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Comments on Proposed Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings

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Comments on Proposed Amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings

Arthur D. Hellman

Abstract

In late 2017, prominent Ninth Circuit Judge Alex Kozinski was accused of engaging in sexual harassment and other misconduct over a long period during his tenure as a judge. Judge Kozinski resigned, but the controversy continued. The Director of the Administrative Office of the United States Courts, responding to a request from Chief Justice Roberts, formed a Working Group to recommend measures “to ensure an exemplary workplace for every judge and every court employee.” The Working Group issued its report in June 2018.

In September 2018, the Committee on Judicial Conduct and Disability (Conduct Committee) of the Judicial Conference of the United States – the administrative policy-making body of the federal judiciary – issued a draft of proposed amendments to the rules for handling complaints of misconduct or disability on the part of federal judges. Virtually all of the substantive amendments in the draft implement recommendations of the Working Group.

The Conduct Committee held a hearing on the proposed amendments in October 2018. I testified at the hearing and submitted this statement to accompany my oral remarks. The statement is in five parts. Part I suggests some general principles to be followed in drafting the Rules and Commentaries, with emphasis on the forward-looking perspective Congress adopted in the 1980 Act. Part II discusses the definitions of cognizable misconduct and disability contained in the new Article II. Part III addresses issues of confidentiality and transparency raised by various amendments to Rules 23 and 24. Part IV comments on some of the other proposed amendments in the September 2018 draft.

Part V offers some additional suggestions for the Committee’s consideration, including one specifically dealing with workplace conduct. The idea is that each circuit would establish an interactive Web page or portal that would permit court employees to file reports of possible workplace misconduct by a judge. The reports would be similar in form and content to a complaint, but they would not be docketed as complaints. At the same time, because the reports would go to the chief judge, there would be no duplication of, or interference with, the procedures established by Congress for handling formal complaints.

The article concludes by emphasizing that the 1980 Act created a “*citizen* complaint procedure, and that the system should operate in a way that promotes confidence in the judiciary among all citizens as well as “ensur[ing] an exemplary workplace.”

After the hearing, I submitted a supplementary statement elaborating on the Web portal proposal and responding to comments by other witnesses. That supplementary statement will be posted separately on SSRN.

**Hearing of the
Committee on Judicial Conduct and Disability
Committee on Codes of Conduct**

**Proposed Amendments to the
Rules for Judicial-Conduct and Judicial-Disability Proceedings
(September 2018 Draft)**

**Washington, D.C.
October 30, 2018**

**Statement of
Arthur D. Hellman**

*Professor of Law Emeritus
University of Pittsburgh School of Law*

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Statement of
Arthur D. Hellman

Judge Scirica and Members of the Committee on Judicial Conduct and Disability:

Thank you for inviting me to express my views at this hearing on the September 2018 Draft of proposed amendments to the Rules for Judicial-Conduct and Judicial-Disability Proceedings.¹ I support most of the proposed amendments, with some caveats and some suggestions for modification. I also call attention to other aspects of the Rules that may be in need of revision, including those defining the central and historic role of the circuit chief judge in assuring adherence to ethical norms by all judges within the circuit.²

Introduction

Many of the amendments in the Draft – including virtually all of the substantive amendments – implement recommendations made by the Federal Judiciary Workplace Conduct Working Group in its June 2018 Report. In that report the Working Group also recommended that the Judiciary “consider possible mechanisms for *improving the transparency of [the process for considering complaints under the 1980 Act].*”³ I believe that a great deal more could be done to “improve[e] the transparency of [the] process,” and much of this statement will be devoted to suggestions for achieving that end.

The statement is in five parts. Part I suggests some general principles to be followed in drafting the Rules and Commentaries, with emphasis on the forward-looking perspective Congress adopted in the 1980 Act. Part II discusses the definitions of cognizable misconduct and disability contained in the new Article II. Part III addresses issues of confidentiality and transparency raised by various amendments to Rules 23 and 24. Part IV comments on some of the other proposed amendments in the September 2018 draft. Part V offers some

¹ Judicial Conference of the United States, Guide to Judiciary Policy (Draft – 9.13.2018), http://www.uscourts.gov/sites/default/files/jcd_rules_redline_-_proposed_changes_-_9.13.18_0.pdf [hereinafter September 2018 Draft or Draft]. References in the text to page and line numbers are to this draft. The hearing also examines proposed amendments to the Code of Conduct for United States Judges. This statement addresses proposed amendments to the Rules. I expect to submit a separate comment on the Code.

² See *infra* Part V-A.

³ Report of the Federal Judiciary Workplace Conduct Working Group to the Judicial Conference of the United States (June 1, 2018) at 31 [hereinafter Working Group Report].

additional suggestions for the Committee’s consideration, including one specifically dealing with workplace conduct. A brief Conclusion emphasizes that the 1980 Act created a “*citizen* complaint procedure,”⁴ and that the system should operate in a way that promotes confidence in the judiciary among all citizens as well as “ensur[ing] an exemplary workplace.”⁵

First, a few words by way of personal background. I am a professor emeritus 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 40 years. My writings include two articles of particular relevance to today’s hearing. One is an overview of the regulation of federal judicial ethics.⁶ The other is an analysis of the first set of nationally binding rules for judicial misconduct proceedings, published shortly after the rules were adopted by the judiciary.⁷

In addition to my academic writing, I have participated in the development and implementation of policy on various aspects of judicial ethics. In 2001-2002, I worked with the House Judiciary Committee in drafting the bill that became the Judicial Improvements Act of 2002 – the law that put the 1980 Act in its current statutory form. In 2009, I testified at the hearing that preceded the impeachment of District Judge Samuel B. Kent, and the House Judiciary Committee, in recommending impeachment, relied heavily on my legal analysis.

Three of my hearing statements bear most directly on the subject of today’s hearing. In September 2007, I testified at a hearing of this Committee on the first public draft of the 2008 Rules.⁸ In April 2013, I testified at a hearing of the House Judiciary Committee on “An Examination of the Judicial Conduct and Disability System.” My written statement suggested some amendments to Title 28 of the

⁴ See *infra* note 26 and accompanying text.

⁵ Working Group Report, *supra* note 3, at 1 (footnote omitted).

⁶ 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.

⁷ 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.

⁸ Much of the substance of that statement can be found in Hellman, *Misconduct Rules*, *supra* note 7.

United States Code.⁹ The substance of several of those statutory proposals was adopted through rulemaking in the amendments to the Rules promulgated by the Judicial Conference in 2015. I also testified before this Committee in 2014 when those amendments were pending.¹⁰

In my 2014 statement to this Committee, I traced the evolution of the system now in place for handling complaints against judges, with particular focus on the legislation, rules, and reports that preceded the adoption of the 2008 Rules.¹¹ I will not repeat that account here, but will refer the interested reader to the earlier statement.

I. Writing the Rules: General Principles

Before turning to the particular issues raised by the proposed amendments, it will be useful to address some of the general principles that should guide this Committee in writing the Rules.

At the 2007 hearing on the first public draft of the Rules adopted in 2008, the then-Chair of this Committee, Judge Ralph K. Winter, posed a basic question: For whom should the Rules be written? Should they be drafted primarily for use by the judges who administer the complaint process, or should they be written in a way that would make them user-friendly for complainants and other members of the public? I suggest that the answer, in essence, is “Both.” That answer has important implications for the way in which the Rules are organized and drafted.

A. *Identifying the Audience for the Rules*

Judge Winter seemed to assume that identifying the primary audience for the Rules is an “either-or” question. I do not think the matter need be viewed that way.

⁹ 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*].

¹⁰ The written statement is available on my SSRN author page. See Arthur D. Hellman, *Proposed Amendments to the Federal Judicial Misconduct Rules: Comments and Suggestions*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2554596 [hereinafter Hellman, *Proposed Amendments (2014)*].

¹¹ See *id.* at 2-7.

First, the needs of judges and the needs of members of the public are not all that different. Both will benefit if the Rules provide lucid and easily understandable descriptions of what it is that chief judges, circuit councils, and other actors are required or permitted to do. Both will benefit if, as suggested below, the Rules provide more context for, and background about, the system of which the Rules are a part. Both will benefit if the Rules are organized in a way that makes it easier to find the provisions applicable to particular situations.

Second, it would be short-sighted to assume that the Act will be administered by a small group of judges who, after a short learning period, will be expert in navigating the Rules' many details and cross-references. Disqualifications (not to mention rotations in circuit council membership) will enlarge the pool of judges who will be carrying out Chapter 16 functions for the first and perhaps only time. The Rules should make it as easy as possible for these users to understand their responsibilities.

Third, there is yet another audience for the Rules – the judges who become the subject of non-frivolous complaints. They have an interest in being given a clear presentation of their rights and responsibilities as well as the procedures they can expect.

Finally and perhaps most important, making the Rules user-friendly for members of the public as well as for judges will help to demonstrate the judiciary's commitment to transparency – and at little if any cost.

B. Implications for Rules Drafting

If, as I believe, the Rules should be written for the public as well as for the judges who administer the Act, this broader view of the audience has important implications for the content and organization of the Rules.

1. Emphasizing the forward-looking perspective

The 1986 Illustrative Rules – prepared by three circuit chief judges, including Chief Judge James R. Browning of the Ninth Circuit, one of the architects of the 1980 Act – began with a statement of purpose:

The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges or magistrates have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties. *The law's purpose is essentially*

forward-looking and not punitive. The emphasis is on *correction of conditions* that interfere with the proper administration of justice in the courts.¹²

This paragraph was retained in the revision of the Illustrative Rules published in 2000,¹³ but when the first set of binding Rules was adopted in 2008, the paragraph disappeared. Instead, the Rules began with a definition of their scope, followed by a commentary that contained a brief history of the genesis of the Rules.¹⁴ The proposed amendments add a definition of “covered judge,” currently contained in Rule 4, but they do not restore the paragraph from the Illustrative Rules.

I suggest that the new Rules should begin with a statement of purpose similar to the one in the Illustrative Rules. Moreover, the statement should elaborate on the proposition that the purpose of the law “is essentially forward-looking and not punitive.” The proposition warrants emphasis for at least three reasons.

First, it is implicit in the language of the 1980 Act. In defining misconduct, Congress in 1980 rejected various formulations that had been used by the circuits and instead used language taken verbatim from 28 U.S.C. § 332, the statute that defines the powers of circuit judicial councils.¹⁵ Section 332, as it stood in 1980, authorized circuit councils to “make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit.”¹⁶ Misconduct is defined in § 351 as “conduct prejudicial to the effective and expeditious administration of the business of the courts.” And in cases where

¹² J. Browning, C. Seitz & C. Clark, *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability* 3 (Federal Judicial Center 1986) (emphasis added) [hereinafter 1986 Illustrative Rules].

¹³ For the 2000 version, see Administrative Office of the United States Courts, *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability* 2 (2000) [hereinafter 2000 Illustrative Rules].

¹⁴ Judicial Conference of the United States, *Rules for Judicial-Conduct and Judicial-Disability Proceedings*, 248 F.R.D. 674, 678-79 (2008) [hereinafter 2008 Rules].

¹⁵ Judge Browning, in an opinion issued in 1986 but not published until 2009, provided a detailed account of the evolution of the statutory language. See *In re Charge of Judicial Misconduct*, No. 83-8037 (9th Cir. Judicial Council Mar. 5, 1986), reprinted in *In re Complaint of Judicial Misconduct*, 570 F.3d 1144, 1145-54 (9th Cir. Judicial Council 2009) [hereinafter *Browning Misconduct Order*].

¹⁶ The 1980 Act amended this provision to refer to “the effective and expeditious administration of justice within its circuit.”

a special committee has been appointed to investigate a complaint, the remedial powers of a judicial council are limited by § 354(a)(1)(C) to “such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.” All of this language is forward-looking; none of it supports any action by a judicial council purely to punish a judge.

Second, the forward-looking perspective was emphasized in both the House and the Senate when Congress considered the legislation that became the 1980 Act. On the House floor, Rep. Carlos Moorhead, one of the sponsors of the bill, noted that the legislation was designed to deal with “isolated cases that involve judicial misconduct or disability, which do not rise to the level of an impeachable offense, yet need *redress*.”¹⁷ He continued by quoting a set of standards promulgated by the American Bar Association:

The major purpose of judicial discipline is not to punish judges, but to protect the public, preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves.

