COMMITTEE ON JUDICIAL CONDUCT AND DISABILITY
OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

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PUBLIC HEARING on the Release :
of Draft Amendments to :
Judicial Conference Rules :
for Judicial-Conduct and :
Judicial-Disability :
Proceedings :
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Thursday, October 30, 2014

Washington, D.C.

The above-entitled matter came on for public hearing pursuant to notice.

BEFORE:

THE HONORABLE ANTHONY J. SCIRICA, JUDGE, CHAIRMAN

THE HONORABLE SARAH EVANS BARKER, JUDGE

THE HONORABLE JOEL F. DUBINA

THE HONORABLE DAVID M. EBEL

THE HONORABLE JOEL M. FLAUM

THE HONORABLE JAMES E. GRITZNER

THE HONORABLE THOMAS F. HOGAN

C O N T E N T S

P R O C E E D I N G S

JUDGE SCIRICA: Good morning, everyone.

Judge Wallace, good to see you again. Thank you for coming here today.

We are having a public hearing on amendments to the Judicial Conduct and Disability Rules.

I am Judge Scirica and I will introduce the members of the Committee. Judge Flaum, to my far left, Judge Dubina, Judge Gritzner, Judge Barker, Judge Hogan and Judge Ebel.

And Judge Wallace, we're delighted that you were able to take the time to come here to speak to us. You've been active and involved in this process for a long time. In fact, you were part of the creation of this entire system of judicial conduct and disability regulation. We are so pleased to have you here.

And you may proceed when you're ready to go.

CHIEF JUDGE WALLACE: Well, thank you very much, Mr. Chairman. I'm grateful to the Committee for allowing me to make this presentation. I'm not making this statement for myself, but I'm speaking on behalf of the Judicial Council of the Ninth Circuit, of which I am a member.

Our Judicial Council met and discussed the issue thoroughly last Thursday at our regular meeting and I was designated to represent the Council at the meeting today.

I'm going to try my best to give you, as I understand, the position of our Judicial Council for whatever benefit that might be to your deliberations.

The issue of judicial misconduct complaints and how they should be addressed is not new, and many of us have been working on the issue for decades. However, because of recent shifts in process and procedures, our Judicial Council believes that proposed changes and changes already made can best be addressed if they're put into their historical context. That I would like to review today.

The need for a local decentralized structure was described by Chief Justice Hughes in 1938. He saw the need for "greater attention to local authority and local responsibility [resulting in]... a decentralization and distribution of authority which I think will greatly promote efficiency and will put the responsibility immediately and directly where it belongs with respect to the administration of justice in the respective Circuits."

Indeed, even long before that, the issue was debated between the Federalists and the anti-Federalists whether the newly drafted Constitution should be adopted. The Federalists opted for centralized power while the anti-Federalists wanted the power to remain in the local arena.

The Supreme Court has not been silent on its part as to the virtues of decentralization in judicial

administration. It is important for your deliberations, we suggest, that the Supreme Court has already made clear that the policy conclusions of the Judicial Conference are not binding on lower courts, and instead are entitled respectful consideration, as pointed out in *Perry v. Hollingsworth*.

Associate Justice Stephen Breyer, who we all know was a former Chief Circuit Judge before he went on to the Court, and responsible for the 2006 Breyer Report stated in his dissenting opinion in *Perry*, “for the past 80 years, local judicial administration has been left to the exclusive province of the Circuit Judicial Councils, and this Court lacks their institutional experience.”

Then quoting Professor Fish, from their creation, "[t]he Councils constituted... a mechanism through which there could be a concentration of responsibility in the various Circuits-- immediate responsibility for the work of the courts, with power and authority... to insure competence in th[eir] work." "For that reason," stated Justice Breyer, "it is inappropriate as well as unnecessary for this Court to intervene in the procedural aspects of local judicial administration. Perhaps that is why I have not been able to find any other case in which this Court has previously done so, through emergency relief or otherwise.”

He then cites to Justice Scalia, who stated in a concurring opinion, “I do not see the basis for any direct

authority to supervise lower courts."

Nor was Justice Breyer "aware of any instance in which th[e] Court has preemptively sought to micromanage district court proceedings as it does today."

Turning to more recent historical context, following Chief Justice Hughes' preference, Congress established the Judicial Councils of the Circuit. It logically followed that Congress would, and did, provide the Judicial Councils with power to enter orders, administrative orders, a power not granted to the Judicial Conference of the United States, or to the District Courts, or to the Courts of Appeals. This power resides only in the Judicial Councils of the Circuit.

That administrative power from the legislature is direct and significant for purposes of this hearing. It empowers the Judicial Councils to enter all orders for administration of the business of the courts. It is significant because this power was not granted nationally, or to the District, or to the Circuit Courts.

So this is the basic framework pursuant to which any disciplinary proceeding must function. Only the Judicial Councils have the power to enter orders dealing with discipline, short of impeachment.

It appears to the Judicial Council of the Ninth Circuit that over the last few years this decentralized

power of the Judicial Councils seems to have been diminished, and the Judicial Conference of the United States, with this Committee, has evolved from an advisory role to what appears to us to be more of a policing role. At no time in the history of the court has such an organization been adopted, so it is important to trace its evolution.

The first attempted major threat to this delegated power was in 1975 when Senator Nunn of Georgia introduced a bill that would create a mechanism to be housed in Washington, D.C. which could remove judges without impeachment. The proposal was approved in principle by the Judicial Conference of the United States, although it was doubtful it had any great support from the judges. Indeed, Chief Justice Burger said to me the concern was that Congress might do something worse, his words. I do not see how it could have been.

The real debate was whether the Judicial Councils could perform judicial correction, short of impeachment, or whether a specific amendment had to be made. Eventually it was deemed prudent by most to amend the current Judicial Council authority so more judges would support it. Three Judges, Judge Browning, Judge Hunter and I drafted the amendment, which was subsequently introduced and adopted in 1980 and became the Judicial Conduct and Disability Act,

which continues to govern all of the misconduct proceedings today.

The Judicial Conduct and Disability Act was tied to the existing power of the Judicial Councils by limiting the authority to censor federal judges only if that conduct interfered with the business of the courts. This accomplished two things. First, it identified the context to be considered by the power already designated to be in the Judicial Councils. Second, it limited the misconduct program to acts which interfered with the business of the courts. The personal life of the judge was to remain private, unless it interfered with the business of the courts.

Subsequently, we had the Kastenmeier Commission. This was the first review of how well the Circuit Councils were applying the statute, which was done about 13 years after the adoption. And the investigating commission was chaired by Representative Robert Kastenmeier. Mr. Kastenmeier chaired the committee, which authorized the statute and its subsequent review. Thus, these findings, I suggest, are significant.

The National Commission found that the system of formal and informal approaches to the problems of misconduct and disability is, in the words of the Commission, "working reasonably well." I point out that the investigation was

the system of formal and informal approaches, and I'll come back to that later.

The Commission wrote that it was not aware of any other system that would strike as well a balance between judicial independence and accountability. The Commission further stated that "information, education, and dialogue are integral to the creation and nurture of a culture that encourages meritorious complaints of misconduct or disability while disposing with dispatch of those that do not belong in the system."

The next investigation is one with which we are all familiar. Some national legislators questioned our system, primarily because of a few high-profile challenges claiming judicial misconduct. A committee was appointed, which made a study which has been known as the Breyer Committee Report released in 2006.

