

Statement of

Arthur D. Hellman

*Sally Ann Semenko Endowed Chair
University of Pittsburgh School of Law*

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

Hearing on

**Draft Amendments to
Rules for Judicial-Conduct and Judicial-Disability Proceedings**

October 30, 2014

Outline of Statement

Introduction	1
I. Background	2
A. The Judicial Conduct and Disability Act of 1980.....	2
B. The Illustrative Rules and the Judicial Improvements Act of 2002	3
C. The Breyer Committee Report and the 2008 Rules.....	4
D. Looking Ahead.....	6
II. Policy Changes in the July 23 Draft	7
A. Filling Gaps in the Availability of Review of Chief-Judge and Judicial-Council Orders	8
B. Expanding Conduct Committee Review in “Track One” Cases	9
C. Allowing Tie Votes in the Conduct Committee	10
D. Requiring Electronic Posting of Final Orders.....	12
E. Assuring Independent Review of Chief-Judge Final Orders.....	13
F. Mandating Disqualification of Circuit Chief Judge who is Under Investigation.....	15
III. Dealing with the “High-Visibility” Complaint.....	16
A. Identifying Complaints Based on Public Reports	17
B. Disclosure of Proceedings	18
C. Temporary Suspension from Judicial Duties	20
D. Conclusion: Striking the Proper Balance	21
IV. Other Suggestions for Amendments to the Rules.....	22
A. Chief Judge’s Duty to Investigate Non-Public Allegations.....	22
B. Judicial-Council Authority to Sanction Abusive Complainants.....	23
C. Chief Judge’s Obligation to Appoint a Special Committee	25
D. Burden of Proof in Judicial-Council Factfinding.....	26
E. Judicial-Council Authority to Conclude a Proceeding.....	27
F. Disclosure of Vacated or Modified Orders.....	29
I. Policy Considerations	29

2. Drafting Considerations	30
G. Developing a Body of Interpretive Precedent	34
H. Disqualification of Judges from Chapter 16 Proceedings: the General Rule	35
I. Availability of Rules and Forms	36
J. Making the Rules More User-Friendly	37

Statement of
Arthur D. Hellman

Judge Scirica and Members of the Committee:

On September 2, 2014, your Committee issued a set of draft amendments (dated July 23, 2014) to the Rules for Judicial-Conduct and Judicial-Disability Proceedings adopted by the Judicial Conference of the United States in April 2008. The announcement invited comments on the proposed amendments. This statement is submitted in response to that invitation.*

Introduction

Even a casual glance at the redlined draft posted on the Judiciary website shows that the changes now being proposed are modest; they leave the 2008 Rules largely intact. Many of the proposed amendments involve clarification or emphasis more than substance.

In this statement I shall concentrate on policy issues. The statement is in four parts. Part I provides some background. Part II discusses the policy changes proposed by the Committee; I support all but one of these changes (sometimes with additional modest suggestions). Part III addresses the special problems raised by “high-visibility” complaints. Part IV suggests some additional modest revisions in the Rules and flags issues that warrant the Committee’s attention in the future.

First, a few words by way of personal background. I am a professor at the University of Pittsburgh School of Law, where I was appointed in 2005 as the inaugural holder of the Sally Ann Semenko Endowed Chair. I have been studying the operation of the federal courts for more than 30 years. My writings include two articles of particular relevance to today’s hearing. One is an overview of the regulation of federal judicial ethics.¹ The other is an analysis of the current rules

* I am grateful to Russell Wheeler of the Brookings Institution for numerous helpful comments on earlier drafts. Mr. Wheeler’s statement to the Committee expresses general agreement with “the analysis of and recommendations as to the red-lined version of the rules [in this statement], while noting some alternative approaches.”

¹ Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. Pitt. L. Rev. 189 (2007) [hereinafter Hellman, *Judicial Ethics*], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1015858.

for judicial misconduct proceedings, published shortly after the rules were adopted by the judiciary.²

In addition to my academic writing, I have testified at several hearings of the House Judiciary Committee on various aspects of judicial ethics, including the 2001 hearing that led to the enactment of the Judicial Improvements Act of 2002 and the 2009 hearing that preceded the impeachment of District Judge Samuel B. Kent. Most recently, in April 2013, I testified at a hearing on “An Examination of the Judicial Conduct and Disability System.”

In the statement I submitted at the April 2013 hearing, I suggested some amendments to Title 28 of the United States Code.³ The substance of several of those statutory proposals has been incorporated into the Rules amendments now under consideration. That is a very positive development, and I welcome it. At the same time, for the reasons given in my April 2013 statement, I continue to believe that on some of the issues, optimal policy requires amendments to the governing statutes. Nevertheless, in this statement – submitted to a committee of the Judicial Conference – I shall concentrate on suggestions for revisions to the Rules.

I. Background

Before turning to the proposed amendments, it will be useful to outline some of the background, with particular focus on the legislation, rules, and reports that preceded the adoption of the 2008 Rules.

A. *The Judicial Conduct and Disability Act of 1980*

For most of the nation’s history, the only formal mechanism for dealing with misconduct by federal judges was the cumbersome process of impeachment. 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.⁴

² Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 Notre Dame J. L. Ethics & Pub. Pol. 325 (2008) [hereinafter Hellman, Misconduct Rules], available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1116703.

³ The statement is available at the House Judiciary website and on my SSRN author page. See Arthur D. Hellman, *The Federal Judicial Conduct and Disability System: Unfinished Business for Congress and for the Judiciary*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435287 [hereinafter Hellman, Unfinished Business].

⁴ See, e.g., *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74 (1969).

That era ended with the enactment of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (1980 Act or Act). The 1980 Act was the product of compromise. Powerful members of the Senate favored a much more radical proposal, one that would have created a new national tribunal with power to remove judges who had committed serious misconduct. However, the Judiciary Committee leadership in the House was deeply skeptical of this approach, as were prominent representatives of the judiciary itself. Ultimately the two Houses agreed on a more modest measure.⁵

The 1980 legislation adopted the basic framework of the system established by the Ninth Circuit in 1978 under the leadership of Chief Judge James R. Browning.⁶ This system included initial screening of complaints by the circuit chief judge, with investigation of serious matters to be carried out by a special committee that would report to the circuit council. In the 1980 Act Congress added several procedural protections to the system established by the judges; it also vested a limited but important review function in the Judicial Conference of the United States. In 1990, Congress adopted a modest package of amendments to the statute.

B. The Illustrative Rules and the Judicial Improvements Act of 2002

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, assisted by the Federal Judicial Center, prepared a set of Illustrative Rules Governing Judicial Misconduct and Disability. These Rules addressed many procedural and substantive issues that were not resolved by the statute itself. A revised set of Illustrative Rules, accompanied by an extensive commentary, was promulgated by the

⁵ A turning-point was the hearing held on July 13, 1979, by the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Judiciary Committee. The witnesses included Chief Judge James R. Browning of the Ninth Circuit, Judge J. Clifford Wallace of the Ninth Circuit Court of Appeals, and Judge Elmo Hunter of the Western District of Missouri, chairman of the Judicial Conference Committee on Court Administration.

⁶ See *In re Charge of Judicial Misconduct*, 593 F.2d 879, 880 n.* (9th Cir. 1979) (quoting *Procedures for Processing Complaints of Judicial Misconduct*); see also Chief Judge James R. Browning, [Report on the] State of the Circuit at 15-18 (July 24, 1979) (on file with the author).

Administrative Office of United States Courts in 2000.⁷ Most of the circuits adopted rules based on the Illustrative Rules.

The Illustrative Rules were brought to Congress’s attention in November 2001 when a subcommittee of the House Judiciary Committee held an oversight hearing on the operation of the 1980 Act. Based on the record of that hearing, Chairman Coble and Ranking Member Berman introduced a bipartisan bill to further revise the statutory provisions governing the handling of misconduct complaints. The bill codified some of the procedures adopted by the judiciary through rulemaking; it also gave the misconduct provisions their own chapter (Chapter 16) in Title 28 of the United States Code. The bill was signed into law as the Judicial Improvements Act of 2002.⁸

In revising the law in 2002, Congress also 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.⁹

C. The Breyer Committee Report and the 2008 Rules

The 2002 Act moved through Congress with bipartisan support and no indication of any serious dissatisfaction with the way the judiciary was carrying out its responsibilities. Soon afterwards, however, rumblings of discontent began to be heard. At a meeting of the Judicial Conference in March 2004, 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. He warned that if the judiciary did not do a better job, “Congress will begin assessing

⁷ Administrative Office of the United States Courts, *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability* (2000) [hereinafter *Illustrative Rules*].

⁸ 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).

⁹ See Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265 (1993) [hereinafter *National Commission Report*].

whether the disciplinary authority delegated to the Judiciary has been responsibly exercised and ought to continue.”¹⁰

In response to the Sensenbrenner remarks, Chief Justice William H. Rehnquist announced that he had appointed a committee to evaluate “the way in which the [1980 Act] is being implemented.”¹¹ 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.

