105] Breyer Committee Report, supra note 17, at 246.

The new Rules are consistent with this view. Rule 5 itself provides that if, on the basis of an initial inquiry, the chief judge "finds probable cause to believe that misconduct has occurred," the chief judge "may seek an informal resolution that he or she finds satisfactory." The Commentary furnishes some guidance as to the elements of a satisfactory resolution. It reminds chief judges that an informal resolution under Rule 5 will ordinarily preclude further action if a complaint is later filed by a litigant or other citizen "alleging the identical matter."[106] And at least implicitly it sends a message to the judge who is the subject of the inquiry: it tells the judge that by responding with "alacrity" in a way that the chief judge "finds satisfactory," the judge may be able to avert the initiation of a formal proceeding.[107]

The final issue raised by Rule 5 is the standard to be applied by the chief judge in deciding whether to identify a complaint when efforts to resolve the matter informally are unsuccessful or infeasible. As already noted, the Rule gives wide discretion to the chief judge at this stage. There is only one situation in which identification of a complaint is required: when "the evidence of misconduct is clear and convincing." In all other cases, the chief judge is free to consider the totality of the circumstances, including the strength of the evidence and the seriousness of the alleged misconduct.

This approach is unobjectionable in routine situations where the allegations come to the chief judge's attention entirely through private channels. The calculus changes when the possibility of misconduct has become a matter of public knowledge. As the Breyer Committee puts it, "[t]he more public and high-

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[106] Misconduct Rules 2008, supra note 25, at 17.

[107] Id.

visibility the unfiled allegations are, … the more desirable it will be for the chief judge to identify a complaint in order to assure the public that the judicial branch has not ignored the allegations and, more broadly, that it is prepared to deal with substantive allegations."[108]

The new Rules address this point only in the Commentary:

> In high-visibility situations, it may be desirable for the chief judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.[109]

I believe that this point should be treated in the Rule itself. Further, when the allegations are highly visible, the chief judge should be required to identify a complaint, even if it is clear that the complaint will be dismissed. High-visibility allegations will not occur frequently, but when they do, there is nothing to be gained by leaving the assertions unrefuted, and much to be lost. That was the conclusion reached by the Breyer Committee, and I hope that the Judicial Conference will modify Rule 5 to incorporate the Committee's judgment.

B. Obligation to appoint a special committee

One of the changes made by the 2002 revision of the 1980 Act was to write into law the provision in the Illustrative Rules that drew a clear line between what I have labeled the "chief judge track" and the "special committee track."[110] The statute now provides: "The chief judge shall not undertake to make findings of fact

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[108] Breyer Committee Report, supra note 17, at 214.

[109] Misconduct Rules 2008, supra note 25, at 17.

[110] For discussion of the background of this change, see *Operations of Federal Judicial Misconduct Statutes:* Hearing before the Subcomm. on Courts, the Internet, and Intellectual Property of the H. Comm. on the Judiciary, 107th Cong. 42 (2001) (statement of Prof. Arthur D. Hellman).

about any matter that is reasonably in dispute."[111] If the facts are "reasonably in dispute," a special committee must be appointed to carry out the investigation.

There is good reason for this requirement: when facts are in dispute, the complainant and the public deserve at least the assurance that a single judge will not dispose of a matter involving a fellow member of the "guild."[112] But experience reveals that, too often, chief judges have dismissed complaints or concluded proceedings notwithstanding genuine disputes over facts or their implications. A recurring theme in the Breyer Committee's account of "problematic" cases is the failure of a chief judge "to submit clear factual discrepancies to special committees for investigation."[113]

Unfortunately, new Rule 11(b) does little more than parrot the statutory language. It states only: "In conducting the inquiry, the chief judge must not determine any reasonably disputed issue."[114] There are at least four ways in which the Rule could usefully elaborate on this standard.

First, the Commentary states that a matter is *not* "reasonably" in dispute – and thus may be resolved by the chief judge – "if a limited inquiry shows that the allegations … lack any reliable factual foundation, or that they are conclusively refuted by objective evidence."[115] The implication is that if the allegations have even the slightest "reliable factual foundation," or if objective evidence leaves

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[111] 28 USC § 352(a).

[112] See infra text accompanying note 147.

[113] Breyer Committee Report, supra 17, at 200. For development of this point, see Hellman, supra note 7, Part II-F-3.