On the Senate side, Senator Dennis DeConcini – who had advocated a stronger measure previously passed by the Senate – quoted the same paragraph from the ABA standards. He too emphasized that the purpose of the legislation was “to *remedy* matters relating to a judge’s condition or conduct which *interfere* with his performance and responsibilities.”¹⁸

Third, the forward-looking perspective is particularly appropriate – perhaps even essential – in dealing with complaints against Article III judges. There is a wide consensus that the sole means of removing an Article III judge from office is the impeachment process delineated in Articles I and II of the Constitution.¹⁹ Thus, if an Article III judge has engaged in misconduct that would not be a basis for impeachment, and the judge does not resign from the bench, the judge will continue to hear and decide cases. The misconduct system should provide “redress” or “remedy,” but it should do so in a way that maximizes the likelihood that the judge will be able to serve effectively during the remainder of his or her tenure.

¹⁷ 126 Cong. Rec. 25370 (remarks of Rep. Moorhead) (emphasis added).

¹⁸ 126 Cong. Rec. 28091-02 (remarks of Sen. DeConcini) (emphasis added).

¹⁹ For brief discussion, see Arthur D. Hellman, *Impeaching a Federal Judge: Some Lessons from History*, U. of Pittsburgh Legal Studies Research Paper No. 2014-37 at 13 (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2500786

That is not only my own view; it is the view that was repeatedly put forward at the key hearings that preceded the passage of the 1980 Act. In particular, Judge Browning recounted several examples of measures taken to address judicial misconduct or disability during his 18 years as a member of the Ninth Circuit Judicial Council. He told about an “alcoholic judge” who “took the cure” and ultimately returned to the bench “under controlled conditions.” Judge Browning noted that the way in which the matter was handled “mad[e] the judge an effective judge again.”²⁰ Summarizing another episode, Judge Browning emphasized that the approach taken by the judicial council allowed the judge to “continue[] to serve until his death, doing an excellent job.”

The point was made even more explicitly by Judge Browning’s colleague, Judge J. Clifford Wallace. Judge Wallace told the House Judiciary Committee that he had been assigned to investigate a misconduct complaint against a judge. In doing so, he emphasized, his approach “was not just to find if the judge [was] wrong.” He continued: “If there were wrong, I wanted to root it out. But more importantly, I wanted to do it in the right way *to save the judge.*”²¹

That arresting phrase caught the attention of Rep. Tom Railsback, the ranking member of the subcommittee (and later a sponsor of the legislation that became the 1980 Act). He asked Judge Wallace about it. Judge Wallace stood his ground. He explained:

That is true. I will correct the situation and save the judge, not just correct the situation. If you are going out for both purposes, that doesn’t necessarily indicate that you would be any less diligent in your investigative work. But you have two responsibilities, and the second is to the institution. If you can correct the situation, as well as improve the institution, you are further ahead.²²

In recalling their experiences for the House and Senate Judiciary Committees, Judge Browning and Judge Wallace were conveying a clear message: the procedures used by the Ninth Circuit to address allegations of misconduct or disability had the effect of making it possible for judges, after intervention, to become “effective judges” once again. The two judges were urging the

²⁰ Judicial Tenure & Discipline – 1979-80: Hearing Before the Subcomm. on Courts, Civil Liberties & the Admin. Of Justice of the House Judiciary Comm., 96th Cong. 86 (1979) (testimony of Chief Judge James R. Browning) [hereinafter House Hearing 1979].

²¹ House Hearing 1979, *supra* note 20, at 104 (emphasis added).

²² *Id.* at 105.

Committee members to support legislation that would, in essence, codify the approach that the Ninth Circuit had been taking. That is what the Committee members did, and Congress adopted the bill that they sponsored.

That is not to say that Congress excluded remedies with a punitive element. On the contrary, the legislation explicitly authorized circuit councils to issue public and private reprimands for judges who have engaged in misconduct. But reprimands are permissible because they serve the other purposes listed by the ABA in the policy statement quoted on the House and Senate floor – they help to “preserve the integrity of the judicial process, maintain public confidence in the judiciary, and create a greater awareness of proper judicial behavior on the part of judges themselves.”

I do not suggest that the Rules include a detailed account of this background. But early in the document there should be at least a brief exposition of the forward-looking perspective outlined in the Illustrative Rules. This can most easily be done by preceding the text of the Rules with a Preface or Introduction containing the statement of purpose and some explanation of the general approach.

2. Reorganizing and restyling to make the Rules more user-friendly

As noted at the outset, the Federal Judiciary Workplace Conduct Working Group recommended “that the Judiciary as a whole consider possible mechanisms for improving the transparency of [the process for handling complaints under the 1980 Act].” A good place to start is with the organization and styling of the Rules that govern the process.

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. Subdivisions within Rules deal with multiple subjects in a single unbroken paragraph. (See, for example, Rule 5(a) and Rule 11(g)(3).) 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 this or (if necessary) 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. At a minimum, lengthy multi-part rules (including proposed Rule 4, 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.²³

If the only purpose of reorganization were to make the Rules easier to use, the effort would still be worthwhile, but breaking up lengthy Rules and paragraphs can also serve a substantive purpose, by clarifying distinctions that are now blurred. For example, not long ago, a judicial council released an order *dismissing* a complaint on the basis of a “voluntary ... apology” – although the apology is specified in the Rules as a ground for *concluding a proceeding*.²⁴ The council might not have made that mistake if the two forms of disposition were treated in separate Rules.

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.

Similarly, breaking up Rule 5(a) would clarify the distinction between the chief judge’s duty to *investigate a report* of misconduct or disability and the chief judge’s duty to *identify a complaint*. The standards are, and should be, different, but lumping the two together in a single paragraph makes it easy for chief judges to apply the wrong standard.²⁵

Reorganization should be accompanied by restyling. In the Introduction to the 1986 Illustrative Rules, Judge Browning and his colleagues emphasized that “the basic statutory mechanism is a *citizen* complaint procedure,” and that the Rules should serve the goal of providing “a reasonable response to *citizens* who

²³ It may also be desirable to reorganize the provisions governing review of chief-judge final orders (now Rules 18 and 19) to put them in closer proximity to the Rules defining the chief judge’s authority to dismiss complaints or conclude proceedings.

²⁴ See *In re Charges of Judicial Misconduct*, 769 F.3d 762, 769 (D.C. Cir. Judicial Council 2014) (Special Committee report). The decision correctly cited Rule 11(d)(2), which lists the circumstances under which a chief judge (or circuit council) may conclude a proceeding.

²⁵ For discussion, see *infra* Part V-A.

invoke it.”²⁶ This meant that “the complaint procedure [should] be available for citizens to use” without the help of a lawyer. Judge Browning and his colleagues therefore “made a special effort to avoid legal jargon in the rules.” This Committee should adopt a similar approach.²⁷

Judge Browning and his colleagues said that they did not seek to avoid legal jargon in the commentary, because the commentary was “addressed primarily to a legal audience.” In fact, the commentary that they wrote is quite readable. Moreover, whatever may have been the case in 1986, today the misconduct process receives attention from journalists and advocacy groups as well as complainants. Thus the Commentaries as well as the Rules should be, in the words of Judge Robert E. Keeton, “user-friendly” – “easy to read and understand . . . , and as crisp and readable as clarity permits.”²⁸

3. Explaining policy choices and changes

When Judge Browning and his colleagues published the first set of Illustrative Rules, they noted that the commentary following each Rule was included “to provide some explanation of the choices made by the committee and the reasons for them.”²⁹ In contrast, the current Rules rarely provide any explanation of policy choices.

The drafters of the Illustrative Rules recognized that many of the Rules implicate choices between competing values. The judges who administer the Act will benefit if the Commentaries candidly lay out the considerations on both sides and explain why the Committee made the choices it did. These explanations will also contribute to the transparency that the Working Group called for.

Similarly, when the Rules are amended, the Commentaries should identify substantive changes and explain why they were made. No one reading the Commentaries in the current Rules (or those in the September 2018 draft) would realize that there have been several changes in policy since the Rules were

²⁶ 1986 Illustrative Rules, *supra* note 12, at ix (emphasis added).

²⁷ In contrast to the Rules for Judicial-Conduct and Judicial-Disability Proceedings, Enabling Act Rules *are* intended primarily for use by judges and lawyers. Nevertheless, the Committee can benefit from the guidance offered by Professor Bryan A. Garner, who served as the style consultant to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference. See Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* (4th ed. 2004).

²⁸ *Id.* at i (Preface by Judge Robert E. Keeton).

²⁹ 1986 Illustrative Rules, *supra* note 12, at viii (emphasis added).

promulgated in 2008, or that those Rules reflected some changes from the Illustrative Rules. Here too, greater transparency would better serve all of the Rules’ constituencies.

II. Defining Cognizable Misconduct and Disability

The most important amendments in the September 2018 draft are those dealing with the definitions of misconduct and disability. In this part of my statement, I comment on the proposed changes and offer a few suggestions of my own. The various matters are treated in the order in which they appear in the draft Rule.

A. The Structure of Article II

In the current version of the Rules, cognizable “misconduct” and “disability” are defined in Rule 3, a lengthy compilation that is primarily composed of technical definitions. The September 2018 Draft reorganizes this material by creating a new Article II containing only the definitions of misconduct and disability.

That is a step forward, and I applaud the Committee for taking it. But it does not go far enough, because all of the material is still contained in a single lengthy Rule (now Rule 4). The preferable approach is to break up what is now Rule 4 into eight or nine separate Rules, corresponding in large part to the numbered paragraphs in Draft Rule 4(a) and the separate paragraph (b).

Reorganizing the material in this way would make it easier for members of the public as well as chief judges to identify the particular provisions that may be relevant to a particular complaint. Another benefit would be to break up the lengthy Commentary, so that the Commentary’s discussion of each particular issue would follow closely upon the Rule language dealing with that issue.

B. Relation to the Code of Conduct for United States Judges

The Commentary to the current version of the Rules includes a paragraph delineating the relationship between the definition of cognizable misconduct under the Act and the provisions of the Code of Conduct for United States Judges. The September 2018 Draft eliminates much of that discussion.³⁰

³⁰ See Draft page 14, line 36 through page 25, line 9.

For the reasons given by Russell Wheeler in his comments, I think the Committee should retain the existing language and perhaps even expand it. As Mr. Wheeler notes, there is much confusion among journalists and commentators about the relationship between the Code and the misconduct system, and the Committee should use the Commentary as an opportunity to provide clarification. It is particularly important to emphasize that the Code’s Canons are “informative,”³¹ not dispositive.

The Commentary could note that this approach finds support in the report of the National Commission on Judicial Discipline and Removal, chaired by former Congressman Robert W. Kastenmeier, the principal sponsor of the 1980 Act. The Commission recognized “the indeterminacy of the Act’s core substantive conduct standard” and the need of chief judges and circuit councils for “more concrete guidance.”³² Where was that guidance to come from? To some extent, from the Code of Conduct for United States Judges. But the Commission emphasized that “*the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the Act.*”³³ Rather, the Commission recommended, in essence, the approach of the common law. Clarification could be “expected to emerge on a case by case basis if dispositions under the Act are circulated and selectively published.” Later in this statement I offer some suggestions for improving this process.³⁴

C. Improper Ex Parte Communications

Current Rule 3(h)(1)(C) provides that cognizable misconduct includes “having improper *discussions* with parties or counsel for one side in a case.” Draft Rule 4(a)(1)(C) revises this language, so that it reads: “engaging in improper *ex parte communications* ...”

I support this change, which brings the language of the Rule in closer conformity with the corresponding provision in the Code of Conduct for United States Judges, Canon 3(a)(4).

³¹ Draft page 15, line 4.

³² Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 344 (1993) [hereinafter National Commission Report].

³³ *Id.* (emphasis added).

³⁴ See *infra* Part III-B-3.

