Statement of Arthur D. Hellman

Committee on Judicial Conduct and Disability
Judicial Conference of the United States

Hearing on

Rules Governing Judicial Conduct and Disability Proceedings:
Draft for Public Comment

September 27, 2007

Judge Winter and Members of the Committee:

Thank you for inviting me to express my views at this hearing on the proposed "Rules Governing Judicial Conduct and Disability Proceedings" prepared by your Committee for consideration by the Judicial Conference of the United States.[1] At the outset, I applaud the Committee for holding the hearing and inviting public comment on the draft. As far as I am aware, this is the first time that any organ of the federal judiciary has sought public input on rules relating to judicial conduct. It is a very positive step, and it augurs well for the success of the enterprise.

Before turning to the proposed Rules, I will say a few words by way of personal background. I am a professor of law at the University of Pittsburgh School of Law, where I was recently appointed as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal

[1] 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 Proposed Misconduct Rules].

courts for more than 30 years. During that period, I have written numerous articles, books, and book chapters dealing with various aspects of the federal judicial system. Of particular relevance to this Committee's task is an article scheduled for publication early in 2008 on the regulation of judicial ethics in the federal system.[2] In addition, I worked with the Subcommittee on Courts, the Internet and Intellectual Property of the House Judiciary Committee in drafting the bipartisan Judicial Improvements Act of 2002.[3] As this Committee is aware, the 2002 Act revised the statutory provisions governing the handling of complaints against judges, primarily by codifying some of the procedures adopted by the judiciary through rulemaking. The 2002 Act is also the law that gave the judicial misconduct provisions their own chapter in the United States Code, Chapter 16.

In this statement, I shall address five aspects of the draft Rules: the move toward greater centralization in the administration of the 1980 Act; the definition of misconduct; the increased emphasis on procedural formality; the nature and timing of public disclosure; and efforts to make the process more visible. Like the Committee, I shall draw on two landmarks in the administration of the current statutory regime: the Illustrative Rules Governing Judicial Misconduct and Disability, originally published in 1986 and revised in 2000 (Illustrative Rules);[4] and the report issued in September 2006 by the Judicial Conduct and Disability

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[2] 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). The current draft of this article will be furnished to the Committee. For a briefer treatment, see Arthur D. Hellman, *Judges Judging Judges: The Federal Judicial Misconduct Statutes and the Breyer Committee Report*, 28 Justice System Journal No. 3 (forthcoming 2007).

[3] For the legislative history of the Act, see H.R. Rep. 107-459 (2002).

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

Act Study Committee (Breyer Committee).[5] Minor points of drafting, not implicating substance, are flagged in an Appendix. I will use the shorthand "Conduct Committee" to refer to this Committee both under its present designation and in its former incarnation as the Committee to Review Circuit Council Conduct and Disability Orders.

I. Self-Regulation – But Somewhat Less Decentralized

The present system for dealing with possible misconduct by federal judges was established by Congress in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (1980 Act). The legislation created a regime that has been aptly described as one of "decentralized self-regulation."[6] Under the proposed National Rules, self-regulation continues, but the decentralization would be cut back to a considerable degree. This development is manifested in three aspects of the current draft: the imposition of mandatory national rules; the implementation of a monitoring function for the Conduct Committee; and the expansion of the Committee's jurisdiction to review orders of the circuit councils. Each of these points warrants discussion.

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 "the

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[5] 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].

[6] 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].

accompanying Commentaries are to be deemed authoritative."[7] 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."

This is a desirable change. The federal judicial system is a single system for administering justice to the litigants who come before it. If allegations of misconduct are not dealt with in appropriate fashion, the fault will 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. 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 variations in the rules that exist today.

Because the Judicial Conference of the United States is now imposing mandatory rules on matters that hitherto have been left to the discretion of the individual circuit councils, it might be useful if the Commentary to Rule 2 stated explicitly that this step is authorized by 28 USC § 358(a).