[114] Misconduct Rules 2008, supra note 25, at 24.

[115] Id. at 26.

some room for crediting them, a special committee must be appointed. It would be better to make this standard explicit, perhaps in the Rule itself.

Second, the initial draft of the Rule stated that the chief judge "may not make … determinations concerning the credibility of the complainant or putative witnesses."[116] Although this point is now made in the Commentary,[117] it belongs in the Rule itself, particularly the warning that "[a]n allegation of fact is ordinarily not 'refuted' simply because the subject judge denies it."[118] There is a natural tendency to assume that judges do not lie or misremember – a tendency that may be strengthened when the accuser is a criminal defendant or some other individual whose motives might be suspect. But as the Breyer Committee stated, "who is telling the truth is a matter reasonably in dispute" unless the allegation is "inherently incredible."[119] Thus, "[a] straight-up credibility determination, in the absence of other significant evidence, is ordinarily for the [special committee and the] circuit council, not the chief judge."[120] Language along these lines should be included in the Rule.

Third, the Rule should make clear that the chief judge may not dismiss a complaint on the ground of insufficient evidence without communicating with all persons who might reasonably be thought to have knowledge of the matter.[121]

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[116] Misconduct Rules July Draft, supra note 24, at 14.

[117] Misconduct Rules 2008, supra note 25, at 29. The commentary does not specifically refer to "the complainant or other putative witnesses."

[118] Id. at 26.

[119] Breyer Committee Report, supra note 17, at 243.

[120] Id.

[121] The Commentary does say (in the course of presenting a lengthy example) that "if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute." Misconduct Rules 2008, supra note 25, at 27. But the point is important enough that it should be part of the Rule itself.

This might seem obvious, but the need for such a provision is illustrated by a misconduct order that was handed down in October 2006, shortly after the Breyer Committee issued its report.[122] In May 2006 the St. Louis Post-Dispatch reported that District Judge Charles A. Shaw, in remarks at a naturalization ceremony, "urged the crowd to vote for a congressman who shared the stage."[123] If Judge Shaw did "urge[] the crowd to vote for" the congressman, it was a clear instance of misconduct.[124] A citizen-activist who read the Post-Dispatch story filed a complaint against Judge Shaw, but Chief Judge James B. Loken dismissed it. He invoked two statutory grounds: the complaint "lack[ed] sufficient evidence to raise an inference that misconduct has occurred," and the allegations of misconduct were "conclusively refuted by objective evidence."[125] The dismissal order noted that there was no transcript of the ceremony, and it quoted Judge Shaw's response to the newspaper account: "I emphatically deny that I endorsed [the

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[122] In re Complaint of John Doe, JCP No. 06-013 (8th Cir. Judicial Council 2006) (Loken, C.J.) (on file with the author) [hereinafter Shaw Order]. In fact, the order notes that the chief judge "considered it prudent to await publication of" the Breyer Committee report.

[123] Tim O'Neil, *Judge urges new citizens to vote for Rep. Clay; Code of Conduct bars federal judges from making endorsements*, St. Louis Post-Dispatch, May 1, 2006.

[124] See In re Charges of Judicial Misconduct, 404 F.3d 688 (2d Cir. Judicial Council 2005). This proceeding involved Judge Guido Calabresi of the Second Circuit Court of Appeals. Curiously, the order dismissing the complaint against Judge Shaw makes no mention of this widely publicized (and officially published) decision.

[125] Shaw Order, supra note 122, at 6.

congressman]."[126] But Judge Loken never contacted the reporter who wrote the story.[127] Nor did he contact others who might have been present.

It is at least possible that a full inquiry would absolve Judge Shaw of misconduct. The story quoted him as saying, "For Congressman Clay to continue doing his good work, he needs your vote, OK?" Perhaps, in context, the judge was doing no more than explaining to the newly naturalized citizens what it means to have the right to vote. But it is hard to understand how the chief judge could dismiss the complaint without communicating with the reporter who was present at the ceremony and who might have been taking notes while Judge Shaw was speaking.[128] The Rules should make clear that, just as the chief judge must not make credibility determinations, he or she must not pretermit possible factual disputes by failing to seek out relevant information.