In that connection, I note that, currently, there is no Commentary for this particular provision of the Rules. It may be desirable to amend the Commentary by adding material from the Code of Conduct to clarify the reference to “*improper ex parte communications*.” In particular, the Commentary could call attention to the Code’s exception for “communication for scheduling, administrative, or emergency purposes” (and also to the limitations on that exception).

D. Violation of Financial Disclosure Requirements

Draft Rule 4(a)(1)(G) states that cognizable misconduct includes “violating requirements for financial disclosure.”³⁵ In 2014, the Ninth Circuit Judicial Council held that “violating financial disclosure requirements may be cognizable misconduct [under the counterpart provision in the current Rules], but only if the judge *knowingly* files false reports or *repeatedly* files erroneous reports, casting doubt on the judge’s good faith in making the disclosures.”³⁶ Judge J. Clifford Wallace – who as noted earlier was one of the architects of the 1980 Act – concurred in the council order, observing that inquiry into a judge’s financial disclosure report is permissible “when a complainant presents evidence of *fraud or bad faith*.”³⁷

I suggest that Draft Rule 4(a)(1)(G) should be modified to incorporate the limitations outlined by Judge Wallace and the Ninth Circuit Judicial Council. The simplest approach would be to insert “knowingly” before “violating.” The Commentary could quote additional language from the Ninth Circuit Judicial Council orders.

E. Harassment and Other Abusive Behavior

The current Rules provide that misconduct includes “treating litigants, attorneys, or others in a demonstrably egregious and hostile manner.”³⁸ The

³⁵ Draft Page 13, line 1.

³⁶ See *In re Complaint of Judicial Misconduct*, 756 F.3d 1143-44 (9th Cir. Jud. Council 2014) (Kozinski, C.J.) (emphasis added). The Ninth Circuit Judicial Council affirmed Chief Judge Kozinski’s order of dismissal “[f]or the reasons stated by the Chief Judge and based upon the controlling authority cited in support thereof.” *In re Complaint of Judicial Misconduct*, 778 F.3d 998, 999 (9th Cir. Jud. Council 2014).

³⁷ 778 F.3d at 999 (Wallace, J., concurring) (emphasis added).

³⁸ The language is now contained in Rule 3(h)(1)(D).

September 2018 Draft makes three changes to this provision. It adds “judicial employees” to the class of persons who are to be protected from egregiously hostile treatment by judges. And it specifies two particular kinds of abusive behavior that fall within the realm of misconduct:

[1] engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; [and]

[2] creating a hostile work environment for judicial employees.³⁹

I support these changes, which codify what circuit chief judges and circuit councils have long assumed. For example, in 1984, only three years after the Act came into effect, five female court employees filed a complaint against a bankruptcy judge in the Ninth Circuit alleging sexual and nonsexual harassment. Chief Judge Browning appointed a special committee to investigate the allegations. Based on the special committee report and other evidence, the Ninth Circuit Judicial Council found that the allegations of sexual harassment were “unproven,” but that the bankruptcy judge had “engaged in undignified and inappropriate behavior by employing vulgar language and recounting off-color stories to court employees.” This behavior “contributed to poor morale, inefficiency and low productivity in the clerk’s office and constituted conduct prejudicial to the effective and expeditious administration of the business of the court.” The council directed the chief judge to administer a private reprimand.⁴⁰

Although the Council concluded that the allegations of sexual harassment had not been proved, the Council assumed, without the need for citation or discussion, that the allegations were within the scope of the Act. And when the bankruptcy judge sought review of the sanction, the Judicial Conference committee made clear that it shared that view.⁴¹

A decade later, the Judicial Council of the First Circuit found that a magistrate judge had “engaged in conduct constituting serious sexual harassment of [court] employees.”⁴² The magistrate judge was suspended for the remainder

³⁹ The new language is included in Draft Rule 4(a)(2). See Draft page 13, lines 2-10.

⁴⁰ In re Charge of Judicial Misconduct, No. 82-8089 (9th Cir. Judicial Council May 2, 1984) (on file with the author).

⁴¹ In re Complaint of Judicial Conduct, No. 84-372-001 at 7 (Jud. Conf. Comm. to Review Circuit Council Conduct & Disability Orders Mar. 10, 1985) (on file with the author) (noting that “there can be sexual harassment without touching”).

⁴² In re Complaint No. 140 (1st Cir. Judicial Council April 28, 1993) (report of Special Committee) (on file with the author).

of his term. Again, the Council assumed without the need for discussion that sexual harassment constitutes cognizable misconduct under the Act.

Decisions like these leave no doubt that sexual harassment and similar behavior has always been viewed as “conduct prejudicial to the effective and expeditious administration of the business of the courts” and thus cognizable as misconduct under the Act. It is helpful and desirable to make that explicit in the Rules, and the September 2018 Draft does so.

F. “Discrimination” as Misconduct

Draft Rule 4(a)(3) provides that cognizable misconduct “includes discrimination based on” race, sex, and several other characteristics or conditions. Although this provision has no counterpart in the current Rules, in its basic thrust it codifies what chief judges and circuit councils have long assumed.⁴³ To that extent, codification is appropriate.

As currently drafted, however, the Rule is too broad. In my view, the provision should be limited to conduct in the performance of official duties. Discrimination outside the performance of official duties could still constitute cognizable misconduct, but only under the circumstances delineated in Draft Rule 4(a)(7), the general Rule dealing with a judge’s personal life.

There are two reasons for adding this limitation. First, “discrimination” is a broad, open-ended concept that can easily be interpreted to include verbal conduct and other forms of expression. Two years ago, the American Bar Association proposed a highly controversial professional conduct rule that would subject lawyers to discipline for “discrimination” based on categories similar to those listed in Draft Rule 4(a)(3). Even though the proposed rule is limited to “discrimination ... in conduct related to the practice of law,” critics have expressed concern that that the rule “represents an unprecedented expansion of the disciplinary committee’s jurisdiction over the private lives and speech of attorneys.”⁴⁴ Influenced by that and other criticisms, several states have already

⁴³ See, e.g., *In re Charge of Judicial Misconduct*, No. 00-80018 (9th Cir. Judicial Council Sept. 11, 2000) (on file with the author) (publicly reprimanding judge for his practice of “writing and exchanging in open court, notes that could reasonably be interpreted as reflecting bias” against various groups).

⁴⁴ Josh Blackman, Reply: A Pause for State Courts Considering Model Rule 8.4(g), 30 *Georgetown J. Legal Ethics* 241, 251 (2017).

rejected the proposed rule.⁴⁵ This Committee should be equally cautious about adopting a rule that could intrude deeply into judges' private lives.

Second, failure to distinguish between discrimination by judges in the performance of official duties and discrimination in their private lives could undermine one of the most fundamental messages that the judiciary seeks to convey to the public: that judges, in carrying out their judicial responsibilities, can put aside their personal feelings and affiliations.

This message has been articulated in a variety of contexts and forums, including two in particular: Senate confirmation hearings and motions to recuse based on a judge's race, religion, or sexual orientation. At Senate confirmation hearings, nominees to the federal bench are questioned about views they have expressed in their personal and professional lives and about positions taken by organizations with which they are, or have been, affiliated. The nominees respond that they will decide cases based on the law irrespective of their personal feelings.⁴⁶ Motions to recuse argue that the judge cannot be impartial when one party to a lawsuit is asserting a position that the judge would be predisposed to favor or disfavor by reason of the judge's race, religion, or sexual orientation. The judges decline to recuse, emphasizing that they will decide the cases based solely on the evidence and the law.⁴⁷

I do not think these judges and nominees are denying that *as individuals* they have, or might have, the beliefs and predilections attributed to them by virtue of their writings and affiliations. Rather, they are saying that *as judges* they will not be influenced by those beliefs and predilections.⁴⁸ The premise must be that judges can separate the beliefs and attitudes they hold by reason of their religious

⁴⁵ See Scott Flaherty, More States Reject ABA Anti-Bias Ethics Rule, Am. Lawyer, Sept. 25, 2018, <https://www.law.com/americanlawyer/2018/09/25/more-states-reject-aba-anti-bias-ethics-rule/>

⁴⁶ See, e.g., Responses of Lucy H. Koh to the Written Questions of Sen. Tom Coburn, <https://www.judiciary.senate.gov/imo/media/doc/LucyKoh-QFRs.pdf>

⁴⁷ See, e.g., Commonwealth of Pa. v. Local Union 542 IUOE, 388 F. Supp. 155, 180 (E.D. Pa. 1974) (Higginbotham, J); State of Idaho v. Freeman, 478 F. Supp. 33, 37 (D. Idaho 1979) (Callister, J)..

⁴⁸ Sometimes this point is made explicitly. See, e.g., [Responses of Amy Coney Barrett to Written Questions [from Senator Dick Durbin] (2017), <https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Durbin%20QFRs.pdf> ("I believe that every judge, like every person, possesses some ideological convictions, but that no judge should allow those ideological convictions to dictate the outcome of a case.").

convictions or ethnic heritage or other private affiliations from the rulings they make as judges. But if the misconduct system draws no distinction between “discrimination” in the performance of official duties and discrimination in a judge’s private life, it implies that the two realms are *not* separate – that the beliefs and attitudes that are part of the judge’s private life will inevitably carry over into the judicial realm. I do not think the Committee should go down that road.

As it is, I suspect that many laypeople find it difficult to accept the proposition that judges can put aside personal beliefs and feelings – particularly those grounded in ethnicity, religion, or other personal affiliations – when they decide cases. But the proposition is fundamental. By the same token, the misconduct system should acknowledge that “discrimination” in a judge’s private life does not necessarily equate to discrimination in the judicial role.⁴⁹

Once again, I emphasize that I am not saying that “discrimination” in private life can never constitute cognizable misconduct. I am saying that it should be treated under the rule applicable to the general run of conduct outside the performance of official duties. That subject is addressed in Part II-H below.

G. Failure to Report as Misconduct

The most significant addition to the catalogue of behavior that constitutes cognizable misconduct is contained in proposed Rule 4(a)6). That provision, with the heading “Failure to Report or Disclose,” states that cognizable misconduct includes “failing to call to the attention of the relevant chief district judge and chief circuit judge information reasonably likely to constitute judicial misconduct or disability.”⁵⁰

The proposed Rule – which has no counterpart in the current Rules – raises several difficult issues. What kind of information should trigger the reporting requirement? To whom should misconduct be disclosed? May a judge, when informed by a third party about possible misconduct, make a promise of confidentiality and, if so, what are the consequences of that promise? There is also an organizational question: how much of the substance should be included in the Rules and how much should be placed in the Code of Conduct for United States Judges?

⁴⁹ In this context, professional activities such as law school teaching and participation in bar association committees would not be considered to be part of “private life.”

⁵⁰ Draft page 13, lines 24-27.

Preliminarily, the proposed Rule is awkwardly drafted; “*information*” cannot “*constitute*” misconduct or disability. I think the Committee means something like: “information that would reasonably lead to the conclusion that a judge likely has engaged in misconduct or has a disability.” But before attempting a redrafting, I address the substantive and policy issues raised by the proposal.

I. Defining the information that triggers the reporting requirement

Under what circumstances should a judge be required to report possible misconduct by another judge?⁵¹ Three considerations are relevant: the nature of the misconduct in question, the quality of the evidence available to the reporting judge, and the level of confidence that there is cognizable misconduct to report.

First, the nature of the misconduct covered by the Rule. In my view, the duty to report should be limited to instances of *serious* misconduct. That is the standard applied in the reporting requirement that governs lawyers, and it is equally appropriate here.⁵² There are costs in collegiality and human relations when judges are required to report misconduct by fellow judges. Those costs may be justified when the alleged misconduct is serious. It is much more difficult to justify the costs when the alleged misconduct cannot be so characterized.

In another context, the Commentary recognizes that “an inadvertent, minor violation of any one of these [specific] rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the Act.”⁵³ By the same token, what appears to be an inadvertent or minor instance of misconduct should not trigger the reporting requirement proposed in the Draft.

