

November 3, 2014*

Statement of Russell R. Wheeler

on

Proposed Amendments to Judicial Conference Rules for Judicial-
Conduct and Judicial-Disability Proceedings

Judge Scirica and Members of the Committee:

Thank you for the opportunity to comment on the proposed amendments. I have provided brief biographical and institutional information in the note below, ** but I speak only for myself in this statement.

With one partial exception, discussed below, I support five of the six major substantive changes in the redlined draft: providing for review of chief judge and council orders when there is no complainant to seek such review; Conduct Committee review of any non-unanimous council order affirming a chief judge's disposition of a complaint; on-line posting of all final orders (which I would amend further); precluding chief circuit judge participation in council review of his or her final orders; and, upon appointment of a special committee through final disposition of the matter, barring a chief judge who is the subject judge from participating in any Chapter 16 proceedings except as a subject judge.

I agree with Professor Arthur Hellman that the amendment to Rule 21(c) is problematic: it would allow a council order to stand if, on a petition for Conduct Committee review, a disqualification produced a tie vote. More broadly, I agree generally with his statement's analysis of and recommendations as to the red-lined version of the rules, while noting some alternative approaches.

By way of summary, this statement:

- particularly endorses two wording changes (making clear that refusal to cooperate in an investigation can be misconduct, and emphasizing the chief judge's obligation not to find facts reasonably in dispute);
- proposes additional substantive changes to:
 - Rule 24(b)—suggesting that the rule direct chief judges and councils to denote non-routine final orders posted on their courts' websites and
 - Rule 28—suggesting that the Rule direct that complaint filing material be made prominently available on court websites' homepages and that the complaint form give

* This statement is a slight revision of one that I submitted to the Committee on Oct. 27, 2014.

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the address for filing complaints. (The statement describes a survey I made of 200 federal court websites in terms of the availability of such material.)

- comments on press misunderstandings of the principal judicial branch actors in the complaint process and proposes a modest amendment that might mitigate some of that misunderstanding.

I. Matters of Clarification and Emphasis

I particularly commend the committee for two non-substantive wording changes. A new Rule 3(h)(1)(H) specifies that cognizable misconduct includes “refusing, without good cause shown, to cooperate in the investigation of a complaint under these rules.” Section (h)(1)’s list of cognizable misconduct as originally promulgated and with these draft amendments makes clear that the list is not exhaustive. It is reasonable to assume that the behavior identified in new subsection (H) has always been cognizable misconduct, but the amendment makes that explicit for the same reason that another amendment makes explicit that a judge’s retaliation against those involved in a complaint’s investigation is misconduct: “public confidence in the complaint process.” A judge’s cooperating with an investigation may be burdensome, but, as the commentary to Canon 2A of the *Code of Conduct for United States Judges* says, “A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen.”

I also commend the new sentence after Rule 11(b)’s admonition that in conducting the initial inquiry, “the chief judge must not determine any reasonably disputed issue.” The additional sentence emphasizes that the chief judge must leave any such determination to a special committee and the circuit judicial council. Although the rule, both currently and with the proposed amendment, merely states what the Act itself makes clear at 28 U.S.C. § 352 (a), there have been some instances in which chief judges appear to have dismissed or concluded complaints when they should have appointed special committees.¹

II. Providing Additional Information to the Public on How Complaints are Addressed Under the Act: Posting and “Publishing” Final Orders

The draft amendment to Rule 24(b) removes the option of making all final orders public solely by placing them in a public file in the court of appeals’ clerk’s office. The amendment would obligate chief judges and councils to post all orders on the respective court of appeals websites as well as maintain them in the clerk’s office.

The change will free from “practical obscurity” orders that are now reasonably available only to individuals in proximity to the headquarters of a court of appeals. It is common-sense recognition that websites are now the preferred and most easily accessible location for making documents available for public inspection. Researchers, journalists, and others who wish to undertake quantitative analysis of all final orders (cross-tabulating, for example, the orders according to categories in Table S-22 of *Judicial Business of the United States Courts*) will now have ready access to the orders.