The Shaw order raises another issue as well. Judge Loken states that "the judge's unrecorded impromptu remark following the congressman's speech – whether quoted more accurately by the journalist or by the judge in his response – did not convert the judge's conduct … into the public endorsement of a candidate for public office within the meaning of Canon 7A(2) of the Code of Conduct." Here the question is not one of credibility but of interpretation. It is noteworthy

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[126] Judge Shaw, responding to Judge Loken's inquiry, said he advised the new citizens that the League of Women Voters had set up a registration booth outside the auditorium. "I then … joked that, 'If they liked what [the congressman] was doing, they could vote for him too.'" Id. at 3.

[127] The order makes no mention of any effort to contact the reporter, and a later story in the newspaper states that the chief judge did not do so. Stephen Deere, Complaint against judge is dismissed, St. Louis Post Dispatch, Nov. 2, 2006.

[128] According to the complainant, the reporter "stood by his original story and maintained that what Judge Shaw said was in fact an endorsement of Congressman Clay's re-election." John Stoeffler, Judge Loken's Loose Logic, South Side Journal, Nov. 14, 2006 (on file with the author).

that in the similar controversy involving public remarks by Judge Guido Calabresi, Acting Chief Judge Dennis Jacobs did appoint a special committee.[129] I believe that a special committee can serve a useful role when facts are not in dispute but their interpretation is contested.[130] The Commentary implicitly recognizes this point in saying that the chief judge must avoid determinations of "reasonably disputed issues as to whether the facts alleged constitute misconduct or disability."[131] But, once again, this is language that belongs in the Rule itself.

Overall, I think that the Rules fall short in delineating the limited scope of the inquiry that the chief judge may undertake in his or her initial review of a complaint. The Rule itself simply echoes the statute. The Commentary provides more guidance, but key points are buried in a mass of detail, and, in any event, the Commentary is not binding. The upshot is that the Rules leave too much leeway for chief judges to find reasons not to appoint special committees when special committees are called for.

Perhaps the Conduct Committee believes that occasional lapses by chief judges in this regard can be dealt with through the monitoring and review procedures described earlier in this article. If that is so, the remedy comes at a cost – a loss of efficiency and perhaps increased friction between the judges in the circuits and the representatives of the Judicial Conference.

It is also possible that the Conduct Committee is concerned that if chief judges were required to appoint special committees in arguably marginal

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[129] See supra note 124.

[130] The Breyer Committee emphasized the "fundamental principle" that "an allegation is not 'conclusively refuted by objective evidence' simply because the judge complained against denies it." Breyer Committee Report, supra note 17, at 243. This principle is equally applicable whether the denial relates to the facts or to their interpretation.

[131] Misconduct Rules 2008, supra note 25, at 26.

situations, the result would be a proliferation of such committees that would exact too great a cost in judges' time. There are two responses to this. First, special committee proceedings need not be elaborate. Second, the Rules could take a page from 28 USC § 352(d)[132] and authorize the appointment of a "standing special committee" that would receive all complaints referred by the chief judge unless the chief judge elected to appoint a standalone committee for a complex or high-profile matter. Judges would serve on the standing committee for limited staggered terms, thus providing some continuity while minimizing complacency.[133]

VI. The Nature and Timing of Public Disclosure

Except in the rare case where the Judicial Conference determines that impeachment may be warranted, Chapter 16 provides for only limited public disclosure in misconduct proceedings. Written orders issued by a judicial council or by the Judicial Conference of the United States to implement disciplinary action must be made available to the public. But unless the judge who is the subject of the accusation authorizes the disclosure, "all papers, documents, and records of proceedings related to investigations conducted under [Chapter 16] shall be confidential and shall not be disclosed by any person in any proceeding."[134] The statute is silent on the handling of chief judge orders dismissing a complaint or terminating a proceeding.

The Illustrative Rules have filled in some of the statutory gaps, but they too evince a bias against disclosure. The basic rule has been that orders and memoranda of the chief judge and the judicial council will be made public only

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[132] See supra note 35

[133] I am indebted to Russell Wheeler of the Brookings Institute for suggesting the idea of a "standing special committee."

[134] 28 USC § 360(a).

"when final action on the complaint has been taken and is no longer subject to review."[135] Moreover, in the ordinary case where the complaint is dismissed, "the publicly available materials will not disclose the name of the judge complained about without his or her consent."