The Breyer Committee found "no serious problem with the judiciary's handling of the vast bulk of complaints under the Act. The federal judiciary handles more than two million cases annually [,and]... the handling of [only] two percent to three percent of those is problematic," which speaks, I think, for itself.

"We find this last number reflective of the difficulties of creating an error-free system." I agree with that. As stated by Russell Wheeler, who was

substantially involved in the Breyer Committee investigation: By way of summary, as the findings and conclusions of the Breyer Committee demonstrate, the Judicial Councils are doing "a very good job of administering the Act."

Then what is the problem to be solved? Professor Hellman refers to the all but two to three percent of problematic cases as findings of approving just the routine cases; that is, if I understand Professor Hellman correctly, and I am not being critical of him, I have known him for decades and we have worked together on many issues, but I think that he is saying there is a differentiation between the routine cases and these two or three percent of high profile cases. He refers to the 97 to 98 percent as routine cases.

They are far from routine, at least they were far from routine when I was a Chief Judge. A good deal of my time was spent not calling investigating committees because I was able to work with a judge and get him to change his conduct so an investigation was not necessary and neither was censuring. That is, I saw the program not only as penalizing judges but helping judges where we can do so appropriately. And a good deal of my time was spent doing just that. As a result, we had very few committees, but it wasn’t that there were not problems or that they were

routine. The ninety-eight percent were composed of many cases that were substantial. So I cannot accept that distinction.

I think that the Breyer Committee found only five of the seventeen high visibility complaints resolutions were problematic, not wrong, just problematic. That is, the Chief Judge and the Judicial Council may have been mistaken in these cases. I do not mind that criticism. I have looked over some of them. I would have acted myself, but that is not my job and I find that from the sidelines the decisions are much easier than when you are at the bench and have to make them.

But what then is the real problem? The real problem is the small number of cases where the Chief Judges made mistakes, or probably made mistakes. That is the problem to be solved. What seems to me the problem then is not recreating the entire process: it is focusing on the real problem of insufficient training of Chief Judges.

When I became a Chief Judge, there was no training at all for Chief Judges. There was for District Court Chief Judges but not for Circuit Court Chief Judges. I went to the Administrative Office and suggested I needed training, and they developed the first training program for Circuit Chiefs and I was the only student.

Since then, the Administrative Office is doing a

much better job, but my view is we do not do enough training of the Chief Judges. Some teachers do not make very good principals. Some judges are not the most effective chief judges. We have to recognize that it is a different skill than judging. If the system will depend on decentralization, then the system is required to make sure Chief Judges are trained in how to be a Chief Judge. Merely because they watched somebody else does not mean they are prepared for the job. They may have been seeing inappropriate or incorrect methods being used.

So I think the focus should be on the real problem, which is training Chief Judges to administer the misconduct program effectively. The Breyer Committee made suggestions that it believed would reduce the difficulty with the small percentage of high visibility complaints. That is fine. Maybe they will work.

But I think the real problem of training has not been addressed sufficiently, and I think that either this Committee, or the Administrative Office, should have the responsibility of administration training for a Chief Judge. It should include how a Chief Judge should function in supervising the misconduct statute. The Chief Judge has to know that just because a failing judge is your friend does not mean that you can fail to act.

But a person does not have to be a Chief Judge, it

can be turned down. But if they are to be a Chief Judge, they should be trained to take the responsibility and be required to carry it out.

Thus, I conclude that appropriate training is where this Committee should focus its attention. We could continue with the decentralization but train Chief Judges so they will carry it out. There's no one else that can do it. As Harry Truman said, the buck stops here.

It seems to our Judicial Council that the obvious answer is not redesigning the judicial correction process, but decreasing the five high profile cases by implementing specific training for the Chief Circuit Judges.

We were advised that there has been some training, but we suggest that that issue deserves further review. In our view, new rules were adopted to solve both what the Kastenmeier and the Breyer studies indicated was not the problem. The Kastenmeier Commission said the Councils are working reasonably well. The Breyer Committee stated there was no serious problem. Professor Wheeler said the Councils are doing a very good job.

Has the Judicial Conference of the United States and this Committee gone too far? In the respectful view of the Judicial Council of the Ninth Circuit, it has tried to broaden the statutory term "business of the courts" to a foreign meaning by rules. For example, consider Section 3,

the Definition section. Rule 3(h) recognizes "cognizable misconduct," but extends it beyond interference with the business of the courts by citing ethical aspirations, as if they were a necessary part of the wording of the statutory term "business of the courts." It then identifies an ambiguous term, "lowering confidence in the Courts," as part of the defined statutory term.

Further, the Judicial Conference adopted an oversight role, which has, in the view of our Judicial Council, become too tenacious. As I wrote in a judicial misconduct charge disposition quite a few years ago, the Canons cannot be the standard for judicial discipline. The Canons are aspirational goals, voluntarily adopted by the Judiciary itself, "designed to provide the guidance to judges and nominees for judicial office," as quoted from commentary of Canon 1.

With the Act, Congress imposed a standard for discipline that is significantly lower and conceptually different from the ideals embodied within the Canons. We realize there is a difference of opinion on this. We have read the Committee reports. But the Judicial Council of the Ninth Circuit respectfully disagrees.

Since 2008, the Rules have required Circuit Councils to send documents to the Judicial Conference for monitoring and possibly for a compendium, which we have not

yet seen. Our Judicial Council has concerns about this practice, as well as a few of the proposed amendments, but in the interest of time our forthcoming written report will cover these issues.

This Committee has challenging work. The task ahead is not going to be easy. There is a lot of pressure on you. We admire your willingness to serve in this minefield.

While these remarks may have been direct, and I apologize if they were too direct, I assure you the Judicial Council of the Ninth Circuit is a team player, but we do have a definite point-of-view, and we know you will give it due consideration.

Thank you, Mr. Chairman, for your time.

JUDGE SCIRICA: Judge Wallace, thank you very much. We value your great experience in this field, both as a former Chief Judge of the Ninth Circuit, and the role that you played in the formulation and adoption of the 1980 Act. Your views will be given great consideration.

We look forward to your written commentary, and the sooner the better so that we can spend time on it, but unless you have to catch a train, I want to ask my colleagues if they might have any questions or comments.

Judge Barker?

JUDGE BARKER: Good morning, Judge Wallace, it's

lovely to see you again.

CHIEF JUDGE WALLACE: Good to see you.

JUDGE BARKER: I must say the Ninth Circuit strategy in choosing one judge to come speak to us was perfectly played. You're their franchise player; we know that. So we exchange compliments back to you by saying thank you for coming. Thank you for devoting your time and attention to this.

I have had the privilege of working with you from time to time over many years and have always admired your strength of intellect, your contributions, your practical wisdom with respect to things, everything that I know you have touched. But it does seem to me that we face a different set of problems at this point than maybe you and I have faced along the way. And that is with a much larger and more complex Judiciary, a society that's immersed in technology and the ease of electronic news coverage and exchange, and out of that setting it's maybe sad to say there's had to be more regimentation because the ability to measure fairness extends to so many more citizens and they're drawn into that debate.

And speaking for myself only on the Committee, one of the pressures that we feel is not just to help and equip Chief Judges in the Circuits, but also to create a process that is transparent and fair, and that the judges below,

that means the judges below the Supreme Court, can expect to be administered in a steady-as-you-go sort of way.