¹ See, e.g., Wheeler, *supra* note ** at 517-519 and Hellman, “When Judges Are Accused,” NOTRE DAME J.J.L. ETHICS & PUB. POL’Y 325, 353-55 (2008)

At the risk, however, of sounding ungrateful to the committee and to those councils that already post all orders on line, such posting by itself is an insufficient step to meet Rule 24 (b)'s goal of "provid[ing] additional information to the public on how complaints are addressed under the Act."

The great majority of final orders are fairly routine, semi-boilerplate documents in which the chief judge dismisses the complaint for well-established reasons or the circuit council affirms such dismissals. A very few orders do not fit those descriptions—and are thus likely to be of general interest—but identifying those few out of all posted orders is a time-consuming and laborious process.² On the court of appeals/council websites that now post all orders, the user encounters a list of docket numbers, dates, and either a pdf of the order or a hyperlink to it. Some councils specify the orders' source, i.e., chief judge or council, but don't distinguish between the many council orders affirming chief judge dismissals and the few council orders that follow special committee investigations.

Unless one knows (probably from press accounts) of a non-routine final order and has its docket number or date, the only way to identify the very few that are exceptions to the routine dismissals is to open every order.

I suggest amending Rule 24(b) further to require the councils to use a uniform method to identify the exceptional orders:

Manner of Making Public: The orders described in (a) must be made public by placing the orders on the court's public website and by placing them in a publicly accessible file in the office of the circuit clerk and by placing the orders on the court's public website. An asterisk (*) should be used to designate any website-posted order in which the chief judge concludes the proceeding (rather than dismisses the complaint) or appoints a special committee, and any order in which the chief judge or the judicial council provides what either believes is a new interpretation of statutory provisions or these Rules. The list of orders placed on the website must also identify the number of pages of each order. If the orders appear to have precedential value, the chief judge, in addition to placing them on the court's public website, should ~~may~~ cause them to be published.

I suggest changes to the first sentence simply to recognize that online availability is today the dominant mode of availability.

Professor Hellman proposes an alternative to my suggestion of using asterisks to denote exceptional orders and suggests a broader category of orders to be published. The committee may find his proposal preferable. In any event, should you pursue the idea, I hope the revised rule will specify a single method, to facilitate inter-circuit analysis.

The reason to provide the number of pages of each order is this: The great majority of routine orders in any particular circuit vary little in their length (although the typical length of orders varies among circuits due to different formats and boilerplate language). Orders with pagination beyond the typical range for the particular circuit are more likely to be exceptional, including those with novel interpretations. Moreover, comparatively

² See Wheeler, *supra* note * at 513 and my testimony before the April 2013 hearing of the House Judiciary subcommittee of jurisdiction available at <http://www.brookings.edu/research/testimony/2013/04/25-judicial-conduct-disability-wheeler>

longer orders might call attention to chief judge final dismissal orders that might have invaded the province of special committees and councils.

I suggest changes to the final sentence because I assume chief judges do not need the rules' permission ("may cause") to publish orders in the Federal Reporter and on-line data bases, among others. Rather the rules should require publication of orders that the chief judge or council believe offer new interpretations of the Act or the rules. And the sentence in its original form may be confusing because it fails to clarify the distinction between placing an order on the court's website and publishing the order.

III. Providing Additional Information to the Public on How Complaints are Addressed Under the Act: Other Matters

A. Readily Available Information on How to File a Complaint

The Rule 24(b) change proposed by the committee is in keeping with efforts over the last fifteen years or so to make the 1980 Act and its implementing mechanisms easier for the public to understand and to use responsibly.

To that end, the Judicial Conference in 2002, responding in part to concerns of legislators and on the recommendation of your previous, generally more passive incarnation, called on every court to include on its website a "prominent link" to the materials for filing a complaint. The Breyer Committee in 2006 recommended that judicial councils require all courts under their jurisdiction to provide information about filing a complaint on their respective websites' homepages.