The new National Rules continue the approach of the Illustrative Rules. Once again, the basic rule is that orders entered by the chief circuit judge and the judicial council must be made public, but only "[w]hen final action on a complaint has been taken and it is no longer subject to review."[136] Additionally, if the complaint "is finally dismissed … without the appointment of a special committee, ... the publicly available materials must not disclose the name of the subject judge without his or her consent." Since the overwhelming majority of complaints are dismissed without the appointment of a special committee, the result is that in all but a tiny fraction of cases, the publicly available materials will not identify the judge, and any explanatory memoranda will omit details that would enable a reader to find out who the judge is. Further, no orders of any kind will be made public until the proceedings have concluded.

The Commentary has little to say about the rationale underlying these rules; it refers without elaboration to the goal of "avoid[ing] public disclosure of the existence of pending proceedings."[137] A more comprehensive explanation can be found in the commentary to the Illustrative Rules. That commentary states:

> We believe that it is consistent with the congressional intent to protect a judge from public disclosure of a complaint, both while it is pending and after it has been dismissed if that should be the outcome. ... In view of the legislative interest in protecting a judge from public airing

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[135] Illustrative Rules, supra note 10, at 52.

[136] Misconduct Rules 2008, supra note 25, at 56.

[137] Misconduct Rules 2008, supra note 25, at 59.

> of unfounded charges, ... the law is reasonably interpreted as permitting nondisclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known.[138]

Several points about this explanation deserve comment. To begin with, while the drafters of the Illustrative Rules assert that their disclosure policy is *consistent* with congressional intent, they do not say that the policy is *compelled*. On the contrary, the authors concede that there is more than one way to read the statute:

> [P]ublic availability of orders under [28 U.S.C. § 354(a)] is a statutory requirement. The statute does not prescribe the time at which these orders must be made public, and it might be thought implicit that it should be without delay. Similarly, the statute does not state whether the name of the judge must be disclosed, but it could be argued that such disclosure is implicit.

Based on this analysis, it is fair to conclude there is at least some room for flexibility in the rules governing disclosure.

The task is to weigh the competing interests. On one side is the interest in protecting judges' good names. This interest belongs to society as much as to individual judges; public confidence in judges' probity is a social good, especially in an era when judges often appear to be taking sides on hotly contested social and political questions. On the other side is the interest in accountability. Accountability too contributes to public confidence in the judiciary. Looking at the competing interests, I believe that three categories of situations can be identified.

First, there are some circumstances where the policy of the new National Rules is readily justifiable – for example, when a disgruntled litigant or a discharged employee has filed accusations against a federal judge that are both baseless and scurrilous. In that setting, disclosure beyond what the Rules allow

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[138] Illustrative Rules, supra note 10, at 54.

would cause injury to the judge without enlightening the public on a matter of public concern.

This is not to say that the policy is beyond criticism. Certainly other public officials do not enjoy protection from "public airing of unfounded charges." But just as the Supreme Court has recognized that not all speech by government employees about the operation of government offices deserves First Amendment protection,[139] one can argue that there is no legitimate public interest in learning the identity of a judge who has been the subject of a totally meritless accusation of misconduct.

The second category embraces the routine cases that make up the vast bulk of complaints. Here the policy of limited disclosure is less easily justifiable, but from the standpoint of public enlightenment the loss is probably minimal. Take the typical case: the chief judge dismisses a complaint on the ground that the allegations are directly related to the merits of a decision. Is there really an injury to the judge's reputation if this "unfounded charge[]" of misconduct receives a "public airing"? At the same time, however, it is hard to see any serious threat to accountability if the judge's name remains undisclosed. Moreover, in today's political environment there is a real possibility that a routine order dismissing a plainly untenable complaint will be misused by persons who seek to attack the judge for reasons unrelated to the rejected allegations. On balance, I do not disagree with the policy of limited disclosure for the run-of-the-mill complaints that dominate Chapter 16 proceedings.