The Breyer Committee issued its report in September 2006.¹² The Committee reached two major conclusions. First, it found that “chief circuit judges and judicial councils are doing a very good overall job in handling complaints filed under the Act.”¹³ Second, in separately assessing a set of “high-visibility cases,” the Committee found an “error rate” that was “far too high.”¹⁴

Drawing on its findings, the Committee provided extensive commentary on key statutory terms; it also made recommendations to all of the judiciary’s institutional actors in the misconduct process. Although the report does not have the status of law, it is treated in many respects as a primary document; chief judges and circuit councils look to its analysis for guidance in handling misconduct complaints.

The Judicial Conference acted quickly to follow up on the Breyer Committee’s recommendations. In March 2007, the Conference issued a series of directives to its newly renamed Committee on Judicial Conduct and Disability (Conduct Committee). The Conduct Committee responded with even greater celerity. In July 2007 the Committee published a draft of a comprehensive set of “Rules Governing Judicial Conduct and Disability Proceedings.”¹⁵ The draft drew

¹⁰ 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://www.tulanelink.com/tulanelink/judicialoversight_box.htm).

¹¹ Chief Justice Appoints Committee To Evaluate Judicial Discipline System, Third Branch, May 2004, at 8.

¹² 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].

¹³ Id. at 206.

¹⁴ Id. at 123.

¹⁵ 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

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; further revisions were made in January and February 2008.

The February draft was approved at the Conference’s regular meeting in March 2008.¹⁶ Unlike the Illustrative Rules, the 2008 rules “provide mandatory and nationally uniform provisions” that govern all misconduct proceedings in the circuits. Consistent with this directive, all of the circuits immediately adopted the Rules as their own. Now, for the first time since 2008, the Committee is considering possible amendments to those Rules.

D. Looking Ahead

Two observations are suggested by this history. First, the evolution of the current system has been characterized by frequent, generally harmonious (but occasionally tense) interactions between Congress and the judiciary. For example, early in the process, Chief Judge Browning noted that the Ninth Circuit’s rules had been formulated “in the midst of the controversy” over the Senate bill and that they formed a basis for a “legislative alternative” to the centralized and “strictly adjudicatory” approach that had already been approved by the Senate. In 2002, when Congress revised the 1980 Act, it drew upon the rules and practices in the circuits. More recently, Chief Justice Rehnquist explicitly acknowledged that he had appointed the Breyer Committee in response to Chairman Sensenbrenner’s warnings.

There is every reason to believe that this interaction will continue. As already mentioned, in April 2013 the House Judiciary Committee held a hearing on “An Examination of the Judicial Conduct and Disability System.” Members of the Judiciary Committee expressed great interest in assuring that the statute and the rules find the right balance between judicial independence and judicial accountability.

(6/13/2007). Although the draft bears the date of June 13, 2007, it was not made available for public comment until July 16.

¹⁶ Rules for Judicial-Conduct and Judicial-Disability Proceedings (Mar. 11, 2008), available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/Misconduct/jud_conduct_and_disability_308_app_B_rev.pdf [hereinafter 2008 Rules].

Second, the 2008 Rules were drafted and put into final form within a very short time frame. Less than a year elapsed between the Judicial Conference directive that started the drafting process and the publication of the final version that the Conference adopted. It would not be surprising if there were room for improvement.

The July 23 draft is a step in the right direction, but more can be done. Your Committee – following up on a recommendation by the Breyer Committee – has taken on a more robust role in overseeing the operation of the complaint process in the circuits. That oversight role should also include ongoing review of the Rules themselves, with amendments when the review reveals deficiencies. If some of the issues raised in this statement cannot be addressed as part of the current set of amendments, I ask that the Committee consider them in the next round of review. And I hope that that next round will begin sooner rather than later.

II. Policy Changes in the July 23 Draft

As already noted, most of the amendments in the July 23 draft involve clarification or emphasis. But I have identified six revisions that do reflect changes of policy from the 2008 Rules. Five of the six reflect sound policy; they will serve to enhance transparency and strengthen procedural regularity. Those amendments should be adopted by the Judicial Conference (some with additional modest changes suggested below). One proposed policy change – an amendment that would allow tie votes in the Conduct Committee on petitions for review – is unwise. I urge the Committee to reconsider it.

One amendment in the July 23 draft does not quite rise to the level of a policy change, but it involves more than clarification. This proposal deals with the procedures for review of judicial-council decisions by the Conduct Committee. The revision would amend Rule 22(c) to shorten the time for filing a petition from 63 to 42 days. I think that this change makes sense. In the general run of cases, six weeks is enough time for a complainant or judge to decide whether to seek review and to prepare the petition. And if review is not sought, the amendment will make the council's decision available to the public that much sooner. However, it may be desirable to allow additional time in extraordinary circumstances – for example, when the proceeding involves a voluminous record.

A. Filling Gaps in the Availability of Review of Chief-Judge and Judicial-Council Orders

The 1980 Act and the 2008 rules established an elaborate system for review of final orders issued by chief judges and judicial councils. But experience has revealed two gaps in these arrangements. First, when a misconduct proceeding is initiated by action of the chief judge “identifying” a complaint rather than by the filing of a complaint, there is no provision for review of the final orders (save in the rare circumstance where the person aggrieved by the order is the judge who is the subject of the proceeding). This gap is especially troubling because these “identified” complaints can often involve “high-visibility” cases like those discussed by the Breyer Committee. Second, if, after accusations have surfaced in the news media, the accused judge (other than the chief judge of the circuit) files a complaint against himself or herself, there might not be an independent complainant who could file a petition for review.

The proposed amendments fill both of these gaps. A new sentence in Rule 11(g)(3) provides that if a chief judge issues a final order on a complaint that was identified by the chief judge or filed by the subject judge, “the chief judge must transmit the order and supporting memorandum ... to the judicial council of the circuit for review in accordance with [the rules governing judicial council review when a petition is filed].” Similarly, a new sentence in Rule 20(f) provides that when the judicial council of the circuit takes action on a special committee report dealing with a complaint that was identified by the chief judge or filed by the subject judge, the council “must transmit the order and supporting memorandum to [the Conduct Committee] for review in accordance with [the rules governing Conduct Committee review when a petition is filed].”

These amendments codify a procedure adopted by then-Chief Judge Dolores Sloviter of the Third Circuit more than 20 years ago.¹⁷ Judge Sloviter received an anonymous complaint alleging that a judge allowed close relatives to practice before him and failed to disqualify himself when required to do so. She found that the allegations “would state a cognizable claim” under the Act, but she concluded the proceeding based on intervening events. She then noted that because the complainant was anonymous, the ordinary review process “may be pretermitted.” She therefore “invoke[d] a sua sponte petition for review” and directed the deputy clerk to send the relevant materials “to the members of the

¹⁷ *Anonymous v. Hon. [Name Redacted]*, J.C. No. 92-03 (3rd Cir. Judicial Council Mar. 4, 1992) (on file with the author).

Judicial Council with the request that they follow the ordinary review procedure.” The Judicial Council did as she requested.

As far as I am aware, Chief Judge Sloviter’s order has never been published, nor has any other chief judge or circuit council “invoke[d] a sua sponte petition for review.” As a consequence, at least two high-visibility orders issued by circuit judicial councils escaped review by the Conduct Committee. One case involved Ninth Circuit Chief Judge Alex Kozinski; the other, Nevada District Judge James Mahan.¹⁸ If the proposed amendment is adopted, orders like these will be assured of review. The proposed amendment should be adopted by the Judicial Conference.

B. Expanding Conduct Committee Review in “Track One” Cases

Like the model adopted by the Ninth Circuit in 1978, the 1980 Act and the 2008 Rules create what is, in essence, a two-track system for handling complaints of judicial misconduct.¹⁹ In Track-One cases, the chief judge dismisses the complaint or concludes the proceeding, and the dissatisfied complainant can obtain review by the judicial council of the circuit. “Track Two” is a shorthand for cases in which the chief judge does not dismiss the complaint or conclude the proceeding. In Track-Two cases, the chief judge appoints a special committee; the judicial council takes action based on the special committee report; and the judicial council order is subject to review by the Conduct Committee.²⁰

The overwhelming majority of cases are disposed of on Track One, with the judicial council affirming the chief judge’s order dismissing the complaint or concluding the proceeding. Rule 21(b) of the 2008 Rules authorizes a petition for review of these affirmance orders, but only when “one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed.” Further, the Committee’s review is limited “to the issue of whether a special committee should be appointed.”

The July 23 redlined draft makes two small but not insignificant changes in this provision. Review would now be authorized whenever one or more

¹⁸ For discussion of these cases, see Hellman, *Unfinished Business*, supra note 3, at 25-26.

¹⁹ Of course the Act and the Rules also govern complaints alleging disability on the part of a judge. In this statement, references to “misconduct” also encompass “disability” unless the context suggests otherwise.

²⁰ In the alternative, one might refer to the “chief judge track” and the “special committee track.”

members of the judicial council dissent from the affirmance order, whatever the ground of the dissent. Further, the Committee’s review would no longer be limited “to the issue of whether a special committee should be appointed.”

These are sensible changes. 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, irrespective of the grounds of the dissent. Nor is there any reason to constrain the Conduct Committee’s discretion to decide what kind of directive is most appropriate.