I remember times just hearing about them when a lot could be done by a Circuit Chief, just by dint of personality and stature, accumulated wisdom and position. I think we may be optimistic to think it's still got that sort of punch when the Chief Judge goes to settle these kind of problems. There's punch for sure, but whether it has that sort of capacity, that's what I worry about.

I'm very interested, of course, in how you view all of this. This whole field has had your fingerprints on it from the beginning. Thank you for helping us.

JUDGE SCIRICA: Any other comments or questions?

We would like to continue the dialogue and we will be calling on you and you should feel free to call on us at any time.

So with great thanks and appreciation from the Committee.

CHIEF JUDGE WALLACE: Thank you very much, Mr. Chairman.

JUDGE SCIRICA: Our next witnesses are Professor Arthur Hellman and Russell Wheeler, both quite familiar to members of the Committee.

And gentlemen, if you would come up.

Professor Hellman, are you going to lead off on

this?

PROFESSOR HELLMAN: I think I will. Thank you, Judge Scirica. Is this microphone on?

JUDGE SCIRICA: We hear you fine.

PROFESSOR HELLMAN: Great. Well, I want to thank you, Judge Scirica, and members of the Committee for holding this hearing and giving Mr. Wheeler and me the chance to share our thoughts on the draft. We thought it would be helpful if we appeared as a panel because we cover many of the same subjects in our statements. And, in fact, I've submitted a very lengthy, detailed statement so I'm going to be somewhat selective, quite selective in these initial comments. And of course I stand ready to answer questions about anything in the statement, about aspects of the Rules I didn't cover, or about Judge Wallace's very thoughtful and interesting remarks.

JUDGE SCIRICA: Well, you can assume, Professor Hellman, that we have read your statement and we understand it.

PROFESSOR HELLMAN: Well, I was going to summarize briefly.

JUDGE SCIRICA: That's fine. Please go ahead.

PROFESSOR HELLMAN: Okay, I'll go ahead and do that and begin by talking about what is in the proposed amendments and then turn to some things that are not in the

proposed amendments but perhaps should be.

Most of the amendments in the July 23 draft involve matters of clarification or emphasis, but I've identified six revisions that do reflect changes of policy from the 2008 Rules. Five of those amendments, in my view, reflect sound policy and I hope the Judicial Conference will adopt them. One proposed amendment should be reconsidered. And at the risk of seeming perverse or unappreciative, I'm going to concentrate here and in fact speak here about the one policy change that I think is unwise.

And that's the amendment to Rule 21(c), which deals with review by your Committee, the Conduct Committee, of Judicial Council orders. The proposed amendment would add one new sentence to that Rule. "If the qualified members are equally divided in their vote on a petition for review, the order of the judicial council will remain in force as though affirmed." Now, affirmance by operation of law, because the tribunal is equally divided, is rare in the federal judicial system. We see it only occasionally but we do see it in the Supreme Court of the United States. We see it in the Federal Courts of Appeals, except Judge Wallace's, which has its own system, when sitting en banc.

It is tolerated in those settings as a matter of necessity because these are settings where there is no possibility of substituting another decision maker for a

judge who is disqualified. That's not true of the Conduct Committee and there is no reason to adopt the practice.

Moreover, although the draft amendment refers in general terms to an equal division in the vote, it turns out, if I'm reading the Rule right, that's there is only one equal division that would be possible. That's because neither the current Rule nor the amended Rule would allow the number of participating members to drop below five. So the proposed amendment would come into play only when a single Committee member is disqualified and the remaining six are divided three to three. And I'm going to suggest to you that that's the last situation in which you'd want an affirmance by an equally divided Committee. Those, almost by definition, are the cases that are the most contentious, most difficult. The public needs a majority decision. The public needs an opinion and so does the judge who is the subject of the complaint.

Now, I can understand why you might be unhappy with the current Rule, which provides that when six members are qualified, no more, no fewer, the Committee will decide petitions for review by rotating panels of five. That's an awkward arrangement. But if you don't want to stick with that, the simplest alternative is to provide that when only six members are qualified, the Chief Justice must appoint a seventh judge to consider petitions and that is the course I

suggest.

Now, I think Mr. Wheeler will have something to say about one or two of the other policy changes and I might want to add to his comments, but right now I'd like to --

JUDGE BARKER: Could I just interrupt. It's me over here.

PROFESSOR HELLMAN: Yes.

JUDGE BARKER: I wanted to ask you about this three-to-three --

PROFESSOR HELLMAN: Sure.

JUDGE BARKER: -- problem, because I'm intrigued by it. Would the Chief Justice appoint a member any time there are only six available, or would you have to wait to see if it's a split vote.

PROFESSOR HELLMAN: I would not wait until it is split. It seems to me waiting until it is split -- you're asking whether to wait until there are six and they are split?

JUDGE BARKER: Well, I mean in anticipation that there might be a split?

PROFESSOR HELLMAN: I think --

JUDGE BARKER: There would have to be a seven judge vote every time --

PROFESSOR HELLMAN: It ought to be seven every time. Yes, it seems to me that you put the appointed judge,

the extra judge in an extremely difficult position if you appoint that judge only after the six are split three-three, if I understand you correctly. Is that what you're --

JUDGE BARKER: Yes.

PROFESSOR HELLMAN: Yes.

JUDGE BARKER: I'm trying to figure out when you'd ring up the Chief Justice and say we need another person.

PROFESSOR HELLMAN: When one of the seven of you is disqualified, Judge Scirica or the other presiding judge rings up the Chief Justice and says we need a seventh judge as the Rules provide. He'd start with a judge who has previously sat on the --

JUDGE SCIRICA: So you would limit it to a --

PROFESSOR HELLMAN: Excuse me?

JUDGE SCIRICA: You would limit it to a former member of the Committee?

PROFESSOR HELLMAN: I think the Rules now provide sensibly that that would be the preference for a seventh member. Whether you would limit it, probably not because you might have a situation where it's impossible to find, for some reason, a seventh member who has previously served. I would give the Chief Justice leeway, but I would keep the provision, which you have in the Rules, as I recall, saying that --

JUDGE SCIRICA: If possible --

PROFESSOR HELLMAN: -- if possible, to appoint somebody who has previously served. And as you know, the total number of cases that the Committee has heard, somebody put together a compilation some years ago, it was eighteen at that time, and there have been maybe ten since. So we're talking about an average of about one a year. Having the Chief Justice appoint a seventh member for the six-member Committees does not seem to me to be a major imposition on judicial time.

JUDGE GRITZNER: Professor, could you amplify on this concept that you believe the rotating panel of five is awkward, awkward in what way?

PROFESSOR HELLMAN: No, I'm sorry. I was speculating really on why you were changing from that. If you folks are comfortable with that, that's fine too. That's the other way of doing it. I thought that it might have seemed awkward to have one person sort of randomly rotated off and not participating. And I guess the other reason I thought you might have had in mind was that when you take that person out of the decisional process for that one matter, you break the continuity in the Committee; that if the next matter that comes up has some overlap or is related to it in some way, that member hasn't participated in the deliberations. And it seems to me that if you have six that are not disqualified, it is probably a good idea to

have all six participating and then bring in the seventh out of necessity so that you don't have an equally, not even the possibility of an equally divided Committee.

By the way, I don't think there have been any even close divisions within the Committee, at least as far as public disclosure. Now what happened behind the scenes, obviously I don't know, but it just seems to me having the seven is clean. It's a very, very modest additional burden on judicial resources, which I know are very scarce.

JUDGE SCIRICA: We will give that matter serious consideration.