B. A monitoring function for the Conduct Committee

In its September 2006 report, the Breyer Committee urged the Conduct Committee to consider "periodic monitoring of the Act's administration." The commentary to this recommendation indicates that Justice Breyer and his colleagues contemplated no more than "periodic samplings of dispositions to

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

detect problematic areas." However, a perusal of the draft Rules suggests that the Conduct Committee may envisage a more robust, hands-on approach. This inference is based on five parallel provisions in the Rules:

- Under Rule 8, copies of each complaint will be sent to the Conduct Committee upon filing.
- Under Rule 11(g), if the circuit chief judge dismisses the complaint or concludes the proceeding – which is what happens in the overwhelming majority of cases – the chief judge's order and supporting memorandum must be provided to the Conduct Committee.
- Under Rule 18(c), 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, along with "*all materials obtained by the chief circuit judge* in connection with the chief circuit judge's inquiry." (Emphasis added.)
- 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, with one exception (discussed below), the Rules require that at each important stage in the handling of a misconduct complaint within the circuit, the relevant documents must be provided to the Conduct Committee in Washington. This includes documents filed by complainants (the complaint and the petition for review) and documents filed by the judges (orders and memoranda).

Of particular interest is the provision in Rule 8 that requires the clerk of each circuit, upon the filing of a complaint, to send a copy to the Conduct Committee. What are the implications of this requirement?

For the vast bulk of complaints, the implications are probably minimal. The Conduct Committee's staff will review the document and will 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 be identified without great difficulty. Most of them will have been filed by public officials or by advocacy groups like Community Rights Counsel or Judicial Watch. Occasionally they will be litigants' or citizens' complaints that have generated attention from media or on web sites. (I am assuming that as part of the Committee's monitoring function, the staff will track media or web reports suggesting that a misconduct complaint has been filed or is in the offing.)

I suspect that when a complaint is filed in a high-visibility matter, the staff will alert the members of the Committee and will keep a watching brief. If, after a period of months, no further orders or other documents have been received, the chairman of the Committee might communicate informally with the circuit chief judge to ascertain the status of the matter.

This leads to a suggestion. The Rules in their current form do not require the circuit clerk to provide the Conduct Committee with copies of chief judge orders appointing special committees. The Committee might wish to consider including

such a provision. If the Committee knows that the chief judge has appointed a special committee, there will be no need to inquire as to the status of the complaint simply because no dispositive order has been received.

Even without this suggested addition, the proposed Rules assure that the Conduct Committee will have ample opportunity to track the handling of complaints by circuit chief judges and circuit councils – if it chooses to do so. By its silence, the current draft implies that the Committee has no immediate plans to pursue this approach. That is a sound decision. The proposed National Rules inaugurate a new era in the administration of the Act. It is appropriate for the Conduct Committee to give the circuit chief judges and circuit councils time to adjust to the new Rules before deciding how extensively, if at all, it wants to monitor proceedings that are still active within the circuits.

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. 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.[8] Three judges dissented from that order. Yagman asked the Judicial Conference of the United States to review the Council's action. The Conference referred the matter to this Committee (then operating under its former name as the Committee to

[8] In re Complaint of Judicial Misconduct, 425 F.3d 1179 (Judicial Council of Ninth Circuit 2005).

Review Circuit Council Conduct and Disability Orders). By a 3-to-2 vote, the Committee found that it had no jurisdiction "to address the substance of the complaint."[9] 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."[10] 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."[11]

The Conduct Committee now takes a different view. Proposed Rule 21(b) authorizes limited review of circuit council decisions affirming chief orders that dismiss a complaint or conclude the proceeding.[12] Specifically, 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

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[9] 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).

[10] Id. at 109.

[11] 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 proposed Rules follow the same approach, and indeed the Commentary 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." Proposed Misconduct Rules, supra note 1, at 30 (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.

[12] The proposed 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." The Commentary explains that the "exceptional circumstances" language "would … permit the council to deny review rather than affirm in a case in which the process was obviously being abused." That of course would be the functional equivalent of affirmance.