The Commentary to the proposed requirement offers further guidance. The Draft states that “the overarching goal” of the reporting requirement “should be to prevent harm to those affected by the misconduct and to prevent

⁵¹ The reporting requirement in the Draft applies to both misconduct and disability. In this section I shall concentrate on issues of misconduct. Somewhat different considerations may apply to disability. Indeed, this Committee and the Committee on Codes of Conduct may wish to consider separate treatment of disability issues in this context.

⁵² Under the Model Rules of Professional Conduct, lawyers are required to report “*serious* professional misconduct related to honesty, trustworthiness, or fitness to practice.” See 2 Geoffrey C. Hazard, Jr., et al., *The Law of Lawyering* § 68.02 at 68-7 (4th ed. 2018) (emphasis added).

⁵³ Draft page 15, lines 13-15.

recurrence.” If the harm to be anticipated from the apparent misconduct is insubstantial, reporting should not be required.

The draft Rule itself, in discussing the circumstances in which a promise of confidentiality “may necessarily yield,” refers to “misconduct that is serious or egregious and thus threatens the integrity and proper functioning of the judiciary.”⁵⁴ That standard, or something similar, should be incorporated into the underlying reporting requirement.

Second, the quality of the evidence that triggers the duty to report. The Rule itself is silent on that point, but the Commentary refers to “reliable evidence of likely misconduct.”⁵⁵ That is helpful, and something along those lines should be included in the Rule itself. But in the context of defining misconduct for which a judge can be sanctioned, it is not sufficient to refer in general terms to “reliable evidence.” Judges should not be put in a position of having to speculate about what kind of information a Circuit Council or the Conduct Committee might later – with the benefit of hindsight – regard as “reliable.” The standard should be an objective one. Specifically: the reporting requirement should generally be limited to situations in which the judge has first-hand knowledge of behavior by another judge.⁵⁶

This view rests in part on a generalized distrust of hearsay. But there is also a practical component. Suppose, for example, that Judge A’s law clerk tells Judge B that she has seen Judge A engaging in what appeared to be unwanted touching of a court employee. But did Judge A touch the employee? Was the touching unwanted? The circuit chief judge could not investigate the allegation without talking to Judge A’s law clerk. Judge A’s law clerk should thus be the person who reports the allegation. And the rules, rather than requiring Judge B to report the allegation, should facilitate direct communication by the law clerk to the circuit chief judge. The judge’s role should be to encourage the law clerk to use the direct channel.⁵⁷

⁵⁴ Draft Page 13, lines 32-36.

⁵⁵ Draft page 16, lines 16-17 (emphasis added).

⁵⁶ A lawyer’s duty to report misconduct by another lawyer is generally limited “to wrongdoing *known* (rather than suspected) to have occurred.” Hazard, *supra* note 52, at 68-8 (emphasis added).

⁵⁷ This approach may require establishing additional channels of communication. See *infra* Part V-A.

Third, the confidence level. The Draft Rule provides, in substance, that judges must report actions or conditions “*reasonably likely* to constitute judicial misconduct or disability.” Given that the Committee proposes to impose a mandatory duty – the violation of which can result in sanctions – I am concerned that this standard does not adequately protect judges who, mistakenly but in good faith, fail to correctly interpret what they have seen or heard. I suggest, therefore, that the duty to report should be imposed only when, based on first-hand knowledge, a judge has substantial grounds for believing that a covered judge has engaged in serious misconduct or has a disability as defined by Rule 4(c).

2. To whom should misconduct be disclosed?

The Draft Rule provides that information about another judge’s misconduct or disability must be “call[ed] to the attention of the relevant chief district judge *and* chief circuit judge.” It is not clear that in every instance the reports should be made to both the chief district judge and the chief circuit judge.

Under the 1980 Act, the circuit chief judge is the individual who is responsible for screening complaints and reports of possible misconduct or disability. But circuit chief judges – particularly in the initial phases of the inquiry about a district judge, bankruptcy judge, or magistrate judge – frequently consult the chief judge of the district in which the subject judge serves. Often it will make sense for a judge who has information about possible misconduct or disability to share that information with both chief judges. But if the judge thinks that in particular circumstances one or the other is in a better position to undertake an initial inquiry, it is hard to see why the judge should not be given the choice.

3. Promises of confidentiality

Undoubtedly influenced by the Report of the Working Group, the September 2018 draft recognizes that a judge’s “information” about possible misconduct by another judge will often come from a law clerk or other court employee, and that that employee will insist on a promise of confidentiality.⁵⁸ Two elements of Draft Rule 4(a)(6) deal with this situation:

⁵⁸ For brevity, I shall refer hereafter to “law clerks,” but the discussion of confidentiality applies equally to other individuals – inside or outside the court – who provide “information” to one judge about another judge.

- The judge “shall respect a request for confidentiality but shall disclose the information to the chief district judge and chief circuit judge, who shall also treat the information as confidential.”
- The “promise” of confidentiality “may necessarily yield when there is information of misconduct that is serious or egregious and thus threatens the integrity and proper functioning of the judiciary.”

I have two suggestions relating to these provisions. First, if the basic thrust of Rule 4(a)(6) is retained, and the Committee decides not to insist on first-hand knowledge, the Rules should make clear that the judge, at the start of the conversation contemplated by the Rule, must inform the law clerk about the limits of a “promise” of confidentiality.

Second, the prospect that judges will be making promises of confidentiality that “may necessarily yield” to concerns about “the integrity and proper functioning of the judiciary” raises further doubts about a rule that would require judges to serve as conduits for information they receive from a third party.⁵⁹ The preferable approach is to take all possible steps to remove barriers to reporting by the law clerk or other individual who has first-hand knowledge of the alleged misconduct.⁶⁰

4. *Organizational considerations*

It is evident from the discussion thus far that a Rule requiring judges to report misconduct by other judges raises numerous difficult questions of policy and implementation. I have no quarrel with the aspirational precept stated in Canon 3B(5) of the Code of Conduct for United States Judges: “A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge’s conduct contravened this Code.” But it is one thing to state the broad precept; it is quite another to apply that precept to the wide variety of human interactions that are potentially implicated. Doubts are heightened if the particulars are to be embodied in the Rules’ definition of cognizable misconduct, and violation can subject a judge to sanctions.

If the subject is to be included in the Rules, the category should be defined narrowly – something like: “Cognizable misconduct includes failing to communicate with appropriate authorities when a judge has first-hand

⁵⁹ “May necessarily yield” is a curious phrase. It seems to mean, in substance, that the judge cannot really make a *promise* of confidentiality.

⁶⁰ I will elaborate on that suggestion later in this statement. See *infra* Part V-A.

information that gives substantial grounds for believing that a covered judge has engaged in serious misconduct or has a disability that impairs the performance of judicial duties.” The contours of the duty to report would be filled out in the Code of Conduct. That is where judges expect to find particularized guidance about the conduct that is required or prohibited by ethical norms.

That said, I think it is an open question whether the matter should be addressed in the Rules at all. I am confident that the Committee does not want to establish a system that could turn the Judicial Branch into a workplace of informers.⁶¹ And it may not be necessary. The proposal in the Draft responds to concerns about sexual harassment and other workplace misconduct. That problem is best addressed by removing barriers to reporting by the individuals directly affected. In Part V-A of this statement, I offer some concrete suggestions to that end.

H. Conduct Outside the Performance of Official Duties

Current Rule 3(h)(2) provides that cognizable misconduct “is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.” The September 2018 Draft deletes the words “substantial and widespread” from the Rule’s reference to the “lowering of public confidence in the courts.”⁶² The Draft also deletes an entire paragraph from the Commentary, including the statement that “judges are entitled to some leeway in extra-official activities.”

In my view, the proposed changes are a step in the wrong direction, and I urge the Committee to reconsider them. Judges *are* “entitled to some leeway in extra-official activities,” and the Rules should carefully circumscribe the power of circuit councils to investigate judges’ private lives. Three points deserve mention.

First, even the current Rule can be read as going beyond what the 1980 Act authorizes. Under 28 U.S.C. § 351(a), a misconduct proceeding is commenced when a complaint is filed “alleging that a judge *has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.*” Only

⁶¹ The Report of the Working Group not only sought to impose on judges an “obligation[] to report ... misconduct”; it also called for “training” in “bystander intervention.” Working Group Report, *supra* note 3, at 31, 42.

⁶² The revised language is contained in Draft Rule 4(a)(7), page 14, lines 3-8.

conduct that *is* prejudicial falls within the ambit of the Act. Conduct that “*might have* a prejudicial effect on the administration of the business of the courts” – the language of the current Rule – does not fall within the Act. It would be especially anomalous to allow speculation about prejudicial effects to support a finding of misconduct when the challenged conduct is entirely “outside the performance of [the judge’s] official duties.”

Second, as noted earlier, Congress, in defining misconduct, made a considered decision to borrow language from the statute defining the power of circuit councils generally.⁶³ The focus is on “the administration of *the business of the courts*.”⁶⁴ How does one get from conduct “outside the performance of official duties” to “the administration of the business of the courts”? The Rules make the connection by looking at the possible effect of the conduct on “*public confidence in the courts* among reasonable people.”

This language evokes a standard that Congress, in considering precursor bills to the 1980 Act, appears to have self-consciously rejected.⁶⁵ Yet even if the basic concept is accepted, the inquiry will necessarily be plastic and predictive. It should therefore be closely cabined. The Rule should permit a finding of misconduct only if non-judicial activity is *likely* to result in the specified lowering of confidence. And it should retain the current requirement that the anticipated lowering of confidence will be “*substantial and widespread*.”⁶⁶

⁶³ See *supra* part I-B-1.

⁶⁴ Judge Browning, after a careful, detailed analysis of the evolution of the statutory language, concluded: “Taken as a whole the legislative history of both chambers can be harmonized only by interpreting the phrase ‘prejudicial to the effective and expeditious administration of the business of the courts’ according to its plain meaning and requiring complaints to allege *conduct affecting the functioning of the courts*.” Browning Misconduct Order, *supra* note 15, 570 F.3d at 1154.

⁶⁵ Early versions of the Senate bill defined misconduct to include, *inter alia*, “conduct prejudicial to the administration of justice *that brings the judicial office into disrepute*.” E.g., S. 1423, 95th Cong., 1st Sess. (1977) (emphasis added). At a markup session in 1979, that provision was dropped “because it was felt that this standard could be too intrusive on the judge’s personal life and was subject to possible abuse.” 125 Cong. Rec. 30,050 (1979) (statement of Sen. Thurmond). At a hearing the next year, the Department of Justice urged the House Judiciary Committee to restore the “disrepute” language, but the Committee did not do so. See Browning Misconduct Order, *supra* note 15, 570 F.3d at 1151-52.

⁶⁶ The initial public draft of the 2008 Rules did not include the requirement that the anticipated lowering of confidence must be “substantial and widespread” to justify a finding of misconduct. That language, along with the substance of the current Commentary, was added in the draft of Dec 13, 2007, after the comment period. It has been part of the Rules ever since.

This approach finds support in the opinion by Chief District Judge James Ware rejecting the claim that Judge Vaughn Walker, as a gay man who “had been involved in a 10-year ... committed same-sex relationship,” should have recused himself from hearing a case challenging the California law denying same-sex couples the right to marry.⁶⁷ The argument for recusal relied, *inter alia*, on 28 U.S.C. § 455(a), which provides that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.”⁶⁸ Judge Ware noted that the test under § 455 is “an objective one,” contemplating a “reasonable observer.” Of particular relevance here, Judge Ware emphasized that “a fact is not necessarily a basis for questioning a judge's impartiality merely because that fact *might lead a segment of the public* to question the judge's impartiality.”⁶⁹ By the same token, the possibility that confidence in the courts *might* be diminished among *some* reasonable people should not justify a finding of misconduct based on extra-judicial activities.

Finally, expansive application of the misconduct statute to a judge's private life will make it even more difficult to persuade the public that judges can put aside their personal feelings and attitudes when they decide cases. I have discussed this point in connection with the provision on “discrimination” as misconduct, and that analysis also applies to the general run of “conduct occurring outside the performance of official duties.”⁷⁰

To be sure, some extra-official activities “are certainly cognizable.”⁷¹ The Breyer Committee gave as examples personal participation in fundraising for a charity or attending a partisan political event. Beyond this, there is an excellent analysis in a misconduct opinion by Chief Judge Dennis Jacobs of the Second Circuit issued in late 2007. Judge Jacobs reviewed the relevant considerations; probably the most important is “whether the [particular conduct] should be seen as reflecting the Judge's attitude toward law, or her understanding of ethical

⁶⁷ Perry v. Schwarzenegger, 790 F.Supp.2d 1119 (N.D. Cal. 2011).