PROFESSOR HELLMAN: Well, let me say something now about two proposed amendments that may or may not reflect a change in policy, but which do raise some concerns. And these are two amendments that appear to respond to the Ninth Circuit Judicial Council's handling of the complaint against Judge Richard Cebull.

The amendments involve variations on the same question. When a Circuit Council issues a disciplinary order based on the findings of a special committee but the time for appeal to the Conduct Committee, your Committee, has not run, may the Council withdraw its order and instead conclude the proceeding based on an intervening event?

The answer given in the proposed amendments is never. I think that the answer should be sometimes. Now,

these are complex issues from a technical standpoint, and they also implicate competing policy concerns. And it may be that I've misunderstood the thrust of the proposed amendments, and if I have, you'll correct me, but meanwhile I'll proceed.

The basic scenario is this. After reviewing a special committee report, the Circuit Council finds serious misconduct or a permanent disability but the judge refuses to resign or retire. The Council issues an order imposing discipline of some kind, but the order is not made public because the complaint is still subject to review as of right. Within the period when review can be sought, that's 63 days under the current rule, 42 under the proposed amendment, within that period the judge has second thoughts. He's willing to negotiate a retirement or resignation. But if these amendments are adopted, the Council would have little or no leeway for negotiation, because it would be unable to conclude the proceeding and unable to withhold public disclosure of the full text of the order, as initially issued.

I think that is too rigid. In the situation I've described, I think the Council should have some discretion to modify or even abrogate that initial order. At least when disability is at issue, the Council should be able to conclude the proceeding and issue an order that does not

identify the judge, assuming of course that the matter has not become public, which changes everything.

More generally, I see no reason why the Council's decision should be frozen at the moment it is issued when under the Rules, and this I suppose is something that Judge Wallace was criticizing, but under the Rules as they are now, that Council decision is only one stage of an ongoing process.

So, I hope you'll reconsider those two proposed amendments, again, assuming I've correctly understood the thrust of them. I think they do raise some difficult questions in which a rigid rule, an absolute rule does not adequately --

JUDGE GRITZNER: So I'm trying to think how you would write the language to put in that discretion. Are you speaking to discretion on the part of the Circuit Council or the Judicial Conduct and Disability Committee, assuming obviously an appeal has been taken with the Judicial Conduct and Disability Committee, or both?

PROFESSOR HELLMAN: Well, it would be some of both. First, I guess, the first thing I would do would be not to put the proposed language into the Rules. And then I would put something into the commentary that would address the policy considerations that led the Council, I'm sorry, led your Committee to the conclusions that it reached in the

Cebull matter, but that outlined in some more general way the importance of the transparency that you were I think aiming at for very good reasons, but give the Circuit Council in the first instance, with some review by your Committee, this discretion, again, to negotiate a settlement.

And Judge, I agree with what Judge Wallace was saying about the importance of informal processes. Now, obviously by the time you get to a special committee report, you're out of the stage of the pure, informal process, but it seems to me that some of the policy concerns are still at work there. And again, if the matter has not been made public, which is quite often in the case of disability, I would think it would be in the best interest of everybody if even belatedly the Council can negotiate a retirement or resignation.

JUDGE BARKER: We learn about these things, of course, by trying to unravel the knots that come before us to work on. So, if we made the words "final order of the Council," basically words of art so that like in a final judgment about which we District Judges are lectured with some regularity, if that signifies final judgment and then that's discloseable, that has to be made public. It seems to me you could, under your proposal, pull back from that and say a "proposed order" or "proposed final order" and

that would give flexibility, as long as it doesn't leap into or get pushed into that final category where it's treated as a word of art that has to have disclosure.

Do you think that would work?

PROFESSOR HELLMAN: Yes, I think something along those lines, again, that given your Committee's role under these new arrangements, I think it is fair to say or legitimate to say that the Council's order is, in a sense, provisional until your Committee has given the go-ahead. I mean, for example, it is not published and it seems to me that one of the reasons for not -- and sorry, I shouldn't say published. One of the reasons for not making it public until the time for review has passed is to give your Committee the chance to review it.

And I'm suggesting that it also gives a final chance at a negotiated resolution. And in a few cases, this is not the sort of thing that's going to be invoked often, but it seems to me that in some instances it could be helpful. I mean Judge Wallace, back in 1978, was saying some rather similar things to what he was saying today, but he said something that was very, very striking about how he wanted to save the judge, not just to discipline, but to save the judge. And I think in some of these situations, if you allow the Circuit Council a little bit more flexibility, you can save a judge and also I think help the system.

JUDGE GRITZNER: May I ask, Professor, if you had any quarrel with Rule 24(a) as it presently exists? As I look at the amendment, the amendment makes it perhaps more clear, particularly with the phrase that you're making them public as originally issued, but Rule 24(a) has always said that at the point of closure, all orders were subject to be made public. And so I'm wondering if you have a particular quarrel with the amendment as opposed to the original Rule, or if you had a problem with the Rule as it originally existed.

PROFESSOR HELLMAN: Well, I guess I maybe do have a quarrel or a reservation about the literal language of that Rule, which is why I didn't include this as a policy change and why your Committee viewed it as what was implicit in the Rule as it currently existed.

But again, it goes back to this basic point of the new role that your Committee has taken, and it does seem to me that that review period, which you propose to shorten, and I think that's a good idea, but that just gives a little window that in a handful of cases will enable a kind of peaceful resolution of what could otherwise be some very unpleasant disclosures and a judge disgraced unnecessarily.

JUDGE SCIRICA: So you're not, in order to effectuate that, you're not proposing any amendments to 24(a)?

PROFESSOR HELLMAN: Well, I have to say I hadn't thought about it in that sense, but I think I would probably want to give it some more thought to make clear that this is permissible. Now, maybe that could be done through commentary, as Judge Barker was suggesting, about giving kind of flexible meaning to final order the way the Supreme Court gives flexible meaning to finality in other contexts.

JUDGE GRITZNER: And do I discern from your writing, your written materials, that at least with regard to the kind of change that occurred in the Cebull case that you would not be looking to allow that kind of a change?

PROFESSOR HELLMAN: Well, no, in the Cebull case, you read my statement correctly. The pervasive sanitizing of that report, it seems to me, I think you correctly said that was impermissible, that what had to be disclosed was something very close to what was in the original report. Now, whether everything in that original report had to be disclosed, whether, as I suggest in my statement there might be instances where a particular phrase or statement in the report was particularly hurtful to the judge, and if taking that one statement out will smooth a judge into retirement or resignation without changing the substance of the report, it seems to me that ought to be permissible.

But no, not the pervasive sanitizing.

JUDGE EBEL: Well, may I then ask are you

proposing an amendment to the Rule that says they can make a change when it would lead to a mooting of the problem, but not other changes? I mean I don't know quite how, because you've now suggested that they just can't rewrite things, and the only argument you've raised for why they ought to have some power to tinker would be to give them more authority to resolve the issue.

So I'm trying to decide whether you're proposing only a limited exception that wouldn't moot the controversy because the controversy is a historical fact, but that might satisfactorily, in their opinion, resolve it. Is that the time when they can amend? Or is it an unlimited opportunity to amend just because they have buyer's remorse about something?

PROFESSOR HELLMAN: Well, it seems to me, first of all, this is one of those situations where disability may be different from misconduct. And I think it is also quite relevant whether there has been any public disclosure. The case where I think I would allow a change in disposition would be the disability that has not become public; that at the last minute the judge agrees to retire or resign. And I would let the judge do that and treat it as if that had happened before the Circuit Council had issued its report.