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 proposed 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." 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 jurisdictional problem" that the opinions in the Real matter had identified. 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."[13] The Committee urged the Judicial Conference to "take action to explicitly

[13] Report of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders at 4 (2007) (on file with the author).

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 draft 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]."[14] 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. 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 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." Perhaps the most plausible explanation is that the Committee views the proposed exercise of authority as a separate proceeding rather than as a review

[14] Proposed Misconduct Rules, supra note 1, at 35 (Commentary).

of the circuit council's disposition.[15] 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.[16]

Or would it? The Conduct Committee is actually rather circumspect in defining the precise scope of the review power it contemplates. In its report to the Judicial Conference, the Committee repeatedly states that upon adoption of its proposal the Committee would have authority to "examine" whether a misconduct complaint requires the appointment of a special committee. But what would the Committee do if, after examining a complaint, it finds that a special committee should be appointed? The Committee does not say. In particular, it does not say that the Committee would order the appointment. Nor do the proposed Rules. The draft Rules provide only that "[i]f the committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons."[17]

Probably the Committee takes the approach it does because it is relying on two provisions of Title 28 that authorize the Judicial Conference to prescribe rules, but not to issue orders. I suspect that the Committee anticipates that a declaration by the Committee would be sufficient to persuade a circuit chief judge or circuit

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[15] 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 to take a second look at a disposition that Congress has said is "final and conclusive."

[16] 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.

[17] Proposed Misconduct Rules, supra note 1, at 34 (Rule 21(b)(2)).

council to reverse course without the need for an order designated as such. And probably it would be.

Indeed, there might not be a need for "a written decision" at all. 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.[18] Only if the circuit council adheres to its ruling would the Committee act formally under the Rule.

At the House Judiciary Committee hearing on the bill to create an Inspector General for the federal judiciary, 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 Conduct Committee has now changed course, and it believes that it can fill the gap within the framework of the existing legislation. The Committee's proposal represents sound policy, basically for the reasons stated in the dissenting opinion in the Real case. But the preferable way of implementing the suggestion would be through statutory amendment. The proposed rule appears to stretch the language of Title 28, with the purpose of allowing the reopening of disciplinary proceedings that would otherwise have concluded.[19] In that setting, there should be no room for doubt as to the legitimacy of what is being done.

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[18] The circuit chief judge does not participate in council consideration of petitions for review when the chief judge declines to appoint a special committee. See Rule 25(c).

[19] 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 now proposed by the Conduct Committee. The closest the Breyer Committee comes

That said, I can understand why the Committee might be reluctant to seek an amendment to the statute. And the concerns I have expressed could be largely met if the Rules stated explicitly that any "written decision" by the Committee on the appointment of a special committee is only advisory and not binding.

2. Implementation of the new jurisdiction

Proposed 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 members of the council dissented from the order on 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 had decided to allow review *only* in cases where one or more council members dissented, it would be difficult to quarrel with the proposed 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.[20] I would probably not fault the Committee if it had decided that the

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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 5, at 210. This procedure, with the initiative coming from within the circuit, is a far cry from review initiated by the Conduct Committee.

[20] "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

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. 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 is no longer subject to review." If the circuit council unanimously affirms a chief judge's order of dismissal, there is no right of review by anyone, and the clerk of the court of appeals would ordinarily release the order to the public. 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."

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 60 days – so that the Committee will have a chance to review them. But this points to a more fundamental problem with the

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Circuit, by the acting chief judge. See Breyer Committee Report, supra note 5, at 180-83; Hellman, supra note 2, Part II-F-3.

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 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 accepts 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 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 suggest that the Committee 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.[21]

II. 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

[21] I am thinking here of the complaint against Chief Judge Boyce Martin, Jr. See supra note 20.

business of the courts." The proposed Rules elaborate on this definition by providing a series of specific but non-exclusive examples of misconduct. 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.[22] 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. 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 action" under the Act.[23]

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 my forthcoming article I provide numerous examples

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[22] 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).