⁶⁸ For discussion of § 455 and its relevance to misconduct proceedings, see *infra* Part IV-E.

⁶⁹ 790 F.Supp.2d at 1190 (emphasis added).

⁷⁰ See *supra* Part II-F.

⁷¹ 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, 241 (2006) [hereinafter Breyer Committee Report]

boundaries.”⁷² Judge Jacobs also considered “whether the alleged conduct [was] part of a ‘pattern of improper activity.’”

Concerns about an overly broad view of misconduct in a judge’s private life carry particular weight in this era of polarized politics. Partisans and advocacy groups can be expected to “weaponize” the misconduct process with the aim of discrediting – or even driving from office – judges who they think are hostile to their policy goals. That is another reason for limiting the category along the lines suggested by Chief Judge Jacobs.

I. Exclusion of Pre-Appointment Conduct

The current Rules, substantively unchanged in the September 2018 draft, specify two kinds of conduct that do not constitute cognizable misconduct: allegations related to the merits of a decision or procedural ruling and allegations about delay.⁷³ I suggest adding a third exclusion: pre-appointment conduct by a covered judge.

This question has arisen several times in the decades since the Act was adopted, and the answer has always been the same: pre-appointment conduct is not covered. The time has come to codify this exclusion.

The earliest decision on this point was written in 1986 by Chief Judge James R. Browning of the Ninth Circuit. Judge Browning was one of the principal architects of the system that Congress adopted in 1980, so his analysis carries special weight. He began by carefully examining the evolution of the “jurisdictional standard” in what is now 28 U.S.C. § 351(a). He then turned to the principle of separation of powers. He concluded: “It would be incompatible with this constitutional principle for the judiciary to review the determination of the executive and legislative branches in the nomination and confirmation process by investigating and possibly disciplining a judge for conduct occurring before appointment to the bench.”⁷⁴

⁷² In re Charge of Judicial Misconduct, No. 06-9056-jm at 12 (2nd Cir. Judicial Council Dec. 14, 2007) (Jacobs, C.J.), <http://www.ca2.uscourts.gov/Docs/CE/06-9056-jm.pdf>.

⁷³ See Draft Rule 4(b), page 14, lines 9-25.

⁷⁴ Browning Misconduct Opinion, *supra* note 15, 570 F.3d at 1155. Judge Browning’s opinion was not published until 2009, when it was appended to a misconduct order issued by Chief Judge Kozinski. See *id.* at 1144.

In 2017, the Judicial Council of the Tenth Circuit reviewed decisions on this point from seven circuits. It found that the decisions were consistent: “the Act does not cover pre-appointment conduct.”⁷⁵

Against this background, there is no reason to require further consideration of the issue by chief judges or circuit councils.⁷⁶ Article II should be amended to make clear that conduct occurring before appointment to the federal bench is ordinarily not cognizable under the Act.

I recognize that both the House and the Senate, through their actions in the Porteous case, have determined that pre-appointment conduct can be a basis for impeachment and removal from office.⁷⁷ To that extent, pre-appointment conduct could support judicial council action under 28 U.S.C. § 354(b) and Judicial Conference action under § 455. That narrow exception could be acknowledged in the Commentary.

III. Balancing Confidentiality and Transparency

When the House passed its version of the bill that became the 1980 Act, the legislation included a strong provision on confidentiality. The Senate amendments made some small modifications to the confidentiality rule and added a new provision requiring that judicial council orders imposing sanctions must be made public. Ever since then, circuit councils and this Committee have struggled to balance the competing interests in confidentiality and transparency.

The September 2018 Draft makes modest changes in the rules on confidentiality and disclosure. The amendments relating to confidentiality codify current policy and should be adopted. The amendments relating to disclosure move in the right direction, but some fine-tuning is in order.

⁷⁵ In re Complaint under the Judicial Conduct and Disability Act, No. 10-16-90009 at 10-12 (10th Cir. Judicial Council July 28, 2017). Except for the Ninth Circuit decision discussed supra note 74, none of the decisions were published.

⁷⁶ The Breyer Committee believed that the question had not been “resolved conclusively.” Breyer Committee Report, supra note 71, at 241. The Breyer Committee was not aware of Judge Browning’s opinion, which had not been published at the time of its report.

⁷⁷ One article of impeachment against Judge Porteous (Article II) expressly referenced his conduct as a state-court judge; another (Article IV) relied on false statements about his past during the nomination and confirmation process. See 156 Cong. Rec. 19133-39 (2010) (setting forth Articles of Impeachment and Senate roll call votes).

A. Confidentiality and Its Limits

The Working Group Report recommended that the Conduct Committee “make clear ... that confidentiality obligations should never be an obstacle to reporting judicial misconduct or disability.”⁷⁸ The September 2018 Draft implements this recommendation by adding two provisions to Rule 23, the Rule dealing with confidentiality.

First, the Draft Rule begins with a statement of purpose: “Confidentiality as referenced in these Rules is directed toward protecting the fairness and thoroughness of the process [under the Act and the Rules].”⁷⁹ Only implicit is the correlative: the purpose is *not* to protect judges from disclosure of misconduct or disability.

Second, Draft Rule 23(c) specifically addresses the point raised by the Working Group: “Nothing in these Rules and Commentary concerning the confidentiality of the complaint process ... prevents a judicial employee from reporting or disclosing misconduct.”

Neither of the new provisions represents a change of policy. The current Rule provides that “[t]he *consideration of a complaint* ... is confidential.” That language imposes no restraints on a judicial employee or anyone else who wishes to report or disclose misconduct. Nevertheless, the Working Group Report suggests that the import of the Rule may have been misunderstood. The clarification is appropriate, and I support the proposed amendments.

One final point. Draft Rule 23(b) is composed of 10 numbered paragraphs, several of which address more than one topic. No obvious ordering principle governs the sequence of the various paragraphs, and several important provisions are not flagged by paragraph headings. I urge the Committee to consider a reorganization, perhaps creating a separate Article for the provisions on confidentiality and disclosure.⁸⁰

⁷⁸ Working Group Report, *supra* note 3, at 30-31.

⁷⁹ Draft page 54, lines 3-7. This is Draft Rule 23(a); The Commentary mistakenly attributes this language to Draft Rule 23(c). See Draft page 58, lines 29-32.

⁸⁰ For further discussion of reorganization, see *infra* Part III-B-3. Russell Wheeler, in his statement, has suggested additional clarification and reorganization of the Rules relating to disclosure. I agree with those suggestions.

B. *The Nature and Timing of Public Disclosure*

Chapter 16 has little to say about the nature and timing of public disclosure of misconduct proceedings, but the judiciary’s rules have filled in some of the statutory gaps. The basic rule (part of Rule 24) is that orders entered by the chief circuit judge and the judicial council must be made public, but only “[w]hen final action on a complaint has been taken and it is no longer subject to review.” This directive is supplemented by rules and commentary that address particular topics. Three of these are the subject of amendments in the September 2018 draft: interim disclosures, identification of the judge who is the subject of an order; and the manner in which orders are made public.

Preliminarily, the September 2018 Draft amends the basic rule to specify that orders should be made public upon the expiration of the deadline for “review *as of right*.”⁸¹ Addition of the italicized language is a sensible change; there is no reason to delay issuance of judicial council affirmances until the Conduct Committee has determined whether to engage in discretionary review under Rule 21(b)(2).

1. *Interim disclosures*

The rule prohibiting public release of chief-judge and judicial-council orders until “final action on a complaint has been taken” is derived from the Illustrative Rules. The commentary to those Rules explained that one purpose of the restriction was to “avoid disclosure of the *existence* of pending proceedings.”⁸² That approach generally makes sense when the events underlying the complaint remain unknown to the public. But when the underlying events have become the subject of public reports, avoiding disclosure of the existence of the proceeding serves no purpose other than to fuel public cynicism about judges “protecting their own.”

In apparent response to this concern, the 2008 Rules took a cautious step in the direction of allowing interim disclosures. The Judicial Conference added a single new sentence at the end of Rule 23(a), the general rule on confidentiality: “In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in

⁸¹ Draft page 59, lines 1-2 (emphasis added).

⁸² 2000 Illustrative Rules, *supra* note 13, at 55 (emphasis added).

the federal judiciary’s ability to redress misconduct or disability.”⁸³ When the Rules were revised in 2015, two changes were made in this provision. The reference to “extraordinary circumstances” was omitted. And disclosures were permitted when “necessary or *appropriate* to maintain public confidence in the federal judiciary’s ability to redress misconduct or disability.”⁸⁴

The September 2018 Draft amends this provision – relocated to Rule 23(b)(1) – by authorizing disclosure by judicial councils and the Conduct Committee as well as chief judges. In addition, a new paragraph in the Commentary to Rule 23 authorizes “the disclosure of information about the consideration of [a] complaint, *including orders and other materials related to the complaint proceeding*,” but only when “a complainant or other person has publicly released information regarding the existence of a complaint proceeding.”⁸⁵

I fully agree that interim disclosures should, when appropriate, include “orders and other materials related to the complaint proceeding.” But there are two problems with the approach taken by the Draft.

The first problem is that the Commentary grounds this new authorization, not in the renumbered Rule 23(b)(1), but in the separate paragraph – now Rule 23(b)(8) – that permits disclosure that “is justified by *special circumstances* and is not prohibited by the Act.”⁸⁶ That is unnecessarily confusing. If the Draft is adopted, there would be two separate provisions – one in the Rule itself, one a combination of Rule and Commentary – that address topics that are closely related. Disclosure of the existence of a proceeding would be governed by different standards from those for disclosure of the materials relating to that proceeding. To add to the confusion, the second provision seems to reintroduce the requirement of “extraordinary circumstances” that was jettisoned in the 2015 revisions.

⁸³ 2008 Rules, 248 F.R.D. at 712. 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.

⁸⁴ For supportive commentary, see Hellman, Proposed Amendments (2014), *supra* note 10, at 19.

⁸⁵ Draft page 58, lines 1-7 (emphasis added). The Commentary says that the disclosure is authorized “in the interest of assuring the public that the judiciary is acting effectively and expeditiously in addressing the relevant complaint proceeding.” But as a textual matter that does not seem to be a prerequisite to disclosure.

⁸⁶ Draft page 55, lines 22-29 (emphasis added).

The second problem is that the circumstances that, as a matter of policy, will justify interim disclosures are not limited to situations where “a complainant or other person has publicly released information regarding the existence of a complaint proceeding.” That will often be the case, but the Rule should apply more broadly to situations where allegations or reports of possible misconduct have become public.

Both problems can be dealt with by adding a new subsection to Rule 23 that would include all of the rules governing interim disclosures. It might read like this:

(d) Interim disclosures. When necessary or appropriate to maintain public confidence in the federal judiciary’s ability to redress misconduct or disability, a chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose –

- (1) the existence of a proceeding under these Rules;
- (2) the identity of the subject judge; and
- (3) orders and other materials related to the complaint proceeding.

It may also be desirable for the Rule to specify particular interim actions that should ordinarily be disclosed. For example:

- The chief judge identifies a complaint based on public allegations or reports of misconduct.⁸⁷
- The chief judge appoints a special committee to consider a complaint involving allegations that are the subject of a public report.⁸⁸
- A proceeding involving allegations that are the subject of a public report has been transferred to another circuit under Rule 26.

I have used the term “public report,” and I think the term encapsulates a concept that is relevant to several aspects of the Rules’ operation. For these purposes, 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

⁸⁷ Ninth Circuit Chief Judge Sidney Thomas followed that practice in the recent controversy involving former Judge Alex Kozinski.