JUDGE BARKER: Well, if flexibility is the goal, and time to exercise some flexibility is necessary, then

we'll defeat our purpose if we try to specify the instances in which flexibility is called for, don't you think?

PROFESSOR HELLMAN: I'm sorry, the?

JUDGE BARKER: Well, you were responding that there might be a limited instance when there is disability at stake, and you want to withdraw the report, or change the report or something like that. If the goal is to allow this time for flexibility, we'll undermine that goal if we try to specify the instances when tinkering with the report is permissible.

PROFESSOR HELLMAN: Yes, and I think some phrase like phrases that you use elsewhere in the Rules, you know, in extraordinary circumstances where the interest of the system and, you know, are suggested or required even, the Circuit Council may, within the period or before the time for review has elapsed, modify an order, something like that.

JUDGE EBEL: Let's just use an analogy in the regular appeal system. Why do you suppose it is that once a District Judge enters a ruling and it's appealed to the Circuit that the District Court doesn't have a further opportunity to say, you know, now that I've read the appellate briefs to the Court, I kind of wish I had said something different, so I am just going to take a do over. I mean isn't there some advantage to closure, just so the

train keeps running on time.

PROFESSOR HELLMAN: I think, sure, there are values in closure but I do think as the Rules emphasize in other contexts that this is not an adjudication. This is not a litigation. This is not an adversary process. And I think those differences do suggest a somewhat greater flexibility would be allowed here than in the litigation context where I agree, the bright lines --

JUDGE EBEL: But you're injecting now some other variables that are hard to put metrics on, suggesting that maybe there's a greater ability to amend for misconduct than there would be for disability. I'm wondering just how we're going to get finality or anyone is going to know when there's finality.

PROFESSOR HELLMAN: Well, first, it seems to me that this kind of flexibility would come into play only in very, very rare cases. I mean first of all, we're talking about a tiny subset of cases anyway. And within that subset --

JUDGE EBEL: The very rare ones are potentially going to be some of the more public ones.

PROFESSOR HELLMAN: Well, I would say again that when something is public, I think as I said in my response to Judge Scirica, I think your options are much, much more limited. Once it's public, once the public knows that the

allegations have been made, I think the Judiciary has an obligation to respond to them and the only changes I would allow would be in the nature of verbal changes tinkering with language.

I do think that disability that has not become public presents a different situation for the Council and this Committee and can be treated differently. And I have confidence in the ability of Councils and the Committee together to figure out what's an appropriate amount of leeway there.

Again, this is not litigation. The principle of litigation that you're referring to is that a case, a given case, a given docket number can be in only one court at a time. That's what underlies that, that finality rule as you referred to. That's not necessarily true of these misconduct proceedings. I mean, again, they're not litigation. They're not adversarial. It's a process in which I would hope the Councils and this Committee would regard each other as partners rather than as adversaries in any sense, and so I do think that calls for a different approach than the finality rule, that a case can be in only one court at a time.

JUDGE EBEL: Thank you.

JUDGE SCIRICA: So on the part of the subject judge, and the kinds of scenarios we're talking about, the

moment of decision as to whether to retire or to resign, it's a question of whether that's after the special committee issues its report but before the Circuit Council has rendered an opinion, or that time period is after the Council has issued its opinion and before the Judicial Conduct and Disability Committee has acted on that opinion. They are the two time periods we're talking about, if I'm explaining it properly.

PROFESSOR HELLMAN: Yes, as I understand it, even under your proposed Rule between the special committee report and the issuance of the Circuit Council order, at that point the judge can still retire or resign and the order is based on the assumption that he has retired or resigned.

Your proposal would change that to the moment the Judicial Council issues its order.

JUDGE SCIRICA: And of course we're referring to an intervening event, which would then conclude the proceeding.

PROFESSOR HELLMAN: That's right, and the intervening event would be the resignation or retirement of the judge. I suppose, conceivably, it could be something else, but that is the one that comes to mind, yes.

JUDGE SCIRICA: Good. Thank you.

JUDGE EBEL: Is there another value in addition to

the value of rehabilitating a judge? Are there other values of public confidence in the Judiciary? Let's say the judge has done something that we would all agree is misconduct, and he's gotten the special committee's report saying it's misconduct, and it's on appeal to us and now he says, "I'm quitting. I would quit and remove that risk to the public if you would modify some things." Is there another party with an interest here, that is the public, to have sufficient disclosure to retain confidence in the Judiciary?

PROFESSOR HELLMAN: Very much so, and as I think I suggested in my statement and I will certainly say now, if there is a finding of misconduct and certainly if it has become public, it has to say enough to reassure the public that the Judiciary has dealt with it.

I mean, again, to go back to Judge Scirica's point, if the judge did that before the Circuit Council issued its decision, I think there's no question that that would, at least under even the draft Rule, that that would moot the proceeding. Is that your understanding of it?

JUDGE EBEL: It is. I agree with that. I do agree with your observation, yes. So your position is that if it could be permitted before the opinion, the decision is rendered, why shouldn't it retain after the decision is rendered?

PROFESSOR HELLMAN: Yes, that's basically it, that

the issuance of the report is one step in a process, and I'm just suggesting that in a handful of cases you would push the point of no return a little bit further than the amendment or perhaps the original, the current version of the Rules, yes.

JUDGE BARKER: All right, well let me just ask you then, where would you put it? Where is the point of no return, because if it's before the Council acts on the special committee's report, we all think that's fair, and if it's after the Council acts, and the judge is on notice, but then the discretion is limited because the Council has acted and, at least under our Rules now, where would you peg it? Where is the point of no return?

PROFESSOR HELLMAN: Well, I suppose the latest possible point of no return would be when your Committee issues its decision.

JUDGE BARKER: So is it when we get the case? Do we keep our confidentiality requirements throughout that process, even though the Council has spoken, so that no matter what we were going to do, if the case is terminated after it has been referred to us, those reports that preceded it have to be disclosed?

PROFESSOR HELLMAN: Well, you could, you could do that. You could say that until your Committee, you could give the judge until your Committee has --

JUDGE BARKER: A last clear chance?

PROFESSOR HELLMAN: A last clear chance, or you could have some arbitrary point and say that, for example, once the time for review has elapsed, the 42 days, that that's the deadline; it could be that when you start considering the 42 days, then at that point it is frozen. Any time short of when you issue your report, your order, is an arbitrary time, but you might want to put that in, just to put some pressure on the judge. I mean I agree that there are some countervailing values, and one way to deal with that would be to say, okay, the deadline is the 42 days; that the judge has the last clear chance within that--

JUDGE BARKER: So on the forty-second day the judge comes in and calls uncle and says "okay, okay, I'm out of here," then everything under your formulation, your proposal, everything before that would be cloaked in confidentiality?

PROFESSOR HELLMAN: Well, no, I'm suggesting a more, I guess, flexible and situational report. It would depend, again, I would draw distinctions between misconduct and disability, and I would draw distinctions based on whether the matter has become public, because again, once a matter has become public, and I was going to say something about that and I do in my statement, I think the entire

calculus changes. I think there is an obligation to disclose that doesn't necessarily exist when, for whatever reason, the matter has not become public.

I think when the public has heard allegations, the Judicial Council and your Committee have an obligation to assure the public that the allegations have been dealt with, that there is a response, an appropriate response to misconduct.