Rule 28, however, is much less ambitious. Beyond directing courts to make the documents available in their clerks' offices, it simply directs them to post the documents on their websites or provide either a link to the documents on the respective court of appeals website or, with the Committee's proposed amendment, a link to them on uscourts.gov.

Requiring that courts display the material on their websites' home pages, however, would not represent a radical departure from current practice. In late October 2014 I canvassed all court of appeals, district and bankruptcy court websites (as well as those of the Court of International Trade and Court of Federal Claims) to learn whether the judicial conduct material in question was available either on the homepage, or, if not, within one click (usually to a page such as "Court Information" or perhaps "Judges"). If the material was not on the homepage and did not appear within one click on any of the other locations where one might reasonably look for it, I regarded the website as not making the material adequately available.

This table on the next page summarizes the results; the note contains some caveats re the data.³

³ These data are instructive but may be imprecise; I coded them myself, but ideally another coder should have undertaken the same exercise to identify any discrepancies. And I did not use a standard protocol in both the 2009 and current inquiries, although both asked fairly simple questions. The small number of districts in some circuits makes circuit-specific percentages volatile.

| | <u>Judicial complaint material available:</u> | |
|--------------------------------|---|----------------------------------|
| | <u>On home-page</u> | <u>With no more than 1 click</u> |
| All courts (200) | 111 (56%) | 159 (80%) |
| Appellate, district, CIT (105) | 56 (53%) | 89 (85%) |
| Bankruptcy, CFC, terr. (95) | 55 (58%) | 70 (74%) |

All but two courts of appeals make the material available on the homepage; those two post it within one click. The percentage of homepage availability by all courts within a circuit varied from 36% to 79%. The 2014 figures suggest a slight regression from the situation I found in 2009 as to courts with good-behavior tenured judges (the only ones I inspected then). In 2009, 69% of those courts put the material on their homepage and 90% had it within one click, versus 53% and 85% respectively today. (To be clear, these findings only mean that the materials are not readily available on the other courts' websites, not that they are necessarily out of compliance with Rule 28 as currently written.)

To bring Rule 28 in line with Judicial Conference policy and Breyer Committee recommendations, I suggest amending it further and adding Commentary. I have imposed my suggested language on the Rule as it would read with the Committee's proposed changes in effect.

~~These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court whose judges are subject to the Act must also make these Rules, the complaint form as provided in Rule 6(a), and complaint-filing instructions prominently available on the homepage of the court's website or provide include on that homepage a prominent Internet link to those items on the appropriate court of appeals website or on www.uscourts.gov. The complaint form, whether available directly on a court's website or by the link to the court of appeals website, should include the address to which to submit a complaint. These Rules and copies of the complaint form must also be available without charge in the office of the clerk of each court whose judges are subject to the Act.~~

Commentary on Rule 28

Rule 28 reflects Judicial Conference policy since 2002 that every court include on its website a "prominent link" to the materials for filing a complaint under the Act (JCUS Proceedings, 2002, at 58), as well as the Breyer Committee recommendation that the information be available on the homepage of the website (Chap. 6, item 6). As that committee said, "the judicial branch has a responsibility to inform the public about its operations, including the availability of this complaint procedure." The committee also noted that its research staff could find no statistically significant relationship between complaints filed about the judges of any particular court and whether or not that court made the relevant information available on its website.

The Breyer Committee also recommended that courts post a cautionary note to advise potential complainants that almost all complaints get dismissed because they are not in compliance with the Act, mainly because they are about judges' judicial

decisions or offer no evidence to support the complaint. The full statement is available in the Breyer Committee report, Ch. 6 at Recommendation 6, and from the Judicial Conduct Committee staff.

In short, I suggest a merging of the Breyer Committee recommendations and those of the Conference—requiring courts not simply to display the material on the homepage but to display it there “prominently” (some homepages are so crowded that they obscure the judicial conduct links displayed there).