⁸⁸ Chief Judge Anthony Scirica followed that practice in an earlier proceeding involving then-Chief Judge Kozinski. In contrast, in the Mark Fuller matter, the public learned of the appointment of a special committee from comments to the media by the judge’s lawyer.

perceptions of the regulation of ethics by the federal judiciary. Articles in mainstream news media (national or local) and postings on widely read websites would be “public reports” in this sense. Allegations on a website operated by an individual with a grudge against a particular judge would not be. It would be useful if the Commentary included some discussion along these lines.

The approach proposed here does no more than codify practices that have already been followed by chief judges – and indeed by Chief Justice Roberts – in some high-profile cases. Disclosure would remain discretionary, particularly with respect to the release of materials. But the Commentary should make clear that when allegations become the subject of a public report, *some* disclosure should be the norm.

2. *Identification of the subject judge*

When final action has been taken on a complaint, the orders of the chief judge and the circuit council must be made public. Should those orders identify the judge who is the subject of the complaint? From the earliest days under the 1980 Act, the judiciary has struggled with that question. The current Rules, largely tracking the 1986 and 2000 Illustrative Rules, divide dispositions into three categories.

First, the rules specify three situations in which “the publicly available materials must *not* disclose the name of the subject judge without his or her consent”:

- [1] “the complaint is finally dismissed ... without the appointment of a special committee;” or
- [2] “the complaint [sic] ... is concluded under [§ 352(b)(2)] because of voluntary corrective action”; or
- [3] “the complaint is finally disposed of by a privately communicated censure or reprimand.”

Second, there is one (and only one) situation in which the judge’s name *must* be disclosed: when the judicial council takes remedial action (other than private censure or reprimand) after a special committee report.

Finally, the Rule specifies two situations in which the judicial council has discretion to disclose or withhold the name of the subject judge: “if the complaint is concluded because of intervening events, or [when it is] dismissed at any time after a special committee is appointed.” The commentary notes one particular circumstance in which disclosure of the judge’s name “may be in the public interest”: when the judge “resigns in the course of an investigation.”

The December 2018 Draft proposes small but significant changes in this regime. In provisions [1] and [2] above – that is, if the complaint is dismissed without the appointment of a special committee, or if the proceeding is concluded because of voluntary corrective action – the words “must not disclose” would be replaced with “generally should not disclose.”⁸⁹ The revised Commentary states that where a proceeding is concluded based on voluntary corrective action, “the name of the subject judge generally should not be disclosed, except where the complainant or another person has disclosed the existence of a complaint proceeding to the public.”⁹⁰

I agree that in the two situations referenced, there should not be an absolute prohibition against identification of the subject judge in the final order of the chief judge or circuit council. However, I believe that there is a better way of drawing the line. The appropriate standard can be found in the concept of the “public report,” discussed in the preceding section.

Consider first the cases in which the complaint is dismissed without the appointment of a special committee. The Commentary to the current Rules has little to say about the rationale for the non-disclosure rule, but a brief explanation can be found in the commentary to the 1986 Illustrative Rules. That commentary referred to “the legislative interest in *protecting a judge ... from public airing of unfounded charges,*” and said that “the [1980] law is reasonably interpreted as permitting nondisclosure of the identity of a judicial officer who is ultimately exonerated and also permitting delay in disclosure until the ultimate outcome is known.”⁹¹

From a policy perspective, it is unnecessary to inquire into Congress’s intent in 1980; the question, rather, is whether the asserted interest in protecting judges from “public airing” should be given primacy over the interest in accountability. In the routine cases that make up the vast bulk of complaints, I

⁸⁹ Draft page 59, lines 9-13.

⁹⁰ Draft page 61, lines 11-16. The Commentary continues to state that if the complaint is dismissed, “the name of the subject judge *must not* be disclosed.” I assume that this was inadvertent, and that the explanatory language in the Commentary was intended to apply to both [1] and [2]. In any event, I deal with the two situations separately in the text.

⁹¹ 1986 Illustrative Rules, *supra* note 12, at 56 (emphasis added). See also 2000 Illustrative Rules, *supra* note 13, at 55.

think the tradeoff is a reasonable one, because neither interest is particularly strong.⁹²

The calculus changes when the underlying events have been the subject of public reports. Suppose, for example, that a major local newspaper publishes a story implying that a judge violated the Code of Conduct by endorsing a candidate for elective office. A misconduct complaint is filed, but the chief judge dismisses it, finding that the judge’s remarks did not constitute an endorsement.⁹³ If the dismissal order does not identify the subject judge, that would not protect the judge from the “public airing of unfounded charges;” on the contrary, it would obscure from the public the information that he had been exonerated. In this kind of situation, the policy of the current Rules is difficult to defend.

That was not always so. In 1986, and perhaps even in 2000, there was some justification for assuming that newspaper reports of “unfounded charges” would generally recede from the public’s memory, so that withholding the judge’s name from the exoneration order would indeed help to protect the judge’s reputation. Today, however, the reports will be available on the Internet and will be found through Google and other searches long after their initial posting. The judge’s reputation will be best protected by making sure that the exoneration order, identifying the judge and explaining why the complaint was dismissed, will also be available.

The “voluntary corrective action” cases present more difficult questions. Typically, these are cases in which the accusation of misconduct has some foundation, but the judge apologizes, and on that basis the chief judge concludes the proceeding.⁹⁴ One can argue that, at least where the chief judge finds that the accused judge has violated the Code of Conduct or other ethical norms, the public has a legitimate interest in knowing the identity of the judge. On the other hand, if the apology (or other corrective action) did not carry with it a promise

⁹² For detailed discussion of this point, see Hellman, Misconduct Rules, *supra* note 7, at 357-59.

⁹³ See *In re Complaint of John Doe*, JCP No. 06-013 (8th Cir. Jud. Council Oct. 18, 2006) (Loken, C.J.) (on file with the author), discussed in Hellman, *Unfinished Business*, *supra* note 9, at 9-10.

⁹⁴ See, e.g., *In the Matter of a Complaint Filed by ___*, No. 11-17-90024 at 16-19 (11th Cir. Judicial Council Mar. 22, 2018) (Carnes, C.J.) (at hearing, bankruptcy judge said to father of debtor, “I think you are the lowest form of life for putting your son through this. You are a despicable human being ...”).

that the order would not identify the judge, the judge might be less willing to acknowledge fault and apologize.⁹⁵ That does not seem like a desirable outcome.

Of course, this implicit bargain makes sense only when the allegations have not received a “public airing.” If the underlying conduct has already been reported in national or regional news media, it is hard to see what is gained by withholding the judge’s name from the order.⁹⁶ And including it allows the public to see that the judiciary has not swept the matter under the rug. Indeed, in this situation, chief judges today sometimes ask the apologizing judge to consent to being identified in the order.⁹⁷

In my view, the policy should be this: When the conduct giving rise to a misconduct complaint has been the subject of a public report, there should be a presumption that orders arising out of that complaint will disclose the identity of the judge. The presumption would apply when the complaint is dismissed on the merits and also when the proceeding is concluded based on corrective action.⁹⁸

The standard proposed in the Draft Commentary – allowing identification of the judge when “the complainant or another person has disclosed the existence of a complaint proceeding to the public” – is both under- and over-inclusive. It does not encompass all cases in which there has been a “public airing” of possible misconduct. And it may be read to include instances where the disclosure would not reach or influence a general audience. The more general concept of the “public report” delineated above is preferable.

⁹⁵ Perhaps this is what the Rules commentary means when it says: “Shielding the name of the subject judge in this circumstance should encourage informal disposition.”

⁹⁶ Consider, for example, the 2016 proceeding involving District Judge Peter C. Economus. Judge Economus wrote a letter to the editor of the local daily newspaper in which he endorsed one candidate in a contested election for county prosecutor. This was a textbook violation of the Code of Conduct. After a misconduct complaint was filed, Judge Economus wrote another letter retracting the endorsement and apologizing for his wrongdoing. Chief Judge R. Guy Cole, Jr., concluded the proceeding – which was certainly appropriate – but the order did not identify Judge Economus. In *Re Complaint of Judicial Misconduct*, No. 06-16-90007 (6th Cir. Jud. Council Sept. 2, 2016).

⁹⁷ See, e.g., In *re Complaint Against District Judge Joe Billy McDade*, No. 07-09-90083 (7th Cir. Jud. Council Sept. 28, 2009) (Easterbrook, C.J.).

⁹⁸ Public reports, in this context, can include appellate decisions. See, e.g., In the *Matter of a Judicial Complaint under 28 U.S.C. § 351*, No. 04-17-90033 (4th Cir. Judicial Council Aug. 7, 2017) (Gregory, C.J.) (concluding proceeding after district judge acknowledged inappropriate behavior in a criminal case that was criticized in court of appeals decision).

3. *Manner of making orders public*

What does it mean to say that orders must be “made public”? Over the years, the Rules have taken successive steps toward greater transparency. The September 2018 Draft makes three small additional changes. But more can be done.

Under both sets of Illustrative Rules, orders were to be made public “by placing them in a publicly accessible file in the office of the clerk of the court of appeals” and by sending them to the Federal Judicial Center in Washington, where they would be “available for public inspection.” The 2008 Rules provided 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.” The 2015 Rules replaced “or” with “and.” The September 2018 draft reverses the sequence, so that Web posting is not only required but has primacy. That is entirely appropriate.

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 Commentary to the September 2018 Draft, apparently in response to this concern, states: “Individual circuits should seek ways to make decisions on complaints filed in their courts more readily accessible to the public through searchable electronic indices.”⁹⁹ That is a welcome step, but it is not adequate. I suggest four additional steps that the Committee can take.

First, although indices would certainly be valuable (and I’ll discuss that topic in a moment), it is more important to make it easy for journalists, scholars, and members of the public to identify the small number of decisions that are of general interest without having to sort through the huge number that are not. There is a simple way to do this: the circuits should be required 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.

Second, the Committee should encourage chief judges and judicial councils to designate non-routine orders as “for publication,” so that they would be published in the Federal Reporter and available (and indexed) in legal databases

⁹⁹ Draft page 61, lines 34-36. This sentence was taken verbatim from Working Group Report, *supra* note 3, at 32.

like Lexis and Westlaw. Several of the recent misconduct orders cited in this statement – because they provide useful discussion of recurring issues – were not designated as “for publication” and will not be found on line unless the researcher knows where to look.

Third, the Rules should specify the criteria for designating orders as non-routine. The designation is appropriate in at least three circumstances: if the order has precedential value; if the complaint has been the subject of public reports; and if the procedural posture departs from the routine. This third category would include cases in which the chief judge identified a complaint, or a special committee was appointed, or the chief judge concluded the proceeding rather than dismissing the complaint.

Finally, it would not be a good use of resources for each circuit to devise and maintain its own index for the handful of decisions that warrant indexing. The index should be on the Federal Judiciary’s website, and the non-routine decisions from all circuits should be posted or linked there. The decisions should be keyed to the provisions of the Act and the Rules that they interpret and also to provisions of the Code of Conduct for United States Judges that they construe or apply. Selected orders from prior years should also be included.¹⁰⁰

The decisions should also be indexed in a way that will allow users to find cases involving particular kinds of alleged misconduct. The key variable is the relation to the judicial role. At one end of the spectrum is conduct on the bench or in judicial rulings. At the other end is off-the-bench conduct not involving the judicial function. In between are, for example, comments to the media about pending cases and conduct related to the judge’s role as employer.

Development of an indexed compendium along these lines would – at long last – implement the recommendation of the National Commission on Judicial Discipline and Removal 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.”¹⁰¹

¹⁰⁰ One possible objection to a retrospective compilation is that some of the orders will reflect decisions or practices that are inconsistent with the current Rules or the Conduct Committee’s current views. The Committee could follow the example of the Breyer Committee and provide commentary for particular decisions that would include a notation of any divergences from current policy or practice.

¹⁰¹ National Commission Report, *supra* note 32, at 344.

The September 2018 Draft makes one other change in Rule 24 that deserves mention. Rule 24(a) is amended to require that orders identifying a complaint or appointing a special committee must be made public when final action has been taken on a complaint.¹⁰² There may be situations – particularly when the complaint involves disability rather than misconduct – where this will be unnecessary and even undesirable. The Rule should allow for some discretion.