When there has not been a public discussion, when the matter has not become public and particularly when it is disability, it seems to me the balance shifts and then, in that situation, if the judge agrees to a quiet retirement, it seems to me the public interest is best served by that.

JUDGE BARKER: Well, I wish that the issues of conduct and disability were always easily distinguishable. It's like the defendant who says I wouldn't have done this crime except I was drinking. So they get mixed and it's really hard to create rules that are that nuanced, Professor, and also give the kind of flexibility you're talking about after the fact. We have to try to anticipate these things.

PROFESSOR HELLMAN: Well, a couple of comments on that. One, I mean I haven't seen every case, but I have not seen many where there's been a mixture of, a genuine mixture of misconduct and disability. There are occasionally

allegations that mix them up, but in the cases that doesn't seem -- I don't think there are a lot of ambiguous cases, but I guess there are going to be some, sure, and much of this I would not put in the Rules. I would put it in the commentary to be worked out by the Circuit Councils and your Committee.

To that extent, I guess I agree with Judge Wallace that it is not necessary to have a set of rules that covers every situation.

JUDGE BARKER: It's hard to legislate all of this, isn't it?

PROFESSOR HELLMAN: That's right. You can't, and again, this is, you need rules for litigation because it's an adversary process and you have the parties involved, and you have to tell all the parties what their obligations are. You have to tell the judge, the court, how much the court can intervene, and so forth.

This is a non-adjudicative process, and I think there is room for this kind of greater flexibility.

Well, that actually is a nice lead-in to what I was going to talk about next, which is the special problem raised by what the Breyer Committee called high visibility complaints. And Judge Wallace was concerned that the Breyer Committee, and I guess your Committee, have given too much weight to the mishandling of what is admittedly a small

number of cases here.

But on this point, I do agree with the Breyer Committee, because the numbers may be very, very small; they are very, very small, but they're the only complaints that the public is at all aware of. So those are the only complaints that shape the public's perceptions of how the Judiciary is handling complaints.

So I do think that it is necessary to design a system that will address those in a way that satisfies the public interest that Judge Ebel referred to.

The Breyer Committee also expressed concern that in considering misconduct complaints, the Judiciary would be swayed consciously or unconsciously by what the Breyer Committee called guild favoritism, inappropriate sympathy for the judge's point-of-view, or de-emphasis of the misconduct problem.

And that concern, of course, is at its height when the complaint has received public attention. But this concern about guild favoritism, or maybe more to the point about perception of guild favoritism, carries, I think, some of its own risks. The danger is that the institutional actors within the Federal Judiciary seeking to reassure the public, as it does have to, that misconduct has not been swept under the rug, will act too swiftly or too severely in dealing with allegations that have received public

attention.

Now, I was suggesting in my exchange with Judge Barker that there is no formula for this. In fact, one of the things that we've learned over the past few years is that every case is different and that you can't anticipate all of the facets that will cause difficulty. But I do think that you can have some rules, some guidelines that will guide Chief Judges and Judicial Councils, and also constrain their discretion. I think you need to do both. I think you need to allow some discretion, but there are some situations in which you should constrain it.

The most important of these Rules are those that deal with disclosure, but that immediately presents a problem that everybody here is aware of. The norm for judicial proceedings, generally, and for misconduct proceedings in particular, is confidentiality. That's certainly what the statute assumes: nothing is disclosed to the public until the process is at an end and there is a final decision.

Now, that confidentiality is perfectly fine for the routine misconduct complaints. To clarify, I guess a point in response to Judge Wallace, by the routine complaints I mean the complaints that simply allege the judge mishandled the case, or the judge was biased, that sort of thing. But when a complaint is identified based on

a public report, or when an advocacy group issues a press release announcing that it has filed a complaint against a judge, the norm is inadequate. The public is not going to be satisfied by a "no comment," nor is the Judiciary well-served when speculation and rumor take the place of information.

The 2008 Rules included one novel and important provision designed to deal with these situations. It's part of Rule 23(a), and it says in extraordinary situations a Chief Judge may disclose the existence of a proceeding under these rules when necessary to main public confidence in the Federal Judiciary's ability to redress misconduct or disability.

That's a good start, but it doesn't go far enough for two reasons. It sets the bar too high and it doesn't address the specific situations that experience tells us are going to arise.

Now, in my statement I suggest a couple of modifications of this, some less restrictive language for the basic provision; some specific events that should be announced publicly when the Judiciary's institutional actors are considering a complaint that has become the subject of a public report; and I also try to define the circumstances that make a report public, in the sense that it should trigger special procedures. And the suggestion here is that

you ought to have a special set of procedures for public reports so you have to define those.

The details, though, are less important than the realization, which I think obviously everybody here does realize, that when allegations of misconduct become public, you're dealing with an entirely different kind of problem and an entirely different kind of proceeding from the one initially contemplated by the Act and the Rules.

I think, Judge Barker, you asked Judge Wallace if things have changed since the Act was conceived in the 1978 to 1980 period. And I think in that respect it has; that the 24-hour news cycle, the ability of all sorts of people to go public, to bring matters into the public domain, that has changed things, and so these public matters require an entirely different approach -- not entirely different, but a substantially different approach than the one that everyone assumed could be applied across the board in 1980.

And I certainly don't think I have all the answers. I probably haven't even asked all of the questions, but this is an aspect of the Rules that I think needs attention.

JUDGE EBEL: So would you just, just for my information, tell me the exact Rule that you're quarreling with and give us, could you, some language that you would tinker with?

PROFESSOR HELLMAN: Well, if we go back to the current language, I would drop the language --

JUDGE EBEL: Give me the cite to which Rule, where you're talking?

PROFESSOR HELLMAN: Okay, this is Rule 23(a). It is on page --

JUDGE BARKER: 35.

PROFESSOR HELLMAN: -- 35, yes, the last sentence of 23(a). I would drop the phrase "in extraordinary circumstances" and have the Rule read,
"a Chief Judge may disclose the existence of a proceeding or interim orders in a proceeding when necessary or appropriate to maintain public confidence," et cetera, something like that. Or maybe just put in "necessary or appropriate" in the Rule and have the commentary discuss some of the particular orders.

I have in mind, actually, here what Judge Scirica did as Chief Judge of the Third Circuit when the Kozinski website matter was referred to the Third Circuit by Chief Justice Roberts. You issued a public statement announcing the appointment of the special committee, and I think that statement included the members.

JUDGE SCIRICA: It did.

PROFESSOR HELLMAN: Did I recall that correctly?

JUDGE SCIRICA: Correct.

PROFESSOR HELLMAN: And I think that immediately told the world that this was going to be considered. It put faces on the people who were going to be considering it, not just an anonymous committee, but here are the judges, and I think that really was an important step in addressing the concern that you raised in your earlier question about public confidence.

JUDGE EBEL: So were you proposing to delete that first phrase? I couldn't tell by the emphasis in your tone?

PROFESSOR HELLMAN: Yes, I would --

JUDGE EBEL: "Extraordinary circumstances," you would take that out?

PROFESSOR HELLMAN: I would delete the phrase "extraordinary circumstances" because it suggests, well, it's too demanding a standard.

JUDGE EBEL: But yet you're telling us that this will only really arise in extraordinary circumstances?

PROFESSOR HELLMAN: No, I think that when there has been a public report, for example, when there's a public report of misconduct and the Chief Judge identifies a complaint, which he or she is supposed to do, that should be announced. That's extraordinary only in the sense that it doesn't happen very often, but it should be routine in cases where it does happen.