So I support the proposed amendments. But I continue to believe that the review provisions initially adopted by the 2008 Rules, while sound as a matter of policy, cannot be reconciled with express prohibitions of review in the 1980 Act. I discussed this point in my statement at the April 2013 House Judiciary Committee hearing and will not repeat that discussion here.²¹

C. Allowing Tie Votes in the Conduct Committee

The Conduct Committee consists of seven members. But when the Committee considers a petition for review of a judicial-council order, Rule 21(c) provides that any member from the same circuit as the subject judge is disqualified from participation. Committee members may also recuse themselves for other reasons. Disqualifications can thus reduce the number of participating members to six or four, creating the possibility that the remaining members will divide equally in their vote.

The 2008 Rules include two provisions designed to avoid tie votes. First, if only six members are qualified, the Committee will decide petitions for review by rotating panels of five. Second, if only four members are qualified, the Chief Justice must appoint an additional judge to consider that petition for review.

The July 23 draft retains the second provision (with different language) but not the first. Instead, the draft would add this new provision: “If the qualified members are equally divided in their vote on a petition for review, the order of the judicial council will remain in force as though affirmed.”

In my view, this new provision is unwise, and I urge the Committee to reconsider it. Almost by definition, cases in which the six participating Committee members are divided three to three will be the most difficult and

²¹ See Hellman, *Unfinished Business*, *supra* note 3, at 22-25.

contentious cases brought for review. They are the cases in which a Conduct Committee ruling is most needed. Moreover, affirmance by operation of law (presumably without a Committee opinion) is likely to leave the public dissatisfied; depending on the nature of the judicial-council order, the subject judge may also feel a sense of incompleteness.²²

In the federal judicial system, affirmance by an equally divided tribunal is used at the United States Supreme Court and by courts of appeals sitting en banc. But those are settings where there is no possibility of substituting another decision-maker for a judge who is recused. That is not true of the Conduct Committee, and there is no reason to adopt the practice.

I can understand why the Committee might be dissatisfied with the current approach – rotating panels of five. Under that approach, one member, although not recused, is excluded from the committee’s deliberations in the particular case. And – unnecessarily – the exclusion breaks the continuity of deliberations between cases.

The simplest solution is to provide that if only six members are qualified to vote, the Chief Justice must appoint a seventh judge (preferably a former member of the Committee) to consider that petition for review. The appointment should be made as soon as the disqualification becomes known. Waiting until an equal division materializes would require the temporarily assigned judge to join deliberations that are already in progress and – even worse – to break the deadlock between the two groups of three judges.

Finally, although I have generally not commented on matters of drafting, two phrases in the proposed amendments to Rule 21(c) may cause confusion, and in the footnote I suggest some rewording.²³

²² When a circuit council divided evenly on whether to enter an order of reprimand recommended by a special committee, the Conduct Committee said that because of the even split “the procedure [enacted by Congress] has broken down.” *Phelps v. Kelly*, No. 87-372-001 (U.S. Jud. Conf. Comm. to Review Circuit Council Conduct & Disability Orders Aug. 4, 1987).

²³ The draft amendments to Rule 21(c) include this sentence: “If the number of members qualified to consider a petition is not more than four, the Chief Justice must name a panel of five United States judges, including the qualified Committee members, to consider it.” To avoid negative phrasing, “not more than four” should be replaced by “four or fewer.” Also, I assume that the term “United States judges” is a reference to the term “judge of the United States” as defined in section 451 of Title 28 (“judges of the courts of appeals, district courts, Court of International Trade and any other court created by act of Congress, the judges of which are entitled to hold office during good behavior”). Because it is not a familiar term, I suggest using

D. Requiring Electronic Posting of Final Orders

Rule 24(b) of the 2008 Rules provides that 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.) The July 23 redlined draft replaces “or” with “and.”

This change is long overdue.²⁴ The ubiquity of the Internet has changed the popular understanding of document availability; in today’s world, availability usually means “available online.” Yet today, only seven of the 13 federal circuits post all final misconduct orders on their websites.

Comprehensive posting has one drawback, however: orders of general public interest (e.g. those that interpret the Code of Conduct or resolve a high-visibility complaint) are buried among the routine ones. The simple solution, as Russell Wheeler has suggested, is that chief judges and circuit councils should “identify which orders [they believe] to have precedential value as well as those that are otherwise unusual.”²⁵ In his statement to this Committee, Mr. Wheeler has proposed that these orders should be designated with an asterisk. While that would accomplish the purpose, I think the preferable approach is to post the non-routine orders under a separate heading or on a separate page within the website. That is the system used by most of the federal courts of appeals for distinguishing between precedential and non-precedential opinions, and I think it would work equally well in this context.

This suggestion can be implemented by revising the second sentence of Rule 24(b). That sentence now provides: “If [misconduct] orders appear to have precedential value, the chief judge may cause them to be published.” But what would “publication” mean if all misconduct orders are posted on the circuit’s public website? Again, the court of appeals model provides the answer. Non-routine orders would be *designated* as “for publication.” Such orders would then be posted under the separate heading or on the separate page.

the term as it appears in section 451 and including a cross reference to that section, lest some read it to include magistrate judges and bankruptcy judges.

²⁴ In his statement to this Committee, Russell Wheeler has recommended reversing the order in which the Rule directs website posting and hard-copy availability. I agree with that suggestion for the reasons Mr. Wheeler gives.

²⁵ Russell Wheeler, A Primer on Regulating Federal Judicial Ethics, 56 Ariz. L. Rev. 479, 514 (2014).

Designating an order as “for publication” also means that the order will be published in the Federal Reporter and will be available in on-line databases like Westlaw and Lexis.²⁶ That will promote Rule 24(b)’s goal of “provid[ing] ... information to the public on how complaints are addressed under the Act.”

The Rules should also expand upon the criteria for designating orders as “for publication.” There are three kinds of circumstances in which publication will be desirable. First, of course, is precedential value. An order has value as precedent if it interprets the Judicial Code, the Rules, or the Code of Conduct for United States Judges. Second, publication is desirable if the complaint has been the subject of public reports.²⁷ Third, an order will generally warrant publication if the procedural posture departs from the routine. This would include cases in which a special committee was appointed or the chief judge concluded the proceeding rather than dismissing the complaint.

Finally, the Rules should encourage chief judges and circuit councils to provide sufficient explanation in their orders to enable outsiders to assess the appropriateness of the disposition.²⁸

E. Assuring Independent Review of Chief-Judge Final Orders

The pre-2008 Illustrative Rules contained a very strong prohibition against any participation by a chief judge in judicial council review of final orders issued by that chief judge under § 352. Rule 18(c) provided:

If a petition for review of a chief judge’s order dismissing a complaint or concluding a proceeding is filed with the judicial council pursuant to [§ 352(c)], the chief judge who entered the order will not participate in the council’s consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the judicial council, with

²⁶ From 2008 to the present, about 50 misconduct orders have been published in the Federal Reporter; they are also available on Westlaw. All but a handful of these are from the Ninth Circuit.

²⁷ For discussion of what constitutes a “public report” in this context, see *infra* Part III-A.

²⁸ For an example of an order that does not meet this standard, see *In re Complaint Against a Judicial Officer*, No. 07-7-352-55 (7th Cir. Judicial Council Sept. 30, 2008). The two-paragraph order informs us that the chief judge appointed a special committee, and the committee carried out an investigation. The committee recommended that complaint be “dismissed as factually unsubstantiated and/or concluded based on voluntary corrective actions.” The circuit council accepted the recommendation. But the order gives no clue as to the substance of the allegations or what the special committee investigated.

copies provided to the complainant and to the judge complained about. The chief judge may not communicate with individual council members about the matter, either orally or in writing.

The commentary acknowledged that the question of chief judge participation had “engendered some disagreement,” but it explained why the mandatory disqualification rule had been chosen: “We believe that such a policy is best calculated to assure complainants that their petitions will receive fair consideration.”

Surprisingly, in the 2008 national Rules, this policy was reversed. Current Rule 25(c) provides that when a petition for review is filed, “the chief judge is *not* disqualified from participating in the council's consideration of the petition.” (Emphasis added.) The commentary gives no explanation for the change.²⁹

The July 23 draft would restore the pre-2008 policy by deleting the word “not” from the current Rule. I strongly endorse this change. Congress decided that a complainant dissatisfied with a chief judge’s final order should have one level of review as of right. Prohibiting the chief judge from participating in that review preserves the independence – and the appearance of independence – of that second look. The proposed new policy also has the benefit of encouraging the chief judge to make sure that all relevant information is part of the formal written record.³⁰

The July 23 draft does not include the provisions in the Illustrative Rules (quoted above) that defined and limited the methods by which the chief judge can communicate with the members of the judicial council in connection with the review process. I think the clarification was helpful, and I suggest that similar language be included in the revised Rule 25(c).

²⁹ The initial draft of the national Rules, circulated for public comment in June 2007, retained the disqualification policy of the Illustrative Rules. The December 2007 draft, circulated after the public comment period, reversed the policy without explanation. Indeed, the commentary states (as it does in the final adopted version) that “Rule 25 is adapted from the Illustrative Rules.”

³⁰ The proposed amendment – unlike the current Rule – is also consistent with a Congressional directive whose substance has been part of the Judicial Code for more than a century: “No judge shall hear or determine an appeal from the decision of a case or issue tried by him.” 28 U.S.C. § 47. I do not suggest that this provision applies of its own force to misconduct proceedings, but I think that the underlying rationale does.