[23] 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 III-B.

of this practice, and I will refer the Committee to that discussion.[24] 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. In Part V of my statement I urge the Committee to take further steps to encourage publication of misconduct orders. 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.

III. Toward Greater Procedural Formality

In the overwhelming majority of cases, the federal judiciary acts conscientiously and effectively to assure that judges comply with the high ethical standards we expect of them.[25] 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 proposed National Rules take two important steps to combat this tendency. 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.

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[24] See Hellman, supra note 2, Part II-B.

[25] 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 6.

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. 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 citizen.

The Breyer Committee report encourages chief judges to make greater use of "their statutory authority to identify complaints when accusations become public." 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 will help to remove the cloud that would otherwise hang over the judge's reputation.[26]

The proposed National Rules would implement the Breyer Committee's suggestion. Under the draft rules, if a chief judge obtains "information from any source" that gives "reasonable grounds to inquire into possible misconduct" by a judge, the chief judge "*must* identify a complaint and, by written order stating the reasons," initiate the review process under Chapter 16. This language makes clear that the threshold for identifying a complaint is very low, and that doubts should be resolved in favor of instituting formal proceedings under the Act.

I strongly endorse this standard. Experience has shown that chief judges have sometimes been reluctant to identify complaints even when information has come to their attention suggesting at least prima facie that a judge has engaged in misconduct. Proposed Rule 5 would take away this discretion and require the chief

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

judge to initiate the Chapter 16 process. However, two of the Rule's subsections require further attention.

First, the Committee recognizes that there will be situations where it will make sense for the chief judge to pursue "informal means" before triggering formal proceedings. But it is not clear that Rule 5 as drafted implements this judgment. The Commentary states that the chief judge "may properly treat identifying a complaint as a resort to be considered after informal approaches at a resolution, if feasible, have failed." Presumably that is a reference to Rule 5(a)(3), which says that the chief judge "may decline to identify a complaint if the matter *has been resolved* by informal means." (Emphasis added.) This language could be read as applying only when the matter has already been resolved by the time the chief judge gets wind of it. The ambiguity could be eliminated by including qualifying language in Rule 5(a)(1) or – preferably – by rewriting what is now section (a)(1) to cross-reference the exceptions.

Second and more important, I think the Committee should reconsider the proviso that relieves the chief judge of the obligation to identify a complaint "if it is clear on the basis of the total mix of information available to the [chief] judge" that the complaint will be dismissed. The next sentence of the Rule provides that that the chief judge "*may* identify a complaint in such circumstances in order to assure the public that highly visible allegations have been investigated." (Emphasis added.) It seems to me that when allegations are "highly visible" – which will not be often – the chief judge should be required to identify a complaint even if it is clear that the complaint will be dismissed. There is nothing to be gained by leaving the allegations unrefuted, and much to be lost. That was

the conclusion that the Breyer Committee reached, and I urge this Committee to adopt the Breyer Committee's standard.[27]

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 the "chief judge track" and the "special committee track." The statute now provides: "The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." If the facts are "reasonably in dispute," a special committee must be appointed to carry out the investigation. 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."[28]

Proposed Rule 11(b) includes language that emphasizes the limited scope of the inquiry that the circuit chief judge may conduct without turning the matter over to a special committee. The chief judge must not "make findings of fact about any matter that is reasonably in dispute," nor may the chief judge make "determinations concerning the credibility of the complainant or putative witnesses." But it may be desirable to hammer the point home more forcefully. The commentary states that a matter is *not* "reasonably" in dispute – and thus may

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[27] See Breyer Committee Report, supra note 5, at 191-92. As stated in the report, "there are many good reasons for not identifying a complaint, but … a chief judge should *not* decline to do so solely because the chief judge believes that he or she would ultimately dismiss it." (Emphasis added.)

[28] Breyer Committee Report, supra note 5, at 200. For development of this point, see Hellman, supra note 2, Part II-F-3.

be resolved by the chief judge – "if a limited inquiry shows the allegations to lack any factual foundation or to be conclusively refuted by objective evidence." The implication is that if the allegations have even the slightest factual foundation, or if objective evidence leaves *some* room for crediting them, a special committee must be appointed. It would be better to make this standard explicit.