As with Rule 24(b), I recommend reversing the order in which the rule directs website posting and hard-copy availability because on-line availability is the preferred mode. (I also recommend revising the last sentence of the first paragraph on the complaint form.)

Requiring each circuit to show the filing address on the complaint form is a simple step to assist would-be filers. I commend to your consideration the cover page to the electronic complaint form on the Second Circuit website (included as an appendix to this statement).

This change is consistent with Professor Hellman’s call for making the rules more user friendly. The complaint form in the Rules Appendix says that Rule 7 specifies “where to file a complaint;” Rule 7(a)(1) tells most complainants to file with “the circuit clerk.” Many complainants probably have no idea what a “circuit clerk” is and are likely to be puzzled why a complaint about, say, a bankruptcy judge must be filed somewhere other than, in this example, the bankruptcy court. (I don’t know, but I suspect clerks of district and bankruptcy courts receive complaints that they either forward to their circuit-level counterparts or return with instructions.) In keeping with this recommendation, my proposed language deletes the option of including a link to the material on the uscourts.gov site because it is, by definition, not circuit-specific.

This rules change, if adopted, will hardly ensure the ready availability of complaint-filing material. Courts adjust their websites periodically, and information can get discarded despite having been put there earlier in response to statutory or Judicial Conference mandates. Periodic monitoring and reminding (which I understand the Administrative Office and the Judicial Branch Committee undertake) is a necessary supplement to the rule. Your committee may wish to ask your staff to undertake similar monitoring.

B. Transparency in Official Disclosures

One barrier to transparency and public understanding of the complaint process stems from the common but erroneous practice of referring to a court of appeals as a “circuit” and from the confusion, even among journalists who cover the courts, about the existence—much less the functions—of the circuit judicial councils. This confusion was highlighted by news reports about an “Announcement” posted August 12 on the website of the U.S. Court of Appeals for the Eleventh Circuit, noting public reports that a case was pending in state court involving a federal district judge who had been arrested on misdemeanor charges. The announcement stated that “all legal matters filed with the United States District Court for the Middle District of Alabama that are pending before Judge Fuller will be reassigned to other judges in accordance with standard procedures for the assignment of cases. No new legal matters will be assigned to Judge Fuller until further notice.”

Statutory authority to remove a district judge's cases and prohibit the assignment of new cases would seem to be the sole province of the circuit judicial council, perhaps under its "all necessary and appropriate orders" authority in 28 U.S.C. § 332(d)(1) or perhaps its authority in 28 U.S.C. § 137 to divide the business of a district court whose judges cannot agree on such division.

The announcement, however, was on the letterhead of the court of appeals and, because it spoke in the passive voice, there is no indication, other than the letterhead, as to which body took the announced action, or why, other than the reference to press reports about the pending state court case. Nor is there any statement of the authority or underlying purpose for the action. In that light, it is not surprising that press coverage reflected confusion on two distinct points: why the judge's docket was removed and who removed it and is now investigating the matter.

Some reporters assumed, at least initially (and reasonably), that the judge's docket was removed as a sanction stemming from his arrest. One press report cast the action as a sort of impeachment-lite: "A federal judge is appointed for life and can be removed from the bench only after he is impeached and then tried by the U.S. Senate. But the appellate courts can take administrative steps to make a judge irrelevant—even temporarily—by taking away cases and limiting duties while he remains on the payroll."⁴

As to who is investigating the matter, the report above named the "appellate court[]." Another said that "An appellate court has empanelled a committee to investigate U.S. District Judge Mark Fuller"⁵ A legal newspaper that advertises itself as "the official legal organ of Fulton County"⁶ said "Federal courts of appeals are supposed to make public how they deal with [misconduct complaints]. At the U.S. Court of Appeals for the Eleventh Circuit, where U.S. District Judge Mark Fuller's behavior is being investigated"⁷ (The story later identified the council as the relevant actor, perhaps assuming that the council is an appendage of the court of appeals, a common reporting error even in cases without this one's confusing announcement.⁸) The national media similarly misreported the proceeding, such as "As for [Fuller's] professional fate, it now lies in the hands of a federal appeals court in Atlanta."⁹