F. Mandating Disqualification of Circuit Chief Judge who is Under Investigation

Rule 25(e) defines the scope of disqualification for judges who are the subject of an investigation by a special committee. The current rule disqualifies such judges only from participation in misconduct proceedings “as a member of any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the [Conduct Committee].” In contrast, the July 23 draft rule states that a judge who is under investigation is disqualified from “participating in *the identification or consideration* of any complaint ... under the Act or these Rules.” The draft commentary spells out the consequences of this broader prohibition: “the subject judge cannot initiate complaints by identification, conduct limited inquiries, or choose between dismissal and special-committee investigation as the threshold disposition of a complaint.”

These three functions are, of course, the functions performed by the chief judge (or acting chief judge). Thus, although the proposed revision never uses the term “chief judge,” its effect is to adopt a rule that a circuit chief judge should not be permitted to carry out his or her responsibilities under Chapter 16 while he or she is the subject of a special committee investigation under § 353.

I support this change. First, it is unseemly for a judge whose own conduct is under investigation for possible violation of ethical norms to be passing judgment on other judges who have been accused of misconduct. Second, as the commentary to the 2008 Rule states, “participation in proceedings arising under the Act ... by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings.” This rationale is fully applicable to the chief judge’s unique responsibilities under the Act. And there is no way of telling in advance whether a particular misconduct complaint will raise issues that bear upon those involved in the chief judge’s own case.

So the proposed amendment to Rule 25(e) is an improvement over the current version. However, both versions fall short of what Title 28 requires. Section 359(a) states unequivocally that a judge who is the subject of a special committee investigation shall not “serve ... upon a judicial council, [or] upon the Judicial Conference.” The disqualification is not limited to the subject judge’s participation in misconduct proceedings.³¹ That, indeed, was the position taken in the pre-2008 Illustrative Rules.

³¹ The House Report – the authoritative legislative history of the 1980 Act – is even more explicit on this point. It states: “The paragraph is clear in its mandate. ... [Its language] means

On the policy question, I agree with the position of the 2008 Rules: a judge who is under investigation should not be disqualified from participating in activities of the circuit council and the Judicial Conference that are unrelated to misconduct proceedings. But until the statute is amended, I see no escape from the broader disqualification rule.

III. Dealing with the “High-Visibility” Complaint

As the Breyer Committee pointed out, public perceptions of the judiciary’s implementation of the 1980 Act are shaped almost entirely by the judiciary’s handling of “high-visibility” complaints – complaints that have “received national or regional press coverage” or have “brought public and legislative attention to the Act.”³² So it is vitally important to avoid slighting these complaints through conscious or unconscious “guild favoritism” (to use the Breyer Committee’s phrase).³³ But concern about public perception of “guild favoritism” can carry its own risks. The danger is that the judiciary’s institutional actors, seeking to reassure the public that misconduct has not been swept under the rug, will act too swiftly or too severely in dealing with allegations that have received public attention.

The 2008 Rules include two provisions designed to address high-visibility situations. But these are not part of a comprehensive scheme, nor do they respond adequately to the exigencies of our 24-hour-news-cycle world. The July 23 draft is unchanged in this respect.³⁴

To some extent, this deficiency may be the consequence of constraints imposed by the 1980 Act. For that reason I would encourage the Committee to

that during consideration and investigation of the complaint, any judge or magistrate whose misbehavior or disability is complained about cannot sit on the council or conference *for any purpose whatsoever* until the complaints have been definitely dealt with.” H.R. Rep. 96-1313 at 14 (1980) (emphasis added).

³² Breyer Committee Report, *supra* note 12, at 123, 173. The Breyer Committee described these “high-visibility” complaints in various ways. For discussion of how the relevant category should be identified, see *infra* section III-A.

³³ See Breyer Committee Report, *supra* note 12, at 119.

³⁴ The July 23 draft includes two amendments that were apparently prompted by the high-visibility proceeding involving misconduct by former District Judge Richard E. Cebull. One amendment deals with circuit council authority to conclude a proceeding; the other, with publication of orders that have been vacated or modified. But the new provisions do not purport to address high-visibility situations, nor are they so limited. They are discussed *infra* Part IV-E and IV-F respectively.

support a modest package of amendments to Title 28.³⁵ Here I will address the substance of measures that would enable chief judges and circuit councils to respond more effectively when allegations of possible misconduct surface in the media. The measures involve three possible actions: identifying a complaint, disclosing the steps that have been taken, and suspending the subject judge from his or her judicial duties.

The Committee may wish to place these provisions in a separate Rule that specifies the obligations of chief judges and circuit councils when allegations of possible misconduct become public. Corporations today have plans and protocols in place to deal with public accusations of misconduct by their executives. I believe that the judiciary should be similarly proactive.

A. Identifying Complaints Based on Public Reports

The Breyer Committee report encourages chief judges to make greater use of “their statutory authority to identify complaints when accusations become public.”³⁶ 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.

But “accusations” is too narrow a word. Sometimes – as when a federal judge is arrested – there will be an actual “accusation.” More commonly, there will be only a *report* of conduct that the chief judge recognizes as possibly falling within the ambit of the Act. For example, in 2009 Chief Judge Frank H. Easterbrook of the Seventh Circuit “learned from a newspaper report” that a district judge had allowed live broadcasting of a civil proceeding. This action violated a judicial council resolution and a local rule, so Judge Easterbrook identified a complaint and initiated a proceeding under the Act.³⁷

Rule 5 of the 2008 Rules defines the circumstances under which a chief judge may or must identify a complaint. But the Rule itself has no provisions that specifically address situations where “accusations become public.” And the

³⁵ Proposals for amending the statute are discussed in Hellman, *Unfinished Business*, supra note 3.

³⁶ Breyer Committee Report, supra note 12, at 245-46.

³⁷ See *In re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (7th Cir. Jud. Council Sept. 28, 2009) (Easterbrook, C.J.).

commentary has only a brief paragraph on “high-visibility situations,” saying that “it *may* be desirable for the chief judge to identify a complaint without first seeking an informal resolution ... in order to assure the public that the allegations have not been ignored.” (Emphasis added.)

I believe that this point should be treated in the Rules, not just the commentary. Specifically: when allegations or reports of possible misconduct have become public, the chief judge should be required to identify a complaint, even if it seems clear that the complaint will be dismissed. This situation will not occur frequently, but when it does, 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 think that the Rules should be amended to reflect the Breyer Committee’s judgment.

Questions will arise about when an allegation or report has become “public” in a way that should trigger the obligation to identify a complaint. Today, any individual with a grudge can start a website – or simply post comments on someone else’s blog. Does that make a report “public”? Not for this purpose. The Rules should adopt a functional approach: a report is “public” if it is published or posted in a print or electronic source in a way that could reasonably be expected to influence public perceptions of the regulation of ethics by the federal judiciary.

B. Disclosure of Proceedings

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 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.”³⁸

Notwithstanding this language, the last sentence of Rule 23(a) now provides: “In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in

³⁸ 28 U.S.C. § 360(a). As noted in the text, there is also a narrow exception for situations involving actual or potential impeachment proceedings.

the federal judiciary’s ability to redress misconduct or disability.”³⁹ The policy underlying this provision is sound, and (preferably supported by an amendment to Title 28) it points the way to rules that would provide more specific guidance to chief judges.

Preliminarily, I think the language just quoted sets too high a bar. There is no need to require “extraordinary circumstances.” And the Rule should authorize disclosures when “necessary *or appropriate* to maintain public confidence in the federal judiciary’s ability to redress misconduct or disability.”

Specifically: when the chief judge identifies a complaint based on public allegations or reports of misconduct, the chief judge should announce that fact. If the chief judge appoints a special committee to consider the complaint, that decision too should be announced.⁴⁰ There should also be an announcement when the *filing* of a complaint has become the subject of a public report and the chief judge appoints a special committee to consider the matter. These announcements will necessarily disclose two other important pieces of information – whether an acting chief judge is handling the matter and whether the complaint has been referred to another circuit under Rule 26.⁴¹

I see no need to mandate further disclosures beyond those already required. What would be useful, however, is for the Committee to provide guidelines to chief judges on other disclosures that are *permitted* under the Rules – for example, in response to media or Congressional inquiries about the status of an investigation that has been pending for an unusually long period of time.

This prompts a further suggestion. The Rules – and court websites – should include introductory commentary that will provide some context for public disclosures in high-visibility cases. Currently, the commentary on court websites is aimed almost exclusively at discouraging the filing of frivolous complaints. That is important, but it is also important to explain how the system operates when a

³⁹ This provision was not included in the draft Rules that were circulated for public comment in July 2007. It was added in the December 2007 draft.

⁴⁰ When Chief Justice Roberts transferred a complaint against Ninth Circuit Chief Judge Alex Kozinski to the Third Circuit Judicial Council, Chief Judge Anthony Scirica immediately announced the appointment of a special committee. The announcement identified the members of the committee. In contrast, in the Mark Fuller matter (discussed *infra* Part III-C), the public learned of the appointment of a special committee from comments to the media by the judge’s lawyer.