The calculus changes in high-visibility cases. To see why, it is useful to consider how the current policy played out in a later stage of the proceedings

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[139] See Garcetti v. Ceballos, 126 S. Ct. 1951 (2006).

involving Judge Real.[140] After the Conduct Committee determined that it had no power to review the Judicial Council decision affirming the dismissal of the complaint, Chief Judge Mary M. Schroeder appointed a special committee to investigate Judge Real's conduct. The special committee carried out a thorough inquiry; it heard testimony from 18 witnesses and reviewed thousands of pages of documents. It found that Judge Real had committed misconduct, and it recommended the sanction of a public reprimand.[141]

On November 16, 2006, the circuit council issued an order adopting the findings and recommendations of the special committee. But the order was not made public at that time. Rather, the order stated that it would be made public "when the order is no longer subject to review, or within 30 days of this order if no petition for review has been filed with the Judicial Conference of the United States."[142] Judge Real did file a petition for review, but the Judicial Conference (or more accurately the Conduct Committee) did not announce its decision in the matter until January 2008. As a result, the Judicial Council order was not disclosed officially for more than a year after it was issued. Meanwhile, however, a copy of the order reached reporter Henry Weinstein of the Los Angeles Times, who published an article in December 2006 describing its contents.[143]

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[140] For discussion of the earlier stages, see supra text accompanying notes 66-71.

[141] Report to the Judicial Council of the Ninth Circuit from the Committee Convened Pursuant to 28 U.S.C. § 353(a) to Investigate the Allegations of Judicial Misconduct in the Complaints Docketed Under 05-89097 and 04-89039 Pertaining to Complaint 05-89097, available at http://www.ce9.uscourts.gov/misconduct/orders/report.pdf.

[142] In re Complaint of Judicial Misconduct, Dkt. No. 05-89097 (9th Cir. Judicial Council 2006), available at http://www.ce9.uscourts.gov/misconduct/orders/council_order.pdf.

[143] Henry Weinstein, Web error reveals censure of U.S. judge, Los Angeles Times, Dec. 23, 2006.

In withholding immediate disclosure of its order, the Ninth Circuit Judicial Council relied on the Council's Rule 17, which in turn is based on the Illustrative Rules. But the current policy makes little sense in a situation like the one involving Judge Real. Even if one accepts "the legislative interest in protecting a judge from public airing of unfounded charges," delaying disclosure of the Judicial Council order did nothing to serve that interest. The allegations had already been the subject of published opinions by the judiciary and a televised hearing in Congress. What is even worse, adherence to the deferred-disclosure rule had the perverse consequence of putting off the day when the public would see the serious and conscientious way in which the judiciary dealt with the accusations.

In my view, the policy should be this: When the substance of a pending complaint has become widely known through reports in mainstream media or responsible web sites, there should be a presumption that orders issued by chief judges or circuit councils will be made public as soon as they are issued. In that circumstance there should also be a presumption that the order will disclose the identity of the judge. And once the information has become part of the official record, the judiciary should not withhold it from later reports or official documents.[144]

The new National Rules take one small step in the direction of greater disclosure. The rule on confidentiality includes this new provision: "In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the

[144] The suggestions here are couched in broad terms; obviously, there are many details that could be the subject of debate. If adopting this policy would require amending the statute, Congress should take that course.

federal judiciary's ability to redress misconduct or disability."[145] But there is no change in the rules governing public availability of orders issued by chief judges or circuit councils. For the reasons already given, I think that the Judicial Conference could and should have gone further.

VII. Making the Process More Visible

As the Breyer Committee recognized, Congress took something of a risk when it opted to deal with possible judicial misconduct by instituting a system "that relies for investigation [and assessment of discipline] solely upon judges themselves."[146] The risk is that the system will be tainted by "a kind of undue 'guild favoritism' through inappropriate sympathy with the judge's point of view or de-emphasis of the misconduct problem."[147] One of the most important safeguards against this risk is visibility. Visibility in this context entails two overlapping elements: the availability of the process must be made known to potential complainants, and the results of the process must be made known to all who are interested in the effective operation of the judicial system.

If there has been a single glaring flaw in the administration of Chapter 16, it is the failure of the judiciary at every level to make the process visible. This flaw has been manifested in two ways. Courts have not made it easy for citizens to ascertain how to file complaints (although, as I shall explain, there have been positive developments recently on this score), and they have failed to make their misconduct decisions readily available to the public.[148] The new National Rules

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[145] Misconduct Rules 2008, supra note 25, at 52.

[146] Breyer Committee Report, supra note 17, at 119.

[147] Id.

[148] For detailed discussion of these points, see Hellman, supra note 7, Part II-F-6.

address both problems, but more could be done toward giving the process the visibility that will minimize the risk of "guild favoritism."