This leads to a more general suggestion: that the Committee examine the structure of Rule 24 and consider breaking it up into several Rules as part of a new Article – perhaps one that also includes the provisions on confidentiality. As the discussion of the revisions to Rule 23 makes clear, confidentiality and public availability are important respects correlatives, and there is much to be said for integrating them into a comprehensive whole.

IV. Other Changes in the September 2018 Draft

Apart from the amendments in (new) Article II defining cognizable misconduct, the changes proposed by the September 2018 draft generally involve clarification or emphasis more than substance. But [five] amendments to other Rule provisions warrant discussion.

A. Institutional Analysis and Reform as Part of the Complaint Process

Current Rule II(e) authorizes the chief judge to conclude a proceeding if intervening events “make remedial action impossible.” The September 2018 draft amends this provision by adding the words “*as to the subject judge.*”¹⁰³ The Commentary explains the thinking behind this change: although remedial action may be precluded as to the *subject judge*, the judicial council of the circuit has “ample authority to assess potential *institutional issues* related to the complaint.” In particular, the council can analyze “what conditions may have enabled misconduct or prevented its discovery and what precautionary or curative steps could be undertaken to prevent its recurrence.”

I support this change, which is fully consistent with the forward-looking perspective discussed in Part I of this statement. Indeed, the new language in the Commentary echoes Judge Wallace’s remarks to the House Judiciary Committee

¹⁰² Draft page 59, line 7 (strikethrough).

¹⁰³ Draft page 27, lines 7-10.

40 years ago when he emphasized the use of the misconduct process to “improve the institution.”¹⁰⁴

The quoted language in the Commentary to Rule 11(e) is repeated in the Commentary to Rule 20(b), dealing with the authority of the judicial council following the appointment of a special committee. It may be desirable to include a brief statement of this idea in the Preface to the Rules.¹⁰⁵

B. Effect of Resignation or Retirement by Subject Judges

Section 351(d)(1) of Title 28 specifies the judges who are covered by the Act: “the term ‘judge’ means a circuit judge, district judge, bankruptcy judge, or magistrate judge.” Draft Rule 1(b) – currently Rule 4 – tracks the statute and defines the “covered judge.” But what happens if a covered judge retires or resigns after a complaint is filed?

The text of the Rules does not address this question, but the Commentary to Rule 11 does.¹⁰⁶ Currently, the Commentary states that the chief judge may “conclude the proceeding” under § 352(b)(2) of the Act if the judge resigns from judicial office, but that the complaint must be addressed as long as the subject judge “*performs judicial duties.*” The September 2018 draft retains the first provision but rewrites the second to say that the complaint must be addressed as long as the subject judge “*retains the judicial office.*”

I support the new language, which applies to judges who retire from regular active service under either 28 U.S.C. § 371(b) or § 372(a) but are not currently performing judicial duties. As long as a judge “retains the judicial office,” he or she may be called upon to perform judicial duties in the future, and the forward-looking perspective suggests that allegations about misconduct or disability should be addressed.

The Rules should also make clear that if the subject judge *does* resign from judicial office, the chief judge *must* conclude the proceeding. To be sure, the governing statute says “may,” not “must,” but for this particular “intervening event,” there is no discretion to do otherwise. As the Second Circuit Judicial Council has put it, when a judge “permanently and irrevocably” relinquishes his

¹⁰⁴ See *supra* text accompanying note 22.

¹⁰⁵ See *supra* Part I-B-1.

¹⁰⁶ Draft page 32, lines 13 to 21.

judicial office, he places himself “outside the parameters of the Act and preclud[es] any action by the Judicial Council.”¹⁰⁷

Finally, the Committee may wish to consider replacing the reference to “the judicial office” with “judicial office *as a covered judge*.” This would eliminate any ambiguity for situations where, for example, a district judge resigns from the federal bench to serve as a justice on a state supreme court.

I also believe that these matters should be addressed in the text of the Rules, not just in the Commentary.

C. Scope of Special Committee Investigations

Rule 13(a) now provides that a special committee “should determine the appropriate extent and methods of its investigation in light of the allegations of the complaint and preliminary inquiry.” The September 2018 draft adds a new sentence: “In investigating the alleged misconduct or disability, the special committee should take steps to determine the full scope of the potential misconduct or disability, including whether *a pattern of misconduct* or a broader disability exists.”¹⁰⁸

This language codifies the approach that special committees have already used in some high-visibility cases, including those involving former judges Mark Fuller and Richard Cebull. The new provision is consistent with the forward-looking perspective; to borrow Judge Wallace’s phrase, it may be possible to “save [a] judge” who has engaged in an isolated instance of misconduct, but probably not a judge who has repeatedly violated ethical norms.¹⁰⁹ I thus support the amendment.

D. Encouraging Complainants to Protect Confidentiality

Rule 16 deals with the rights of the complainant in a special committee investigation. Sections (a) through (d) give the special committee considerable discretion in matters such as providing the complainant with a copy of the special committee report and permitting the complainant to offer oral argument. Rule 16(e) provides that in exercising that discretion, “the special committee may take

¹⁰⁷ In re Complaint of Judicial Misconduct, No. 17-90118-jm at 3-4 (Feb. 5, 2018) (citing authorities).

¹⁰⁸ Draft page 35, lines 35-39 (emphasis added).

¹⁰⁹ See *supra* text accompanying notes 21-22.

into account the degree of the complainant’s cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.”

The September 2018 draft deletes Rule 16(e) in its entirety, along with the corresponding paragraph in the Commentary.¹¹⁰ There is no explanation for the deletion, so I can only speculate as to the Committee’s thinking. Perhaps the Committee sees this as a corollary of other revisions emphasizing that confidentiality rules are designed to protect the thoroughness and fairness of the statutory process, not (implicitly) to prevent the disclosure of wrongdoing. If so, I am not convinced that the change is desirable.

I am confident that the Committee does not intend to disparage the value of confidentiality in the process. A large measure of confidentiality is required by the statute. Even if it were not, studies such as those carried out for the National Commission on Judicial Discipline and Removal make clear that chief judges and circuit councils can often deal most effectively with misconduct (and particularly with disability) if they can negotiate a resolution behind the scenes. Moreover, confidentiality is often essential to securing complete and candid testimony from witnesses.

In this light, it seems to me that special committees, in exercising their discretion regarding the role of the complainant, *should* be able to take into account the complainant’s cooperation in protecting the confidentiality of the proceedings. I would retain the current provisions of the Rule and the Commentary.

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

Rule 25 deals with the disqualification of judges from participating in misconduct or disability proceedings. The amendments adopted in 2015 altered some of the specific provisions in the Rule,¹¹¹ but they did not change the general standard 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.) The September 2018

¹¹⁰ See Draft page 41, lines 4-7 and 32-37.

¹¹¹ For supportive discussion of the 2015 amendments, see Hellman, Proposed Amendments (2014), *supra* note 10, at 13-16.

draft now proposes to amend Rule 25(a) by deleting the words “in his or her discretion.”¹¹²

There may be some utility in de-emphasizing the element of discretion, but the proposed change would not cure what I view as the fundamental flaw in Rule 25(a), which is that the standard is completely subjective. Rule 25(a) 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) “adopts *the objective standard of a reasonable observer*” who is “fully informed of the underlying facts.”¹¹³ 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 own sense of whether disqualification is required. 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.”¹¹⁴ 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.

The weak disqualification standard of Rule 25(a) is especially anomalous in light of the bright-line rule that applies when the Conduct Committee considers a petition for review after action by the judicial council of the circuit. Rule 21(c) (unchanged in the September 2018 draft) provides: “*Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review related to that subject judge.*” Thus, if the subject judge sits in the Central District of California, a Conduct Committee member from Alaska is disqualified even if the two judges barely know one another and have met only at circuit judicial conferences.

¹¹² The Commentary (page 64, lines 6-7) retains a reference to discretion, but I assume this was inadvertent.

¹¹³ *United States v. Bayless*, 201 F.3d 116, 126 (2nd Cir. 2000) (emphasis added).

¹¹⁴ Breyer Committee Report, *supra* note 71, at 119.

Perhaps this bright-line prophylactic rule can be justified by ease of administration, but ultimately it must rest on a concern for the appearance of impartiality in the administration of the Act. That concern should also be reflected in the basic disqualification standard of Rule 25(a).

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.¹¹⁵ That was also the view of Chief Judge Browning and his colleagues when they circulated a draft of the first set of Illustrative Rules in December 1985. The draft rule read:

A judge will disqualify himself or herself from participating in any consideration of a complaint in the same circumstances in which disqualification would be appropriate in any other matter under 28 U.S.C. § 455 or other ethical precepts. No waiver of any ground for disqualification may be accepted.¹¹⁶

But when the final version of the 1986 Illustrative Rules was made public, this provision had disappeared, without explanation. Nothing replaced it until the adoption of the current provision, quoted above.¹¹⁷ For the reasons already given, I believe that that provision should be replaced with language that incorporates the standard of § 455(a), or perhaps (as in the 1985 draft) the entirety of § 455.¹¹⁸

V. Other Suggestions for the Committee

Most of the substantive amendments in the September 2018 draft implement recommendations of the Federal Judiciary Workplace Conduct Working Group. In this section I suggest additional measures to address the

¹¹⁵ 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.

¹¹⁶ Model Rules Covering Complaints of Judicial Misconduct and Disability, Draft of 12/2/85, at 75 (on file with the author).

¹¹⁷ The current provision first appeared in the December 2007 draft. It was not included in the draft circulated for public comment in the summer of 2007.

¹¹⁸ Section (e) of § 455 allows waiver by “the parties” of disqualification otherwise required under section (a). In agreement with the 1985 draft, I see no need for a waiver provision here.

Working Group’s concerns and offer a few other proposals for improving the administration of the 1980 Act.

A. Strengthening the Role of the Circuit Chief Judge

In discussing proposed Rule 4(a)(6), “Failure to Report or Disclose,” I suggested that when a judge receives information from a law clerk or other employee about possible misconduct by another judge, the judge should encourage the employee to report the allegations directly to the circuit chief judge. This suggestion brings to the fore the role of the chief judge in assuring adherence to ethical norms by all judges within the circuit.

The 1980 Act itself, in what is now 28 U.S.C. § 351(b), authorizes the circuit chief judge “to *identify a complaint* for purposes of [Chapter 16] and thereby dispense with filing of a written complaint.”¹¹⁹ Current Rule 5 and the accompanying Commentary provide some guidance as to how that authority should be exercised. Rule 5 also contemplates that the chief judge may conduct an *informal inquiry* into possible misconduct or disability without identifying a complaint under § 351(b). The Rule thus codifies what Rep. Robert W. Kastenmeier – one of the architects of the 1980 Act – referred to as “the historic functions of the chief judge to respond to problems that come to his or her attention, a function that existed prior to the Act.”¹²⁰

In this section I outline some steps that can be taken to strengthen the role of the chief judge. First, Rule 5 should be amended to make clear that under specified circumstances a chief judge *must* conduct an informal inquiry or *must* identify a complaint. Second, the Committee should consider encouraging the circuits to establish Web portals that would enable court employees to inform the circuit chief judge about possible misconduct or disability without filing a formal complaint. Finally, chief judges should make a visible and emphatic public commitment to addressing legitimate complaints and protecting complainants from reprisal.

1. Chief judge’s duty to investigate reports of misconduct or disability

Rule 5(a) now begins with this sentence: “When a chief judge has information constituting reasonable grounds for inquiry into whether a covered

¹¹⁹ This provision was added in 1990. See Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 Ky. L.J. 763, 781-82 (1987-88).

¹²⁰ *Id.* at 182.

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.”¹²¹ 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 this first sentence of Rule 5(a) does not deal with the statutory procedure of identifying a complaint and thereby 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].”¹²²

But that rationale does not apply at this antecedent 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.¹²³

This requirement would apply irrespective of whether the “information” reaches the chief judge through private communications or from public reports. Although informal inquiry can be a particularly valuable tool for addressing concerns voiced by law clerks or other court employees about judges’ behavior,¹²⁴ it can also serve a useful purpose when public reports signal a possible problem. For example, in February 2014, local media reported that District Judge Patricia Minaldi of the Western District of Louisiana was arrested for driving while intoxicated. She pleaded guilty to first-offense DWI. Three years later, after an embarrassing series of in-court interruptions and mistakes, Judge Minaldi acknowledged an “alcohol problem.”¹²⁵ The Fifth Circuit Judicial Council

¹²¹ Draft page 19, lines 3-8 (emphasis added).