⁴¹ Implementing these suggestions would require modification of one of the proposed amendments in the July 23 draft. See *infra* Part IV-F-2.

non-frivolous complaint is filed. Of course, no commentary can anticipate – let alone deflect – all possible misunderstandings. But when allegations of misconduct become the subject of public discussion, it will be helpful if there is a readily available source of information about the purposes and functions of the system, with emphasis on the importance of protecting judicial independence.

Finally, in his statement to this Committee, Russell Wheeler has suggested that when a judicial-branch body issues an order that reasonable observers might regard as related to a complaint of misconduct or disability, the order should specify who is taking action and what the authority for that action is. A requirement along those lines would be particularly valuable in high-visibility cases, and I agree that it should be incorporated into the Rules.

C. Temporary Suspension from Judicial Duties

Early in the morning of Sunday August 10, 2014, Judge Mark E. Fuller of the Middle District of Alabama was arrested in Atlanta on a misdemeanor battery charge involving domestic violence. Two days later, a notice appeared on the website of the Eleventh Circuit Court of Appeals announcing that all of Judge Fuller’s cases had been reassigned to other judges, and that no legal matters would be assigned to him until further notice. The effect of this announcement was to suspend Judge Fuller from his judicial duties for an indefinite period of time. The announcement made clear that the suspension was linked to the arrest.

The lack of any explanation in the announcement leaves open the possibility that Judge Fuller was relieved of his judicial responsibilities at his own request.⁴² But it is also possible that the judicial council of the circuit imposed the suspension over Judge Fuller’s objection.⁴³ And even if the judge took the initiative, the cryptic announcement could easily leave the impression that the suspension was disciplinary in nature.

⁴² He might have made the request for a number of reasons. He may have felt that he could not carry out his judicial duties effectively with the stigma of the arrest hanging over him. He may have needed time to prepare fully for the criminal proceedings which he then anticipated. Or he may have believed that his actions that led to the arrest were the product of an illness or psychological disability that required treatment.

⁴³ The announcement bears the letterhead of the Eleventh Circuit Court of Appeals, not the Judicial Council, but I am confident that no provision of law authorizes a court of appeals to suspend a district judge. I therefore assume that if the suspension resulted from an order, the order was issued by the Judicial Council, probably under the authority of 28 U.S.C. § 332.

Whatever the circumstances of this particular episode, suspending an Article III judge based on an arrest or accusation raises serious issues of authority and transparency that should not be left to improvisation by chief judges and circuit councils. If Article III judges are to face the possibility of suspension from judicial duties based on an arrest or an accusation, the Rules should specify, in as much detail as possible, the kind of misconduct that will justify a suspension, the evidentiary burden that must be satisfied, and the procedures to be followed.⁴⁴

Drafting those rules will be no easy task. At this early stage, I will suggest, tentatively, that a judge should be involuntarily stripped of his cases only if there is good reason to believe that the judge has engaged in conduct that could be grounds for impeachment. The decision should be made by the judicial council of the circuit, with immediate review available by the Conduct Committee. The chief judge should immediately appoint a special committee to investigate the accusations.

D. Conclusion: Striking the Proper Balance

Public reports alleging serious misconduct by a federal judge pose a unique challenge for the institutional judiciary. Justice Oliver Wendell Holmes famously warned about the “kind of hydraulic pressure” exerted by “some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment.” An allegation of misconduct by a public official or a public figure can readily generate the “kind of hydraulic pressure” to which Holmes referred. If political-branch officials or corporate boards succumb to such pressure, there may be unfairness to the individual involved, but there is no threat to an essential element of our governmental system. However, if the judicial branch allows itself to be swayed by the popular clamor aroused by a single “accident of immediate overwhelming interest,” there is a risk of eroding the independence of the judiciary in the longer term.

At the same time, it is also important to avoid the appearance of “institutional favoritism” and to maintain “public confidence in the courts among reasonable people.” There is no magic formula for striking the proper balance, but the task will be made easier if the judiciary has adopted rules that constrain the discretion of chief judges and circuit councils. These rules should promote transparency and procedural regularity; they should be accompanied by

⁴⁴ Depending on the circumstances, there may well be a need for amendments to Title 28. But this is not the forum to address questions of statutory authority.

commentary that explicitly addresses the competing imperatives of independence and accountability.

IV. Other Suggestions for Amendments to the Rules

As discussed in Part II, the proposed amendments in the July 23 draft include five policy changes that will enhance transparency and strengthen procedural regularity. But in my view the draft does not do all that it could – and should – to improve the administration of the 1980 Act. Here I suggest some additional amendments, applicable to complaints generally. I recognize that the Committee will not be able to consider all of these suggestions as part of the current round of revisions. But as stated earlier, I think the Committee should undertake an ongoing review of the Rules, and the issues raised here can serve as a useful starting-point for the next stage of that process.⁴⁵

A. Chief Judge's Duty to Investigate Non-Public Allegations

For reasons discussed in Part III-A, the authority of the chief judge to identify a complaint plays a particularly important role when allegations of misconduct become public. But the utility of early intervention by the chief judge is not limited to “high-visibility” situations. On the contrary, when the chief judge receives private information suggesting that a judge has engaged in questionable behavior, responsive action may avoid the embarrassment and awkwardness of a public controversy.

The current provisions of Rule 5 deal adequately with these non-public situations – with one exception. The Rule now states: “When a chief judge has

⁴⁵ The pending proceeding involving District Judge Mark E. Fuller, discussed supra Part III-C, raises the question: when does off-the-bench activity fall within the ambit of the 1980 Act? Rule 3(h)(2) of the 2008 Rules states that “conduct occurring outside the performance of official duties” can justify discipline “if the conduct might [result in] a substantial and widespread lowering of public confidence in the courts among reasonable people.” But there is some evidence that the Act was not intended to cover extrajudicial conduct at all. For example, Judge J. Clifford Wallace of the Ninth Circuit, who was deeply involved in the development of the Act, see supra note 5, wrote in a 1995 order that “a judge’s personal conduct” is not within the scope of the Act. *In re Charge of Judicial Misconduct*, 62 F.3d 320, 322 (9th Cir. Judicial Council 1995). A decade later, the Breyer Committee assumed that off-bench activity could “meet the statutory standard,” but it cited no authority. See Breyer Committee Report, supra note 12, at 241. I do not pursue the matter here, but I think it is worth some attention from the Committee. For a useful discussion, with citations, see *In re Charge of Judicial Misconduct*, No. 06-9056-jm (2nd Cir. Judicial Council Dec. 14, 2007) (Jacobs, C.J.), <http://www.ca2.uscourts.gov/Docs/CE/06-9056-jm.pdf>.

information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge *may* conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed.” (Emphasis added.)

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 or disability. It is important to emphasize that we are not dealing here with the standard for identifying a 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].”

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. (For example, the chief judge might informally ask the district chief judge to look into the matter.) 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.

In offering this suggestion, I do not minimize the value of informal measures, particularly when the allegations point to disability rather than misconduct. This point was made by Chief Judge Browning in 1979 when the House Judiciary Committee was considering the legislation that ultimately became the 1980 Act, and it remains valid today. But informal measures require that someone take the initiative, and under the Act that responsibility falls to the circuit chief judge.

B. Judicial-Council Authority to Sanction Abusive Complainants

Rule 10(a) provides that a complainant who has “abused the complaint procedure” (for example, by filing repetitive or frivolous complaints) may be restricted or even prohibited from filing further complaints.⁴⁶ In at least three instances, however, the Judicial Council of the Ninth Circuit has gone further than restricting the right to file. On two occasions, the council issued a “public

⁴⁶ Before restricting the right to file, the circuit council must give the complainant an “opportunity to show cause” why the limitation should not be imposed.

reprimand” of a lawyer complainant.⁴⁷ These reprimands were published in West’s Federal Reporter. In another case, the council imposed a fine of \$1,000 on a non-lawyer complainant.⁴⁸

Some abuses of the complaint process may perhaps be so egregious that sanctions more severe than filing restrictions are warranted. If that is the view of the Conduct Committee and the Judicial Conference, the Rules should be amended to provide explicit authorization for such sanctions. I also suggest that when a judicial council imposes sanctions that go beyond a filing restriction, the complainant should have a right of review by the Conduct Committee. This added level of scrutiny – by a group of judges outside the circuit of the accused judge – will provide some assurance that the sanctions are not excessive and were imposed through fair procedures.

On the other hand, if the Conduct Committee and the Judicial Conference believe that the sanctions now specified in Rule 10(a) are sufficient, the Rule should be amended to make clear that no other sanctions may be imposed on abusive complainants.

I incline towards this latter view. In part, this is because it is not clear that circuit councils have *statutory* authority to impose sanctions such as a monetary fine.⁴⁹ The Ninth Circuit Judicial Council, in the orders mentioned above, did not cite any statutory authority.⁵⁰ Section 332 authorizes circuit councils to make “all necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuit,” but the statute goes on to say that “[a]ll *judicial officers and employees of the circuit*” must “promptly carry into effect” the council’s orders; there is no mention of orders directed to anyone else. Federal *courts* have “inherent powers,” including the power to impose sanctions, but judicial councils are not “courts.”⁵¹ In the absence of clear statutory authority, it would

⁴⁷ See *In re Complaint of Judicial Misconduct*, 550 F.3d 769 (9th Cir. Jud. Council 2008); *In re Complaint of Judicial Misconduct*, 623 F.3d 1101, 1102-03 (9th Cir. Jud. Council 2010).