A. Availability of rules and forms

New Rule 28 requires each court to make the complaint form and the Rules available on the court's own website or to provide an Internet link to the form and the Rules on the national judiciary website. That is the minimum; it does no more than to implement a recommendation made by the Judicial Conference as long ago as 2002. The judiciary can and should go further. The Breyer Committee reported that even when courts present information about the Act on their websites, they "often present it in a way that would stump most persons seeking to learn about how to file a complaint."[149]

The solution is simple. As the Breyer Committee suggested, every court should be required "to display the form and [the National Rules] '*prominently*' on its website – that is, with a link *on the homepage*."[150] The website should also include "a plain-language explanation of the Act, emphasizing that it is not available to challenge judicial decisions."

In addition to the Breyer Committee's suggestions, the Rule might also require that the link be labeled explicitly – for example, as "Judicial Misconduct and Disability."[151] A link that says only "Judicial Complaint Form" does not adequately identify the subject.

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[149] Breyer Committee Report, supra note 17, at 208.

[150] Id. at 218 (emphasis added).

[151] See Memorandum from Administrative Office Director James C. Duff to Chief Judges, United States Courts (June 27, 2007) (on file with the author).

B. Public availability of decisions

Rule 24(b) outlines the procedures for making decisions public. The Rule contains three elements, each of which warrants brief discussion.

> [Final orders disposing of a complaint] must be made public by placing them in a publicly accessible file in the office of the circuit clerk *or* by placing such orders on the court's public website. [Emphasis added.]

It is difficult to understand why the Rule does not require, without qualification, that all final orders must be posted on court web sites. The ubiquity of the Internet has changed the popular understanding of document availability; in today's world, availability means "available on line." By the same token, for most people, a document that is "available" only as a physical copy in the court of appeals clerk's office is not really "available" at all. Nor would the suggested rule impose a great burden on the clerks' offices. Today the courts of appeals post hundreds if not thousands of routine "unpublished" dispositions on their websites.[152] Adding the equally routine misconduct orders would be de minimis. The benefit is that it would give citizens the chance to see the operation of the system in its full measure, including the merits-related allegations that generate most of the complaints and the conscientious treatment that most complaints receive. It would also comport with Congressional policy as expressed in the E-Government Act of 2002.[153]

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[152] By way of example: in 2007, one court of appeals – the Fifth Circuit – posted more than 900 dispositions that use identical language to reject "arguments that are foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998)." That is more than the total number of misconduct complaints considered by all federal courts in a year.

[153] Section 205 of the E-Government Act, P.L. 107-347, requires all federal courts to provide access on their websites to "the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter." The judiciary probably takes the position that misconduct orders – which are issued in the name of the

Three federal circuits – the Seventh, the Ninth, and the Tenth – have now begun to post routine misconduct orders on their websites. Perhaps the other circuits will follow their example without being directed to do so. Yet even if this happens, placing the requirement in the Rule is not only sound policy; it would also demonstrate the judiciary's commitment to transparency in the administration of the disciplinary process.

> If the orders appear to have precedential value, the chief judge may cause them to be published.

This second element of the rule falls short in three respects. First, "may" should be replaced by "shall." If a misconduct order "appears to have precedential value," that means that it will provide guidance to other judges in administering the Act. That is enough to warrant publication.

Second, the Rule should recognize the desirability of publication not only when dispositions appear to have precedential value, but also when they resolve complaints that have been the subject of discussion in the media or in Congress. At least some of the courts of appeals use "general public interest" as a circumstance justifying publication of opinions in adjudicated cases.[154] That criterion should carry even greater weight when the disposition deals with allegations of misconduct within the judiciary's own ranks.

Finally, the rule should encourage chief judges and circuit councils to provide sufficient explanation in their orders to enable outsiders to assess the appropriateness of the disposition. If – as in the case involving Judge Jon McCalla – a detailed account might interfere with the effectiveness of the remedy, the detail

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circuit council – are not "written opinions issued by the court." Even so, the policy underlying the E-Government Act would certainly seem to encompass misconduct orders.