That announcement is, as far as I know, a one-of-a-kind incident as to its specifics, but it emphasizes the importance of clarity and transparency in announcements about, or that may appear to be about, disciplinary actions—especially if the Committee reacts favorably to Professor Hellman's suggestion for greater disclosure of and about chief judge-identified

⁴ Cook, Federal judge's cases reassigned due to pending domestic violence case, *The Atlanta Journal-Constitution*, Aug. 13, 2014, available at <http://www.ajc.com/news/news/breaking-news/federal-judges-cases-reassigned-due-to-pending-dom/ng2br/>

⁵ Visser, Committee to investigate domestic violence charge against judge, *The Atlanta-Journal Constitution*, Sept. 30, 2014, available at <http://www.ajc.com/news/news/committee-to-investigate-domestic-violence-charges/nhYpT/>

⁶ See <http://www.dailyreportonline.com/?slreturn=20140915111638>

⁷ Palmer, Gripes About Federal Bench: Banal to Bizarre (Fulton County) Daily Report, August 27, 2014 available at <http://www.dailyreportonline.com/id=1202668133271/Gripes-About-Federal-Bench-Banal-to-Bizarre>

⁸ E.g., "The Judicial Council for the US Court of Appeals for the First Circuit in Boston has tapped Susan J. Goldberg as the new circuit executive, to oversee all administrative duties for the region's federal appeals court." Valencia, "Appeals Court Taps Goldberg as Chief Executive," *BOSTON GLOBE*, Oct. 15, 2014 available at <http://www.bostonglobe.com/metro/2014/10/15/appeals-court-taps-goldberg-chief-executive/vBpQKgzcOBEdTDwaWBFuhN/story.html>

⁹ Arenas, "Alabama Judge's Spousal Abuse Case Has Some Seeking His Resignation," *CBS Evening News*, Oct. 28, 2014, available at <http://www.cbsnews.com/news/judges-alleged-spousal-abuse-case-has-some-seeking-his-resignation/>

complaints based on published accusations or reports. I recognize that the misunderstanding at issue here may be comparatively minor, in the total scheme of public misunderstanding and lack of knowledge of how the judicial branch functions, and that it is not the judiciary's job to ensure accurate press coverage. On the other hand, if it can take modest steps to promote accurate understanding of its functions, it makes sense to do so.

The committee might consider a new section (e) for Rule 24:

(e) Official public disclosures. Public announcements of actions of judicial branch bodies directed at individual judges or groups of judges that reasonable observers might regard as related to complaints of misconduct or disability must identify the acting body and the authority for the action.

APPENDIX—COVER PAGE OF SECOND CIRCUIT COMPLAINT FORM
(copied from
<http://www.ca2.uscourts.gov/Docs/CE/Instructions%20and%20complaint%20form.pdf>)

LOCAL INSTRUCTIONS
FOR COMPLAINTS FILED UNDER THE JUDICIAL CONDUCT AND DISABILITY
ACT OF 1980, 28 U.S.C. §§ 351-364

When filing a complaint, a complainant is encouraged to use the form provided on the court's website. The complaint must be written and must include a brief statement of facts containing the information described in Rule 6. It also must comply with the following additional requirements:

1. A separate complaint, with the required number of copies, must be filed for each judge complained about.
2. The complainant must submit the following number of copies of each complaint:
court of appeals judge – original and 3 copies
district court or magistrate judge – original and 4 copies
bankruptcy judge – original and 5 copies.
3. The envelope must be marked “COMPLAINT OF DISABILITY” or “COMPLAINT OF MISCONDUCT,” and must not show the name of any judge (for further information see Rule 6(e)).
4. The Statement of Facts **should not be longer than 5 pages** (five sides).

Complaints should be mailed to:
Clerk of Court
United States Court of Appeals
Thurgood Marshall, U.S. Courthouse
40 Foley Square
New York, NY 10007