⁴⁸ *In re Complaint of Judicial Misconduct*, 601 F.3d 1005 (9th Cir. Jud. Council 2010).

⁴⁹ I am indebted to Russell Wheeler for calling this point to my attention.

⁵⁰ In the “order to show cause” that preceded the levy of the fine, Chief Judge Kozinski cited one Ninth Circuit Judicial Council order, but that order imposed only a pre-filing restriction. *In re Complaint of Judicial Misconduct*, 579 F.3d 1062, 1065 (9th Cir. Judicial Council 2009).

⁵¹ See *Chambers v. Nasco, Inc.*, 501 U.S. 32, 42-51 (1991) (referring repeatedly to “courts” and “Courts of justice”).

be preferable to amend Rule 10 to make clear that the sanctions now listed are the only ones that may be imposed.

C. Chief Judge's Obligation to Appoint a Special Committee

If there is any single defect that has marred the judiciary's record in administering the 1980 Act, it is the failure of chief judges to appoint special committees in the face of genuine disputes over facts or their interpretation. Both Congress and the judiciary have taken steps to address this problem. The 2002 revision of the Act added a provision, drawn from the Illustrative Rules, stating: "The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." The 2008 Rules added a provision, already discussed, that authorizes limited review by the Conduct Committee when the circuit council affirms a chief judge's order dismissing a complaint or concluding the proceeding rather than appointing a special committee.⁵²

The July 23 draft adds some language by way of emphasis to Rule 11(b), and that is a step in the right direction. But the draft does not otherwise seek to clarify or delineate the limitations on the chief judge's authority to dismiss a complaint or conclude a proceeding. I think more is needed. For example, 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 – or evidence about – the matter.⁵³ In addition, the Rule itself – not simply the commentary – should remind the chief judge that even if the facts are undisputed, a special committee is required as long as there are "reasonably disputed issues as to whether [those facts] constitute misconduct or disability."

I have discussed this point in greater detail elsewhere.⁵⁴ Here I will add that the Committee's experience in carrying out its oversight role over the last few years may help the Committee to formulate other directives that would further define the "limited inquiry" contemplated by Chapter 16. For example, in 2012 the Committee suggested to the chief judge of the Tenth Circuit that she reopen

⁵² See *supra* Part II-B.

⁵³ 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." 2008 Rules, *supra* note 16, at 15 (cmt). But the point is important enough that it should be part of the Rule itself.

⁵⁴ See Hellman, *Misconduct Rules*, *supra* note 2, at 351-55.

a complaint alleging disability on the part of a judge.⁵⁵ What was there about the record of the initial proceeding that alerted the Committee to the desirability of additional investigation?

D. Burden of Proof in Judicial-Council Factfinding

In a decision made public this month, the Judicial Council of the District of Columbia Circuit noted that neither the 1980 Act nor the 2008 Rules “expressly indicates what burden of proof a judicial council should apply in its factfinding in a judicial misconduct proceeding.”⁵⁶ The Council found one provision in the Rules suggesting indirectly that “the standard must at least be preponderance of the evidence.”⁵⁷ But the opinion pointed out that in the “analogous context of attorney disciplinary proceedings,” most jurisdictions require that misconduct be established “by clear and convincing evidence.” The Council found no need to choose between the two standards, because the disposition would be the same under either one. But sooner or later a case will arise where the burden of proof does make a difference.

The answer is not obvious. Although the D.C. Circuit Council looked for guidance in rules governing *attorney* disciplinary proceedings, it did not consider what would seem to be a closer analogy: judicial disciplinary proceedings in the states. Unfortunately, no clear answer can be found there either. As the leading treatise comments, “many courts base their decisions on whether or not the proceeding is of a criminal nature.”⁵⁸ That is a rather abstract way of approaching the problem.

Policy arguments can be made on both sides. On the one hand, a finding of misconduct is a serious stain on a judge’s reputation.⁵⁹ One can argue that a

⁵⁵ See *In Re Complaint Under the Judicial Conduct and Disability Act*, No. 10-10-90056 (10th Cir. Judicial Council Jan. 15, 2014).

⁵⁶ *In re Charges of Judicial Misconduct*, No. DC-13-90021 at 9 (D.C. Cir. Judicial Council Aug. 12, 2014) (Special Committee report).

⁵⁷ The Council cited Rule 20(b)(1)(A)(iii), which states that a judicial council may dismiss a complaint because “the facts on which the complaint is based have not been *established*.” (Emphasis added by the council.)

⁵⁸ Geyh et al., *Judicial Conduct and Ethics* § 12.08 (5th ed. 2013).

⁵⁹ I vividly remember that when the House Judiciary Committee held a hearing to consider the possible impeachment of Judge Manuel Real, Judge Real proudly told the Committee, “I have never been sanctioned for any type of judicial misconduct.” He could not say that today. See *In re Committee on Judicial Conduct and Disability*, 517 F.3d 563 (U.S. Jud. Conf. 2008).

judge should not be stigmatized in that way on the basis of a mere preponderance of the evidence. On the other hand, it might also be troubling to see a judicial council saying that even if it is more likely than not that a judge engaged in misconduct, the complaint will be dismissed because the evidence is not clear and convincing.

At least one judicial council, without discussing the burden of proof, has dismissed a complaint upon finding that the allegations “were not supported by clear and convincing evidence.”⁶⁰ Now that the D.C. Circuit Council has flagged the issue publicly, I think the Committee should include it on its agenda for review of the Rules.

The D.C. Circuit Council decision also illustrates why it is a good idea for the Conduct Committee to make available, as Rule 24(b) contemplates, a compilation of “illustrative orders” that will demonstrate “how complaints are addressed under the Act.” Even if the Conduct Committee adopts a rule on burden of proof (and certainly until it does), councils will benefit from a readily available assemblage of orders of other circuits that develop and apply burden of proof standards.⁶¹

E. Judicial-Council Authority to Conclude a Proceeding

Rule 20(b)(1) lists the actions that a judicial council may take after considering the report of a special committee. Among other possibilities, the judicial council may “conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.” The July 23 draft adds new language – Rule 20 (b)(3) – whose import is to preclude the council from concluding the proceeding after “it has issued a final decision on the merits” following the appointment of a special committee.

I assume that the purpose of this new language is to codify the interpretation of current law that the Conduct Committee applied in its ruling on the complaint against District Judge Richard Cebull.⁶² But even assuming the

⁶⁰ In re Complaint of Judicial Misconduct, No. 93-6-372-14 (6th Cir. Judicial Council Nov. 10, 1993) (on file with the author).

⁶¹ For discussion of the compilation described in Rule 24(b), see *infra* Part IV-G.

⁶² For that reason, I do not treat the language (or the amendment to Rule 24(a) discussed immediately below) as a change of policy. See In re Complaint of Judicial Misconduct, 751 F.3d 611, 617 (U.S. Jud. Conf. Comm. on Judicial Conduct & Disability 2014).

soundness of that ruling, I do not think it is a good idea to impose an absolute prohibition against concluding a proceeding after the circuit council has issued a final decision on the merits.

Consider this hypothetical. The circuit chief judge receives a private communication alleging that District Judge Smith is behaving erratically and that this may be the consequence of medication the judge is taking for a chronic pain condition. The chief judge identifies a complaint and appoints a special committee, which finds that Judge Smith is indeed impaired in the performance of his judicial duties by reason of the medication. The chief judge urges Judge Smith to accept voluntary retirement under 28 U.S.C. § 354(a)(2)(B)(ii), but Judge Smith insists that his condition is only temporary. Reluctantly, the circuit council issues an order certifying disability under § 354(a)(2)(B)(i). But the order is not made public, because Judge Smith can seek review. Two weeks later – before the time for appeal has passed – Judge Smith changes his mind and accepts voluntary retirement.

I think that in that situation the circuit council should be able to vacate its order, conclude the proceeding, and allow Judge Smith a quiet exit. The commentary to Rule 20 can make clear that “intervening events” that justify concluding a proceeding will *ordinarily* involve events that occur before the circuit council issues its order, but the rule should not be absolute. I therefore suggest that the proposed new paragraph should be rewritten along the following lines:

~~A~~ ~~Unless it has issued a final decision on the merits,~~ a judicial council may, at any time after the appointment of a special committee but before a petition for review of the council’s decision has been filed or the time for filing a petition has elapsed, conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.⁶³

Even with this Rule change, however, Judge Smith will still not have a quiet exit if the initial order certifying disability must be made public after the conclusion of review, with the judge’s name disclosed. That question is addressed by a separate amendment in the July 23 draft. I now turn to that amendment.

⁶³ Events that occur after a petition has been filed fall within the domain of the Conduct Committee. See *infra* Part IV-F.