In other words, what I'm suggesting is that there

is a category of circumstances that is summed up under the phrase "an allegation has been made public." And I try to define that in my statement, what makes an allegation public. But when that happens, these disclosure obligations should be triggered.

And you don't just, you don't need the word extraordinary because I think you define it in some much more particularized way. Now, there may be other circumstances, but that's covered by deleting that word.

JUDGE EBEL: Any other matters you'd like?

PROFESSOR HELLMAN: Well, I think I will stop. I had a few other things I was going to talk about, but let me just mention one and then turn the panel over to Mr. Wheeler.

I do suggest that in the next phase of its review, and I recognize that you can't do it with these amendments, that the Committee should look into reorganizing and restyling the Rules. It's really, these Rules are just not a very user-friendly document. And in my statement, I present a few specific suggestions on that.

The main one is to break up some of these very, very long Rules into separate Rules that will highlight some of these distinct concepts. And I don't think that would be an enormously difficult thing to do. I think it would be helpful to the public and I think it would also be helpful

to the Chief Judges and the Circuit Councils.

I give one instance from the D.C. Circuit Council this month where I think there is confusion between dismissing and concluding.

So I would hope you would look into that in the next phase. But I will leave the rest to my statement, unless there are questions, and give Mr. Wheeler a chance.

JUDGE SCIRICA: Thank you very much, Professor Hellman.

Russell Wheeler, of course, is well-known to all of us. He is the former Deputy Director of the Federal Judicial Center and the principle resource on the Breyer Commission Report.

Good to see you, Russell, and welcome.

MR. WHEELER: It's good to see you again, Judge Scirica and the other members of the Committee, and thank you for giving me this opportunity.

I should say that my statement covered a lot less ground than did Professor Hellman's. I endorse his statement though with few exceptions, but generally I agree with most everything he said.

And I also agree with what he regarded as the substantive changes he proposed in the amendments, with the one exception he mentioned having to do with tie votes.

My comments, my suggestions about the Rules deal

pretty exclusively with the concept of providing the public information about how the system is operating, as well as providing information to potential complainants, to help them use the system and help them use the system responsibly.

One of these has to do with Rule 24(b). The Committee would change Rule 24(b) to obligate Chief Judges and Councils to post final orders on the court's website. Up until now, the Circuits had the option and about half of them decided to post all final orders; the rest decided to post only exceptional orders.

There's this concept in public records called practical obscurity, in which documents are public but as a practical matter they're obscure because you can't get to them. And final orders contained somewhere in the Clerk's Office of the Court of Appeals are, for practical purposes, fairly obscure because most people just don't have the resources to get to them. So I commend the Committee for that change. And it's a pretty common sense change because now when you say public availability most people think you mean somewhere on a website.

I should say that change is going to enable people who are of a mind to do it to undertake more elaborate analysis of the patterns of complaint disposition. A lot of the categories in Table S-22 can be looked at in other ways

and people might want to do it and they can do that, they'll be able to do that once the final orders are all available online, do it much more easily anyway.

But there is still a problem of practical obscurity in the sense that other people are interested principally in the extraordinary orders, or the orders which are outside of the routine, or something more than a Chief Judge's dismissal of a complaint or a Circuit Council's upholding a dismissal, dismissals for, in almost all cases, eminently sound reasons.

And that's the reason that I suggest that the Rules mandate some way of directing the Councils and the Chief Judges to call attention to those very small number of orders which are not routine; those in which the Chief Judge does not dismiss the complaint; those in which he or she appoints a special committee; those in which the Circuit Council or the Chief Judge believes that their order represents a new interpretation of the Act or the Rules.

I suggested designating them just with an asterisk. Professor Hellman suggested a different approach. I'm less wed to which approach is better than the fact that it be done as an assistance to those who are in the press, the academics and others who are trying to, as the Rule said, get more information about how the Act is being administered.

I would also, as I suggested in my statement, I would also direct the Councils and the Chief Judges, when they list the orders online, to designate or just give the number of pages. When you read these orders and you go over the orders on the various Circuit websites, they follow a pattern and they have different kinds of boilerplates and different formats, but the orders typically for any particular Circuit will stay within a range of one to two pages, and other Circuits maybe four to five pages. When you see an order that's 10 pages, you have an inkling that there's something going on there out of the ordinary. It may be because there is a need for extensive interpretation of a phrase in the statute, which has not been interpreted before. As I point out, it could be one of those relatively few instances in which Chief Judges undertake the find facts reasonably in dispute, which they really should leave to the special committee or the Judicial Council.

And I suggested a few other changes to Rule 24(b) that I won't go into here.

As to the availability of complaint filing information, this is Rule 28, and it makes two slight amendments. It includes the complaint filing instructions among the things which should be posted on the website of the courts, and it also gives the courts the option of making the complaint form, the instructions and the Rules

available simply by a link, not simply to the Court of Appeals but also to the national court website, uscourts.gov.

I would go somewhat further, however. I would say that the judicial complaint material, the complaint form, the Rules and the complaint instructions should be, and I use the phrase "prominently available on the homepage" of each court's website. And this is basically a melding of a Judicial Conference policy in 2002 which instructed all courts to include that information prominently on the website, and the Breyer Committee, which recommended that courts include the information, the material on the homepage, regarding the homepage as synonymous with prominent.

I took an afternoon off when I was preparing my statement and I looked at the 200 court websites and I asked myself the question, how many of them display the information that we're talking about here on the homepage, or display it within one-click away? And I found several things. One is that most courts, a majority of courts are, indeed, putting the material on their homepage. The fact is, however, that some of these homepages are so cluttered with information that it's really kind of hard to identify where the judicial conduct information is. So that is the reason why I would phrase the Rule as I did.

And secondly, as I said, this is not going to be something new for the majority of the courts. Over half of the courts already put this material on the homepage, and the others, four out of five of them, put them there or within one-click away. So this is not a big change, but I think it would be of assistance.

I did include on page 4 of my statement the results of this little survey I did. If you would like more information on what I found, I'd be quite happy to provide it to you.

Third, I would also require the complaint forms, as they're listed on the websites, to give the address for filing a complaint. And this ties in a little bit with Arthur's suggestion about making the Rules more user-friendly.

The complaint form on the website for the Second Circuit has a face page, local instructions for complaints filed under the Act. And it repeats some of the instructions in the filing instructions and also gives the address of the Clerk of the Court of Appeals. That's the only Circuit that does it that way, as far as I can tell. Others, sometimes in the rules that they post, Rule 7 will give the address of the Clerk of Court. But others, in other Circuits, the complainant is left to wander into Rule 7 because that's where they're told to file the complaint,

and it says file it with the Circuit Clerk. And I can't imagine how many people don't sit and say, well, I don't have a complaint about some Circuit, my complaint is about a magistrate judge. Why do I have to file it here? It's not going to clear up that confusion, but it's going to say clearly where the complaint ought to be filed.

I think it would save the time of not only the complainant, but surely of the Clerks of the District and Bankruptcy Courts who must get these complaints and either send them back or forward them.

JUDGE BARKER: Russ?

MR. WHEELER: Yes.

JUDGE BARKER: When you made your review of these webpages, and thank you for giving us a day of your annual leave to do that, which one had the best page? Is there a best practices out there that you would draw our attention to?