[154] E.g., D.C. Cir. Rule 36(a)(2)(G) (2006).

can be omitted.[155] And there may be instances where it is impossible to adequately explain the disposition without disclosing the judge's identity.[156] What is important is that chief judges and circuit councils recognize the obligation to provide a comprehensible explanation in the absence of circumstances implicating a countervailing imperative.[157]

> [The Conduct Committee] will make available on the Federal Judiciary's website … selected illustrative [final] orders, … appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

This third element requires little comment. I would add only that in addition to posting new orders as they are issued, the Committee should create a retrospective collection of past orders that will help to enlighten the public on the administration of the Act. At a minimum, the compilation should include all orders that apply or interpret provisions of the Code of Conduct for United States Judges. This will help to address criticisms that the standards are too vague; it will also carry forward the recommendation of the National Commission that the judiciary develop "a body of interpretive precedents" to promote consistency in the implementation of the Act.[158]

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[155] For discussion of the McCalla case, see Breyer Committee Report, supra note 17, at 196; Hellman, supra note 7, Part II-F-6. The Breyer Committee Report does not identify the judge.

[156] This concern is implicated only in cases where there is no good reason to disclose the judge's identity. See Part VI supra.

[157] The Commentary to Rule 11 addresses this point, stating that when complaints are disposed of by chief judges, "the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached." This is the right approach, but the point is important enough that it belongs in the Rule. Moreover, the complainant will of course be familiar with the facts; an explanation designed for public consumption may require more detail.

[158] National Commission Report, supra note 12, at 352.

VI. Conclusion: A Question of Attitude

A few years ago, on a visit to Washington, I stopped at the Federal Judicial Center to browse through the misconduct orders stored in file cabinets in the Center's library. I paid particular attention to the folders containing orders from my home circuit, the Third. The chief judge at that time was the late Edward R. Becker. I discovered that even the most routine orders bore the unique stamp of Judge Becker's personality. And I found one order that was definitely not routine. The underlying case was not identified in the order, but it was obvious enough to anyone from Pennsylvania; the order involved the habeas proceeding in *Lambert v. Blackwell*,[159] and the target of the complaint was District Judge Stewart Dalzell.[160]

As Chief Judge Becker explained, the complaint was filed by "the parents of a young woman who was brutally murdered." The woman convicted of the murder filed a habeas corpus petition, and the case was assigned to Judge Dalzell. After extended proceedings, Judge Dalzell not only agreed that the defendant's constitutional rights had been violated; he ordered that she be released and "and that she should not be retried." (That decision was reversed on appeal.) The judicial misconduct complaint alleged that Judge Dalzell "ignored the law," "undermined our justice system," and "severely damaged the lives and reputations of many dedicated and honest people."

Chief Judge Becker "studied the record in the underlying case with great care." He found that Judge Dalzell had used language in his opinion that was "excessive," "hyperbolic," and even "intemperate." But he concluded that "the

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[159] 962 F. Supp. 1521 (E.D. Pa.), rev'd, 134 F.3d 506 (3d Cir. 1997).

[160] In re Complaint of Judicial Misconduct, J.C. No. 99-50 (Judicial Council of the 3d Cir. 2000) (Becker, C.J.) (on file with the author).

offending language was merely part of 'the decision making process'" and thus "directly related to the merits of" the judge's decisions. He dismissed the complaint.

Anyone who reads this order will have no doubt that Judge Becker did study the record with great care; that he felt compassion for the grieving parents; and that he understood their anger at the judge who had freed their daughter's murderer. But the reader will also appreciate why the law – and the protection of an independent judiciary – required Judge Becker to dismiss the complaint of judicial misconduct.

So here is a document that would enlighten the public, in a very concrete way, about how the misconduct process operates. It would provide reassurance that dismissal of a complaint, even in an emotion-laden setting, did not represent mere "guild favoritism." But the document remains buried in a file cabinet in Washington.

Unfortunately, the invisibility of Judge Becker's order is all too typical of the federal judiciary's administration of the 1980 Act. Too often, the federal judiciary has appeared to view misconduct complaints as at best a nuisance and at worst an affront.[161] In this article I have criticized some aspects of the rules newly adopted by the Judicial Conference for carrying out the Chapter 16 process. These details warrant attention, but more important is the attitude that the judiciary takes in implementing the new regime. It is certainly understandable that judges would become impatient with the stream of meritless complaints that reflect no more than a litigant's effort to use the 1980 Act as a cost-free device for challenging an

[161] The tendency to tiptoe around the subject can be seen even in the new name of the responsible committee of the Judicial Conference. Symmetry as well as accuracy would suggest that it should be called the Committee on Judicial *Mis*conduct and Disability.

adverse court ruling. Nevertheless, the judges should look beyond the routine complaints and view the process not as a burden but as a valuable tool for strengthening the credibility and thus the independence of the judiciary.