F. Disclosure of Vacated or Modified Orders

The July 23 draft includes another amendment that appears to codify the Conduct Committee’s interpretation of existing law in the Cebull matter. Currently, Rule 24(a) provides that when final action has been taken on a complaint, “all orders entered by the chief judge and judicial council ... must be made public.” The July 23 draft would amend the Rule to require that when an order has been *vacated or modified*, that order must be made public “*as originally issued.*”

As with the amendment dealing with judicial-council authority to conclude a proceeding, I think that the absolute rule proposed by the Committee goes too far. The July 23 draft itself exempts two kinds of orders from the generally applicable disclosure requirement: chief-judge orders identifying a complaint and orders appointing a special committee. These exemptions can readily be justified on the ground that such orders are interlocutory; they are intermediate steps in a continuing process.⁶⁴ Orders that have been vacated or modified may also be interlocutory, and when they are, they too should be excluded from the disclosure requirement.

That said, I think that the proposed amendments present difficult questions of policy and of drafting. Both require attention.

1. Policy Considerations

In my view, until final action has been taken on a complaint, circuit councils (and indeed the Conduct Committee itself) should have leeway to adjust disclosure obligations in light of changing circumstances. Thus, in the hypothetical Smith matter discussed above, the circuit council should be able to replace the order certifying disability with an order concluding the proceeding based on voluntary retirement, without having to publish the earlier order. And the replacement order would not identify Judge Smith.⁶⁵

The proposed amendment to Rule 24 would deny the council that flexibility. In some instances, the amendment would also limit the discretion of the Conduct Committee itself. For example, the Committee might want to replace a public

⁶⁴ Even so, disclosure will be warranted if the complaint involves conduct that has become the subject of a public report. See *supra* Part III-B; *infra* Part IV-F-2.

⁶⁵ Nothing in the statute forecloses this approach. Section 360(b) requires the public release of written orders that “implement any action under section 354 (a)(1)(C).” If the revised order modifies the disposition, the action contemplated by the earlier version is no longer being implemented.

reprimand of a judge with a private reprimand. But that option would be effectively foreclosed if the circuit council order with the public reprimand had to be made public “as initially issued.” Similarly, if the Rules are amended to provide for Conduct Committee review when a judicial council orders a public reprimand of a lawyer who has abused the complaint process, the review could not serve its full purpose if the order as originally issued had to be made public. The Conduct Committee might overturn the reprimand, but the public availability of the council order would cause some injury to the lawyer’s reputation.⁶⁶

The kind of flexibility I am suggesting is most obviously desirable when the council is dealing with a complaint that has not come to public attention at all. But it could also be helpful in high-visibility matters like the one involving Judge Cebull. I can understand why the Conduct Committee was troubled by the Ninth Circuit Judicial Council’s pervasive sanitizing of its initial (March 15, 2013) order. But in other situations it may be appropriate to allow small modifications of the council’s original text. For example, a judge who has engaged in misconduct may be willing to retire if the council’s order is revised to omit a few sentences or phrases that the judge especially does not want publicized. As long as the published order identifies the judge and retains the substance of the findings, the council cannot credibly be accused of giving in to “institutional favoritism.” And if the consequence is that a judge who has engaged in serious misconduct can be removed from the bench without impeachment, the public interest is fully served.⁶⁷

2. *Drafting Considerations*

If the Committee agrees with this approach, the next question is how to incorporate it into Rule 24(a). Preliminarily, there is one ambiguity in that Rule that deserves attention apart from the issue addressed by the proposed amendment. The current language implies that *no* order is to be made public until “final action has been taken on a complaint and it is no longer subject to review.”⁶⁸ But chief-judge orders dismissing a complaint or concluding a proceeding are routinely made public when issued, even though they are subject to review by the judicial council under 28 U.S.C. § 352(c) and Rule 18(a). As far

⁶⁶ See supra Part IV-B for discussion of sanctioning abusive complainants.

⁶⁷ Again, section 360(b) does not stand in the way. Given the plenary authority of the Judicial Conference, it is reasonable to treat judicial-council orders as provisional until the time for review by the Conference’s Conduct Committee has expired.

⁶⁸ The July 23 draft would specify “review *as of right*.”

as I am aware, this practice has not given rise to any problems, and I would codify it with a new sentence in Rule 24(a) along these lines: “Chief-judge orders dismissing a complaint or concluding a proceeding and judicial-council decisions affirming such orders must be made public when issued.”⁶⁹

That brings us to the focus of the proposed amendment – orders issued by circuit councils in cases where a special committee has been appointed. The proposed amendment addresses three questions: (a) *When* must orders be made public? (b) *Which* orders must be made public? (c) If an order has been modified before it is made public, must the text as initially issued also be made public?

There does not seem to be any dispute over the first question: the orders must be made public only “[w]hen final action has been taken on [the] complaint and it is no longer subject to review.” This means that if a petition for review is filed, the circuit council order will not be made public until the Conduct Committee has issued its decision.

That is the practice that has generally been followed. For example, the Second Circuit Judicial Council’s order in the transferred proceeding involving Sixth Circuit Judge Boyce Martin was issued on June 20, 2013, but it was not made public until January 17, 2014, when the Conduct Committee issued its decision rejecting Judge Martin’s petition for review.⁷⁰

If no petition for review is filed, the import of the Rule is that the council decision should be made public when the complaint “is no longer *subject* to review.” This means that the council would withhold disclosure until the deadline for filing a petition for review has passed – 63 days under the current rule, 42 days under the proposed amendment. Based on available materials, I cannot ascertain whether this practice has been followed. I suggest that when a judicial council issues an order in a special-committee case, the order should specify the date on which the order will be made public if no petition is filed.⁷¹

⁶⁹ A conforming change would be required in the commentary (page 39, lines 30-32 of the July 23 draft).

⁷⁰ An exception is the order issued by the D.C. Circuit Council in the transferred proceeding involving Fifth Circuit Judge Edith Jones. Because the complainants made the order available to the public when they filed a petition for review, the D.C. Circuit Council did so also.

⁷¹ The Ninth Circuit Judicial Council followed this practice in its Cebull orders, but the Second Circuit did not when it issued its order involving Judge Martin.

Which orders must be made public? Rule 24(a) now says: “*all* orders entered by the chief judge and judicial council.”⁷² (Emphasis added.) The July 23 draft would amend the Rule to specify two exceptions: orders under Rule 5 (identifying a complaint) and orders under Rule 11(f) (appointing a special committee). I agree with those exceptions for the general run of cases; however, for reasons given earlier, those orders *should* be made public when the complaint involves conduct that has become the subject of a public report.⁷³

The “policy” discussion above suggests another exception to the general rule. Judicial-council orders that have been vacated should *not* be made public unless the circuit council or the Conduct Committee determines that disclosure is necessary “to maintain public confidence in the federal judiciary’s ability to redress misconduct or disability.”⁷⁴ Thus, in the Smith hypothetical discussed in the preceding section, the initial circuit council order certifying disability would not be made public – only the final order concluding the proceeding based on voluntary retirement.⁷⁵ On the other hand, in the Cebull matter, the initial (March 15, 2013) order *would* be made public because only that order contains sufficient detail to show that the council had faithfully carried out its obligation to investigate allegations of misconduct that threatened to impair public confidence in the courts.⁷⁶

The final question raised by the proposed amendments is whether judicial-council orders subject to the disclosure requirement must be made public as initially issued or in the form finally adopted by the council. In accordance with the discussion above, I think that council orders should be made public in the form finally adopted by the council, except when such publication would be

⁷² Rule 24(a) includes a series of “exceptions,” but these exceptions involve the identity of the judge, the identity of the complainant, and the text of a private reprimand, not the orders themselves.

⁷³ See *supra* Part III-B.

⁷⁴ This language is, of course, taken from current Rule 23(a).

⁷⁵ I am assuming that no public disclosure of the proceedings has occurred. If Judge Smith’s disability is a matter of public knowledge, Judge Smith will not have a quiet exit in any event. In that situation, there is no great harm in making the initial order public, but perhaps no great benefit either.

⁷⁶ In the alternative, the circuit council might have modified only the remedial section of the order while retaining the factual findings and legal conclusions. Disclosure of the order as modified would then fully serve the interest in “maintain[ing] public confidence in the federal judiciary’s ability to redress misconduct or disability.”

inconsistent with the Conduct Committee’s disposition of the complaint. For example, if the Conduct Committee replaces a public reprimand with a private reprimand, the council order (if published at all) would be redacted so that judge’s identity would not be disclosed.

Thus far I have not mentioned the requirement in Rule 24(a) that when orders are made public in accordance with the Rule, “any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council” must also be made public. This requirement is retained in slightly different form in the July 23 draft, but neither version makes any mention of reports by special committees. The reference to “supporting memoranda” could be read to include such reports; however, the practice has generally been *not* to make those reports public.

I think the Rule should be amended to make clear that special-committee reports need not be made public. These reports may contain sensitive facts, identification of witnesses and what they said, etc., and the judicial council should have discretion to summarize the contents of a report without making the document itself public.

One scenario remains to be considered. Suppose that in the Smith hypothetical discussed above, Judge Smith – unwilling to accept voluntary retirement – petitions the Conduct Committee for review of the order certifying disability. Before the Committee has completed its review, Judge Smith changes his mind and agrees to take voluntary retirement. I think the Committee should be able to allow the retirement and conclude the proceeding without making public the circuit council order.