The Committee may also wish to include language in the Rule (or in the Commentary) to 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. 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.[29] 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."[30] If Judge Shaw did "urge[] the crowd to vote for" the congressman, it was a clear instance of misconduct.[31] 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

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

[30] 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.

[31] See In re Charges of Judicial Misconduct, 404 F.3d 688 (Judicial Council of the 2d Cir. 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.

refuted by objective evidence." 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 congressman]." But Judge Loken never contacted the reporter who wrote the story.[32]

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.[33] 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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[32] 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.

[33] 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.[34] I believe that a special committee can serve a useful role when facts are not in dispute but their interpretation is contested.[35] The Committee may wish to incorporate this idea either into the Rule or into the Commentary.

IV. 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." 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 is that orders and memoranda of the chief judge and the judicial council will be made public only "when final action on the complaint has been taken and is no longer subject to review." Moreover, in the ordinary case where the complaint is dismissed, "the publicly

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[34] See supra note 31.

[35] 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 5, at 243. This principle is equally applicable whether the denial relates to the facts or to their interpretation.

available materials will not disclose the name of the judge complained about without his or her consent."

The proposed National Rules continue the approach of the Illustrative Rules. 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 is no longer subject to review." Additionally, if the complaint "is finally dismissed … without appointment of a special committee, .. the publicly available materials must not disclose the name of the subject judge without his or her consent."

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." 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 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.[36]

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

[36] Illustrative Rules, supra note 4, at 54.

> 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 Illustrative 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 would cause injury to the judge without enlightening the public on a matter of public concern.[37]

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

[37] This is not to say that the argument is airtight. 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, see Garcetti v. Ceballos, 126 S. Ct. 1951 (2006), 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.

allegations are directly related to the merits of a decision. Is there really an injury to the judge's reputation – or to any other legitimate interest – 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 involving Judge Real. 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.

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." Judge Real did file a petition for review, and at this writing the petition is still under consideration. As a result, the Judicial Council order has not been

disclosed officially. 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.[38]

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.[39]

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

[39] 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.

The proposed National Rules do not adopt this approach. There is no exception for situations where the existence of the proceedings has been disclosed to the public, irrespective of the nature or extent of the disclosure. Based on the analysis above, I believe that this approach is short-sighted, and that a more flexible policy would be preferable.

V. 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."[40] 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." 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 is a single glaring flaw in the administration of Chapter 16, it is the failure of judges 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; and they have failed to make their misconduct decisions readily available to the public. I have discussed these points at length elsewhere, and I will not repeat that discussion in my statement today.[41] The proposed National Rules address both problems, and, with some fine-tuning, the Rules should go far toward

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[40] Breyer Committee Report, supra note 5, at 119.

[41] See Hellman, supra note 2, Part II-F-6.

giving the process the visibility that will minimize the risk of "guild favoritism." Beyond this, the Committee may want to consider other measures that might increase public awareness of how the judiciary deals with allegations of misconduct by judges.

A. Availability of rules and forms

Proposed 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 in 2002. The Committee 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."[42]

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*."[43] 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."[44] A link that says only "Judicial Complaint Form" does not adequately identify the subject.

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[42] Breyer Committee Report, supra note 5, at 208.

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

[44] See Memorandum from Administrative Office Director James C. Duff to Chief Judges, United States Courts (June 27, 2007).

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 clerk of the court of appeals *or* by placing such orders on the court's public website. [Emphasis added.]

On this first point I have only one small suggestion: "or" should be replaced by "and." That is, the Rule should require without qualification that all final orders must be posted on court web sites. In today's world, availability means "available on line." 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.[45] 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.[46]

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[45] By way of example: thus far in 2007, one court of appeals –the Fifth Circuit – has posted more than 500 dispositions that use identical language to reject "arguments that are foreclosed by Almendarez-Torres v. United States, 523 U.S. 224 (1998)." That is not far below the total number of misconduct complaints considered by all federal courts in a year.