¹²² Id. lines 36-38.

¹²³ It would also be helpful to divide Rule 5(a) into two separate paragraphs, one dealing with the informal inquiry, the other with the identification of a complaint.

¹²⁴ See *infra* Part V-A-3.

¹²⁵ Michael Kunzelman, US judge says her alcoholism didn’t affect case resolutions, AP Online, Apr. 14, 2017 (available on Westlaw).

found “compelling and uncontroverted medical evidence” showing that Judge Minaldi was permanently disabled, and she retired for disability under 28 U.S.C. § 372(a).¹²⁶ If the chief judge of the Fifth Circuit had initiated an inquiry after the DWI arrest, Judge Minaldi’s “alcohol problem” might have been caught much sooner, and at least some of the disruption and embarrassment might have been avoided.

2. Chief judge’s duty to identify a complaint based on public reports

In emphasizing the value of informal inquiry when the chief judge receives information about possible misconduct or disability, I do not minimize the importance of the statutory procedure of identifying a complaint. On the contrary, I think that this element of Rule 5 should also be strengthened.

A large measure of discretion in exercising the statutory authority is desirable when the chief judge receives information through private channels, but the justifications discussed above carry much less weight when allegations or reports of possible misconduct have become public. In that situation, the chief judge should be required to identify a complaint and to announce that he or she has done so.¹²⁷ 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.¹²⁸

3. An alternate channel for reports about workplace conduct

The July 2018 Working Group Report recommended that “the Judiciary should develop additional, less formal alternatives [to the procedures under the 1980 Act] for addressing inappropriate workplace behavior.”¹²⁹ The Report noted the “need for the Judiciary to develop multiple informal mechanisms that can provide a broad range of advice, intervention, and support to employees.”¹³⁰

¹²⁶ In re Complaint of Judicial Disability, No. 05-16-90074 (5th Cir. Judicial Council Aug. 23, 2017).

¹²⁷ For further discussion of interim disclosures, see *supra* Part III-B-I, particularly note 87 and accompanying text.

¹²⁸ In the current Rules, this point is treated only in the Commentary, and identification of a complaint is not mandatory. See Draft page 20, lines 17-20. For discussion, see Hellman, Proposed Amendments (2014), *supra* note 10, at 17-18.

¹²⁹ Working Group Report, *supra* note 3, at 17.

¹³⁰ *Id.* at 36.

I agree with the idea of developing new mechanisms, separate from those established by the 1980 Act, for providing advice and support to employees. But when it comes to investigating and redressing misconduct by judges – whether in the workplace or elsewhere – new channels should be integrated into the procedures established by the 1980 Act and should respect “the historic functions of the [circuit] chief judge to respond to problems.”

One way of doing this would be for each circuit to establish an interactive Web page or portal that would permit court employees to file reports of possible workplace misconduct by a judge. The reports would be similar in form and content to a complaint, but they would not be docketed as complaints. At the same time, because the reports would go to the chief judge, there would be no duplication of, or interference with, the procedures established by the 1980 Act. Text on the portal page would educate employees about the operation of the portal and the differences between it and the complaint procedure. For example:

- If the matter can be resolved to the satisfaction of the reporting employee, the subject judge, and the chief judge, no complaint will be identified and no order will be issued under Rule 24.
- As Rule 5 now provides, if the chief judge finds clear and convincing evidence of misconduct and no informal resolution has been reached, the chief judge must identify a complaint and initiate a formal proceeding under the Act.
- If a formal proceeding is initiated and relevant issues are reasonably in dispute, the chief judge must appoint a special committee.

One question that will arise is whether reports can be submitted through the portal anonymously. The Working Group Report notes the concerns of law clerks in particular about the possibility of retaliation, embarrassment, or other undesirable consequences.¹³¹ But it will be difficult for the circuit chief judge to conduct any sort of inquiry without knowing who has made the report, at least where the reporting employee is also the alleged victim. Nevertheless, it may be

¹³¹ Id. at 12-13.

desirable to allow the option of an anonymous report, with a cautionary note to the employee about the resulting limits on the chief judge’s inquiry.¹³²

The chief judge may also be able to take steps without having full information in a way that might not be possible if a formal complaint was filed. For example, the chief judge may be able to address the issue generally at a judges’ meeting.

The Committee might consider asking a few circuits to establish portals as pilot projects.¹³³ It may be that there is no need for an alternate channel; employees may be willing to file complaints if they are assured of protection against retaliation. That assurance should come from the circuit chief judge – a point that warrants separate discussion.

4. “Leadership from the top”

In outlining measures for “ensuring an exemplary workplace” for court employees, the Working Group emphasized that “leadership must come from the very top of the organization.”¹³⁴ This admonition is equally valid in the broader context of misconduct and disability generally. I reiterate the point that I made in my testimony at the House Judiciary Committee hearing in 2013: the most important element in “assuring that justified complaints are brought to the attention of the judiciary without fear of retaliation”¹³⁵ is the visible, emphatic, public commitment by the chief judge of the circuit to addressing legitimate complaints and protecting complainants from any form of reprisal.

There are many forums in which this commitment can be communicated; a good place to start is the circuit website. Currently, if you go to the “judicial conduct and disability” page of most (perhaps all) circuit websites, you will find a

¹³² In his statement to the Committee, Russell Wheeler has suggested that the Rules should authorize the chief judge, upon request, to withhold identifying information in the copy of the *complaint* provided to the subject judge. I have some reservations about that suggestion when a formal complaint has been filed, but there is certainly room for flexibility in the administration of the informal portal system outlined here.

¹³³ Use of the portal would be limited to Judiciary employees. I recognize that lawyers may have a similar reluctance to file formal complaints. The Breyer Committee suggested the creation of “local bar committees that could serve as conduits between members of the bar and chief judges concerning potential complaints.” Breyer Committee Report, *supra* note 71, at 217.

¹³⁴ Working Group Report, *supra* note 3, at 8 (citation omitted).

¹³⁵ See Breyer Committee Report, *supra* note 71, at 217 (quoting Judicial Conference proceedings).

series of sentences emphasizing, in different ways, that “complaints about judges’ decisions and complaints with no evidence to support them must be dismissed.”¹³⁶ That is an important point to make, but it should not stand alone. The page should also feature a personal statement from the circuit chief judge telling court employees – and everyone else – that if there is evidence of misconduct or disability, the chief judge really wants to hear about it and will take steps to address it, including protecting complainants against retaliation.¹³⁷

B. The Mechanics of Filing a Complaint

Current Rule 6(e), unchanged in the September 2018 Draft, requires the complaint to provide “the number of copies of the complaint required by local rule.” Most of the circuits now require only one copy, but at least one, the Eleventh Circuit, requires four.¹³⁸

I assume that in the circuits where only one copy is required, the complaint and other materials will be scanned to create an electronic document, and the electronic document will be transmitted to the chief judge. There is no reason why all circuits should not follow this procedure, and the national Rules should be amended to provide that only one copy must be filed by the complainant.

Going one step further, I suggest that the Committee consider amending the Rule to authorize electronic filing of complaints. Obviously, security concerns would have to be satisfied, but if parties can file litigation documents electronically, it is hard to see why complainants should not have that option also.

If this were done, the complaint form would be made available on court web sites not only as a PDF but as an interactive document that would allow complainants to enter data and submit the form electronically.¹³⁹

¹³⁶ This language was suggested by the Breyer Committee. See *id.* at 219.

¹³⁷ Chief judges can also make the point in public speeches. See Lynne Marek, *An All-Points Bulletin: Be on the Lookout for Aging, Cranky Judges*, *National L.J.*, May 21, 2008 (quoting Seventh Circuit Chief Judge Frank Easterbrook telling Seventh Circuit Bar Association, “When a judge slows down, or becomes cranky, or shows signs of losing a step mentally, I need to know.”).

¹³⁸ 11th Cir. JCDR 6.4, <http://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/RulesAddendum03MAY16.pdf>.

¹³⁹ Russell Wheeler, in his statement to the Committee, provides a more detailed discussion of electronic claims submission.

C. Transfer to Another Circuit Council

Rule 26 (unchanged in the September 2018 Draft) authorizes chief judges and circuit councils to request the Chief Justice to transfer a misconduct proceeding “to the judicial council of another circuit.” This provision implements a recommendation of the Breyer Committee. I have two suggestions for amendments to the Rule and the Commentary.

First, the Rule authorizes a request for transfer only in “exceptional circumstances.” This predicate makes sense if one considers (in the Breyer Committee’s phrase) “the bulk of the iceberg” of complaints. But it may not be quite as appropriate if one focuses on the much smaller universe of cases in which a request would be a realistic possibility. To be sure, the Breyer Committee stated that transfers “should not be a regular occurrence.” Nevertheless, the Committee’s report seems to contemplate a somewhat broader use of the device than the phrase “exceptional circumstances” suggests. Moreover, the specific circumstances listed in the Commentary to the draft Rule (e.g., “the issues are highly visible and a local disposition may weaken public confidence in the process”) might not necessarily be viewed as “exceptional.”

I think the best approach is simply to omit the prefatory phrase. All that the Rule needs to do is to authorize the procedure. Explanation of the circumstances that might justify a request can be left to the Commentary. The Commentary could note that transfers “should not be a regular occurrence.”

Second, over the last few years, chief judges have consistently followed the practice of requesting a transfer when serious allegations have been raised about a judge of the court of appeals. This makes sense; a majority of the members of the circuit council will be colleagues of the subject judge. I think the time has come to codify this practice. Either the Rule or the Commentary should provide that when a non-frivolous complaint is filed against a court of appeals judge, or a complaint is identified against a court of appeals judge, the chief judge should request the Chief Justice to transfer the proceeding to another circuit.

D. Reporting on the Administration of the Act

Congress has required the Administrative Office of United States Courts (A.O.) to include in its annual report a statistical summary of the number of complaints filed under the Act and their disposition. The Breyer Committee recommended refinements to that report, and the A.O. has complied. But the report is still confined to numbers.

I suggest that this Committee should supplement the statistical report with a narrative report that includes discussion of particular noteworthy complaints and their resolution. Models for such a report can be found in the annual reports issued by some state boards and commissions. The Minnesota Board on Judicial Standards provides “abridged versions” of cases to maintain confidentiality; the California Commission on Judicial Performance gives a wealth of detail.

The report should be signed by the chair of the Conduct Committee. And it should be posted as a separate document on the “Judicial Conduct and Disability” page of the Federal Judiciary’s website. Taking these steps would not only enhance public understanding of the Act’s administration; it would also show the judiciary’s commitment to policing misconduct within its ranks.

Other, smaller steps could also help in this regard. For example, the Judicial Conduct and Disability web page should list the members of the Conduct Committee. Currently, there is no way for the public to know who serves on the Committee. Even Committee orders do not necessarily identify all current members.

Conclusion

The proposed amendments in the September 2018 Draft are designed primarily to advance the goal stated by the Federal Judiciary Workplace Conduct Working Group: “to ensure an exemplary workplace for every judge and every court employee.”¹⁴⁰ They do this effectively, although, as I have suggested, there is room for improvement. But in considering amendments to the Rules, the Committee should not lose sight of a point emphasized by the architects of the misconduct system: the 1980 Act established “a *citizen* complaint procedure,”¹⁴¹ and one purpose is “to maintain *public* confidence in the judiciary.”¹⁴² That goal is even more important in an era when social media and 24/7 news cycles foment public distrust of all institutions, even the most independent and upright. To counteract that phenomenon, the Rules should foster transparency, thoroughness, and procedural regularity in all contexts, whether the allegations involve workplace conduct or some other aspect of the “administration of the business of the courts.” The suggestions in this statement are offered in that spirit.

¹⁴⁰ Working Group Report, *supra* note 3, at 1.

¹⁴¹ See *supra* note 26 and accompanying text.

¹⁴² See *supra* text following note 17.