It would be possible to add a specific provision to the Rules to deal with this situation, but I do not think it is necessary. Rather, I suggest adding language to Rule 21 to make clear that the Conduct Committee, on review of a judicial-council decision, can take any action that the council could have taken.

To summarize, I suggest that Rule 24(a) should be rewritten to incorporate the following precepts:

(1) Chief-judge orders dismissing a complaint or concluding a proceeding and judicial-council decisions affirming such orders should be made public when issued.

(2) Chief-judge orders identifying a complaint or appointing a special committee should not be made public unless the complaint involves conduct

that has become the subject of a public report; in that situation, the orders should be made public when issued.

(3) Subject to the exceptions noted below, orders issued by a judicial council following the appointment of a special committee should be made public when final action has been taken on the complaint and the complaint is no longer subject to review.

(4) Judicial-council orders that have been vacated should not be made public unless the circuit council or the Conduct Committee determines that disclosure is necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability.

(5) Judicial-council orders that have been modified should be made public in the form finally adopted by the council, except when such publication would be inconsistent with the Conduct Committee's disposition of the complaint.

(6) When orders are made public under this Rule, any supporting memoranda, dissenting opinions, and council members' separate statements should also be made public. Special-committee reports may be made public at the discretion of the judicial council.

If Rule 24(a) is rewritten along these lines, items (1) through (5) in current Rule 24(a) could be placed in subsection (b), with current (b) through (d) redesignated as (c) through (e). The revised Rule could also incorporate Russell Wheeler's suggestion, noted in Part III-B, that when a judicial-branch body issues an order that reasonable observers might regard as related to a complaint of misconduct or disability, the order should specify who is taking action and what the authority for that action is.

G. Developing a Body of Interpretive Precedent

Two decades ago, the National Commission on Judicial Discipline and Removal, chaired by former Rep. Robert W. Kastenmeier, recommended that the judiciary develop "a body of interpretative precedents" that would guide judges in administering the Act and also enhance "judicial and public education about judicial discipline and judicial ethics."⁷⁷ The Breyer Committee renewed and elaborated upon this recommendation.⁷⁸ But no such compilation has been

⁷⁷ National Commission Report, *supra* note 9, at 352.

⁷⁸ Breyer Committee Report, *supra* note 12, at 216-17.

made available on the federal judiciary’s public website. I believe that chief judges, circuit councils, and the Conduct Committee can all play a role in developing the “body of interpretive precedents” that has long been lacking.

First, as already discussed, Rule 24(b) should be revised to require chief judges to identify and separately post orders that appear to have precedential value.⁷⁹

But circuit-by-circuit publication is not enough. Rule 24(b) recognizes this, stating that the Conduct Committee “will make available on the Federal Judiciary’s website ... selected illustrative orders, appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.” But the only orders published on the website are seven opinions of the Conduct Committee.⁸⁰

The Breyer Committee recommended that illustrative orders should be “published in broad categories keyed to the Act’s provisions, and ... with brief headnotes.” I would add that the categories should also be keyed to provisions of the Code of Conduct for United States Judges. Finally, it would be useful to include an introductory statement making clear that the orders are posted on the Judiciary website as a matter of historical record and that they do not necessarily reflect the view of the Judicial Conference or the Conduct Committee on how the complaints should have been handled.

H. Disqualification of Judges from Chapter 16 Proceedings: the General Rule

As discussed above in Parts II-D and II-E, the July 23 draft proposes amendments to some of the specific disqualification provisions in Rule 25. But it does not change the general rule stated in Rule 25(a): “Any judge is disqualified from participating in any proceeding under these Rules if the judge, *in his or her discretion*, concludes that circumstances warrant disqualification.” (Emphasis added.)

This subjective, discretionary standard for misconduct proceedings contrasts sharply with the standard that Congress enacted in 28 U.S.C. § 455(a) for “litigation”: a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” The courts have held that § 455(a)

⁷⁹ See *supra* Part II-C.

⁸⁰ I am aware that the Committee is developing a compilation for posting on the Federal Judiciary website. I applaud the Committee for undertaking the task and look forward to seeing the result.

“adopts the objective standard of a reasonable observer” who is “fully informed of the underlying facts.”⁸¹ In addition, § 455(b) specifies several particular circumstances in which disqualification is required (e.g. financial interest) and which are non-waivable.

Given the commands of § 455, it seems anomalous to say that a judge, when deciding whether to participate in considering a misconduct complaint against a fellow judge, should look only to “his or her discretion.” One would think that, if anything, the bar to participation would be higher than it is in the context of litigation. This is so for two reasons. First, as the Breyer Committee recognized, the Act’s system of self-regulation necessarily raises concerns about “guild favoritism.”⁸² Judges should therefore be especially vigilant to avoid the appearance of conflict. Second, a refusal to recuse in the context of litigation is generally subject to appellate review, while a refusal to recuse in a misconduct proceeding is generally not reviewable at all.

I do not think it is necessary to elevate the bar *above* that of § 455(a), but I do believe that the standard of § 455(a) should be applied in misconduct proceedings.⁸³ I therefore suggest that the sentence quoted above from Rule 25 should be replaced with language drawn from § 455(a).⁸⁴

I. Availability of Rules and Forms

The Breyer Committee recommended that every federal court should display the complaint form and the governing rules “prominently” on its website – “that is, *with a link on the homepage*.”⁸⁵ (Emphasis added.) But when I canvassed district court websites in mid-June 2011, I found that more than one-third of the courts had failed to take this modest step toward greater visibility. In his statement to this Committee, Russell Wheeler reports on a comprehensive

⁸¹ United States v. Bayless, 201 F.3d 116, 126 (2nd Cir. 2000).

⁸² Breyer Committee Report, *supra* note 12, at 119.

⁸³ In the past, the Conduct Committee has taken the position that § 455 is “not a template for recusals in misconduct proceedings” because the latter “are administrative, and not judicial, in nature.” *In re Complaint of Judicial Misconduct*, 591 F.3d 638, 647 (U.S. Jud. Conf. Comm. on Judicial Conduct & Disability 2009). I do not think the “administrative” characterization responds to the points made above in the text.

⁸⁴ Section (e) of § 455 allows waiver by “the parties” of disqualification otherwise required under section (a). I see no need for a waiver provision here.

⁸⁵ Breyer Committee Report, *supra* note 12, at 218.

canvass of all federal court websites that he carried out this month. He found that 45% of all courts did not make the material available on the homepage.

Rule 28 now requires only that each court make the Rules and the complaint form available “on the court’s [own] website” or provide an Internet link to the court of appeals website. The July 25 draft adds the option of providing a link to the Federal Judiciary website. But neither version of the Rule incorporates the Breyer Committee recommendation that the link should be displayed on the court’s homepage.

Based on his research, Mr. Wheeler suggests that Rule 28 should be amended to require all federal courts to follow the Breyer Committee’s preferred approach, with the further requirement that the materials should be *prominently* available on the homepage. (In the alternative, there should be a *prominent link* on the homepage to the materials on the court of appeals website.) I agree with this suggestion.

But there is a further problem: courts revamp their websites from time to time, and a directive contained in the Rules on Judicial-Conduct and Judicial-Disability Proceedings may be lost in the welter of instructions that will be given to the website developer. The Conduct Committee should ask its staff to check all court websites once a year so that the Committee can send out reminders to the courts that are not in compliance.

J. Making the Rules More User-Friendly

In their current form, the Rules for Judicial-Conduct and Judicial-Disability Proceedings are anything but user-friendly. Key concepts are buried within lengthy multi-part Rules. Commentaries can extend over several single-spaced pages, without subdivisions or internal headings. Cross-references sometimes resemble those in the Internal Revenue Code.

I suggest that, in the next phase of its review, the Committee should reorganize and restyle the Rules to make them easier to use by judges, journalists, and citizens generally. This is not the place to go into detail, but, at a minimum, lengthy multi-part rules (including Rule 3, Rule 11, and Rule 20) should be broken up, so that key elements are defined in separate rules. This will also facilitate cross-references. Lengthy commentaries should be divided into sections, each with a descriptive heading. (The Illustrative Rules offer a model.)

An example may be useful. The final sentence of current Rule 11(a) would become something like: “After reviewing the complaint, the chief judge must

determine whether it should be (1) dismissed under Rule 12, (2) concluded under Rule 13, or (3) referred to a special committee under Rule 14.” Separate rules – each with its own commentary – would delineate the grounds for dismissing a complaint and for concluding a proceeding. This reorganization would also help to emphasize and clarify the distinction between the two forms of disposition. Just this month, a judicial council released an order *dismissing* a complaint on the basis of a “voluntary ... apology” – but citing Rule 11(d)(2), which specifies the circumstances under which a chief judge (or circuit council) may conclude a proceeding.⁸⁶

A reorganization could also highlight the distinction between a dismissal under 28 U.S.C. § 352(b)(1)(A), which is analogous to a dismissal for failure to state a claim on which relief can be granted, and a dismissal under §352(b)(1)(B), which is analogous to the summary judgment that the commentary invokes.

⁸⁶ See *In re Charges of Judicial Misconduct*, No. DC-13-90021 at 14 (D.C. Cir. Judicial Council Aug. 12, 2014) (Special Committee report).