[46] 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 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.

> In cases in which such orders appear to have precedential value, the chief circuit judge may cause them to be published.

On this second point I have three suggestions. 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.[47] 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 can be omitted.[48] And there may be instances where it is impossible to adequately explain the disposition without disclosing the judge's identity.[49] 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.

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

[48] For discussion of the McCalla case, see Breyer Committee Report, supra note 5, at 196; Hellman, supra note 2, Part II-F-6. The Breyer Committee Report does not identify the judge.

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

> [The Conduct Committee] must make available on the judiciary 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.[50]

C. Other measures to enhance visibility

The proposed Rules would make a significant contribution to increasing the visibility of the complaint process. The Committee and the Judicial Conference may wish to consider additional steps to that end.

First, this Committee has taken on the enlarged and invigorated oversight role contemplated by the Breyer Committee. That is all to the good; it is highly desirable to have an entity within the judiciary whose single function is – and is known to be – that of strengthening judicial ethics and enhancing transparency. But if the Committee is to perform its function effectively, it too should be visible. The announcement of today's hearing on the federal judiciary website refers to this Committee as the drafter of the proposed Rules, but it does not identify the

[50] Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 352 (1993).

Committee's chairman or its members. Indeed, if the members of the Committee are identified anywhere on the website, the information is well hidden. This is a mistake. The public should know that when misconduct issues arise, they will be dealt with, not by anonymous bureaucrats but by individual judges whose names and backgrounds can readily be ascertained.

There are other steps that could be taken along these lines. For example, when a new chairman is selected for the Committee, the Chief Justice could make a public occasion of the announcement. The chairman and other Committee members could speak at meetings of bar associations and other organizations to describe and publicize the operation and availability of the complaint process.

VI. Conclusion: Buried Treasure

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*,[51] and the target of the complaint was District Judge Stewart Dalzell.[52]

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[51] 962 F. Supp. 1521 (E.D. Pa.), rev'd, 134 F.3d 506 (3d Cir. 1997).

[52] 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).

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 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 emotional setting, did not represent mere

"guild favoritism." But the document remains buried in a file cabinet in Washington.

This Committee has drafted an excellent of set of rules. I have offered a few suggestions for improvement; with or without the suggested changes, I hope that the rules will be adopted by Judicial Conference. Yet more important than the details of the rules is the attitude that the judiciary takes toward the complaint process. In the past, judges have too often appeared to view misconduct complaints as at best a nuisance and at worst an affront.[53] They have not appreciated that the complaint process can be a valuable tool for strengthening the credibility and thus the independence of the judiciary. In holding this hearing today and in inviting public comment on the draft rules, this Committee signals that change is in the offing, and change for the better.

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

Appendix
Additional Suggestions re Drafting

Rule 5. This Rule has only a single subsection. I suspect that this was inadvertent and that the three numbered paragraphs should be identified by letters as subsections. (The body of my statement has additional suggestions relating to the substance of this Rule. See Part III-A.)

Rule 5(a)(2)(B). I do not understand what is meant by the reference (page 8, lines 28-30) to the possibility of appointing a special committee. If it is clear that the complaint will be dismissed, that is tantamount to saying that no special committee would be required anyway.

Rule 8. The Rule refers (page 12, line 19) to "Such complaints." It would be clearer to say: "All complaints, whether identified under Rule 5 or filed under Rule 6, must also be filed with [the Conduct Committee]."

Rule 25(c). It seems to me that Rule 25(c) would be better placed in Rule 19. Non-participation by the circuit chief judge is an important element of circuit council review of chief judge orders.

Commentaries. There are occasional references in the Commentaries to Chapter 16, but most of these simply speak of "the Act." It would give the Rules a firmer foundation if the Commentaries gave greater emphasis to the provisions of the statute that they implement. That was certainly the approach of the Illustrative Rules.