MR. WHEELER: You know, a couple of years ago the Judicial Branch Committee published a template, a suggested template for webpages, and it grew partly out of the Breyer Committee concern that there are a variety of things that statutes or a Judicial Conference say have to be on the webpage and they're not there. And so the concern was we ought to, well, we can't order them to be there, any more than the statute can, but we can put up a sample webpage.

And so this template that they adopted, which I think less than half of the Courts use is, in my mind, very good. I'm no website designer but it's clean, it's simple, it's direct and it does have judicial conduct material right smack dab in the middle of the homepage.

So I would refer you to that more than anything else. The interesting thing, though, even courts who say they use the template, slightly under half of them don't have the judicial conduct material because these websites are constantly in evolution as best I can tell. The court says we have to change our website because we have new local rules and the IT guy says, "well, what's all this judicial conduct stuff here? Why do we need that?" And out it goes, not maliciously but that's just the way things happen.

JUDGE SCIRICA: Would it be better to handle these matters through a best practices, since there are constant changes, and sort of monitor it?

MR. WHEELER: I think the -- I'm sorry.

JUDGE SCIRICA: Just to monitor the webpages from time-to-time?

MR. WHEELER: I think that's already happening in the sense that I'm pretty sure the Administrative Office, the part that staffs the Judicial Branch Committee, monitors the websites, and I think they also send out periodic advisories.

The point you're making, and you're right, is the Rule change is not going to change behavior for everyone, but at least it's a start. But I think, yes, it would be a good idea for the Committee staff to do that monitoring as well, and just remind courts that there are certain things that the Judicial Conference has the authority to mandate be there and, indeed, should be there.

JUDGE SCIRICA: Any comments or questions for Mr. Wheeler?

MR. WHEELER: I wanted to add one thing, if I may, Judge.

JUDGE SCIRICA: Yes, of course.

MR. WHEELER: Arthur and I both referred to the matter which arose in the Eleventh Circuit in August where there was posted on the website of the Court of Appeals on the Court of Appeals letterhead an announcement about cases being suspended from a District Judge there who was involved with a misdemeanor charge.

And his point was that perhaps there ought to be clarity as to who was authorized to suspend the caseload of a judge. My interest, instead, was the inaccuracy of the press reporting about what was going on there with Judge Fuller. And this is confusion that probably would be there even without the announcement, which I think was a little, I had a hard time deciphering it because I don't know what

authority the Court of Appeals has to suspend a judge's caseload. But everybody reported, as they always do --

JUDGE DUBINA: I don't think they do. I'm from the Eleventh Circuit and I've researched that, and I agree with you. I don't think there was any authority to do that.

MR. WHEELER: Well, thank you. I feel better about that.

JUDGE DUBINA: I do think there is authority by the Judicial Council to not assign anymore cases, but I don't know how you take cases away from a judge; however, I think what probably cured it, assuming that was some sort of error, was the fact that the judge agreed to that.

JUDGE BARKER: We love waivers, you know.

MR. WHEELER: I suspect the Judicial Council does have the authority to do that, but you know, I yield to your judgment. Arthur assumed that it was the Judicial Council operating because it had to be, but my point is this, there is confusion enough out there in the press about how this process operates. Part of that stems from the fact that we routinely refer to the Courts of Appeals as Circuits. And I've been uneasy with that for a long time, but that's the way the Supreme Court does it, so I guess, you know, I know who is going to win that one.

But you get constant press reports about the Court of Appeals doing things that you know the Circuit Council is

doing, but they mix up Court of Appeals and Council, so all I am saying really is that the Committee, to the degree it can help clear up that confusion, it would be helpful.

I suggest an amendment to Rule 24, which may be going too far but at least it's there, but it's really quite interesting to read the press reports from Atlanta about what was going on there. And all I can say is the announcement didn't cause the confusion, it just perhaps made it even a little worse. That's all.

JUDGE SCIRICA: A little practical obscurity in a different sense?

MR. WHEELER: Yeah, it's the opposite of practical obscurity.

JUDGE SCIRICA: I don't mean that it was intentional at all.

MR. WHEELER: Sure.

JUDGE SCIRICA: I don't mean it in that sense.

MR. WHEELER: They're very unobscured but yes, we have the same plan.

JUDGE SCIRICA: Sure.

MR. WHEELER: I had a few comments about Judge Wallace and the statement about training Chief Judges, but I won't go into that here unless you're interested in it?

JUDGE BARKER: Well, could you, just, is that all right, Mr. Chairman?

JUDGE SCIRICA: Of course.

MR. WHEELER: Well, the Breyer Committee included a fairly extensive recommendation for individualized, as you know, Judge Barker --

JUDGE BARKER: Yes.

MR. WHEELER: -- for individualized sessions by a member of this Committee with each new Chief Judge. That went nowhere. It did not get picked up when enforcing rules and regulations were adopted.

And I think the thought was, and you may have a better idea than I, but I think the thought was that there may be some danger if each Circuit is orienting its Chief Judge to do things the way the last Chief Judge did it. There is some benefit, perhaps, of a different perspective. So it would be worth the time of a member of this Committee to go to the headquarters or the site of a new Chief Circuit Judge and just spend a half day or a day going over the regulations.

We did find, the Breyer Committee did find some rather striking examples of Chief Judges, no disrespect, who really just didn't understand the Act very well, as to what corrective action was, for example. Corrective action, in the minds of some, is when a Court of Appeals reverses the judge. Well, that's not corrective action in terms of the Act. So that was a suggestion.

When I was at the Judicial Center, we did, I think maybe every two years or so at the time of the Judicial Conference, have a seminar for Chief Circuit Judges, and the hot topic, of course, was how to deal with misconduct complaints and more than that, complaints of disability. But that's rather impractical and every two years is not the same as striking when the iron is hot.

So the Committee may want to look at that Breyer Committee recommendation and reconsider whether it wants to do such a thing.

JUDGE SCIRICA: Good suggestion. Any other comments or questions?

Well?

JUDGE GRITZNER: Professor?

JUDGE SCIRICA: Did you have a question?

JUDGE GRITZNER: Yes.

JUDGE SCIRICA: Sure, Judge Gritzner has a question.

JUDGE GRITZNER: Yes, I wanted to ask Professor Hellman, with regard to the interplay between Rule 25(e) and 28 U.S.C. Section 359(a), with regard to a judge that is the subject of a special committee investigation not serving in connection with any other matter that has to do with a judicial conduct proceeding, our Rules, of course, address it that far. And you pointed out what you believe to be a

tension between that limitation and our Rules applying only to further activity in the judicial conduct area, and whether it also applies, as the statute suggests, for any activity on a Judicial Council, or for that matter, on the Judicial Conference.

And I guess my question is one that is jurisdictional. And that is I understand why our Rules might apply to further participation in disciplinary or judicial conduct proceedings, but would it not be the judgment and responsibility of the Judicial Councils or the Judicial Conference to determine the extent to which any particular judge would be involved in matters not involving judicial conduct?

PROFESSOR HELLMAN: I suppose they do have independent responsibility to do that. I would think though that it is probably helpful to have a rule that is in accord with the statute. It seems to me that it is confusing to have a statute that says one thing and a rule that says something else. So it just seems to me that while the enforcement is probably in the hands of the Council and the Conference, maybe you wouldn't get into enforcement issues if the rule said what the statute says.

JUDGE GRITZNER: Well, we may be on the same page then because my concern is the enforcement, and whether or not the Rules for this Committee should be suggesting to the

Judicial Conference of the United States what an individual member of that group should be doing with regard to matters that are not judicial conduct matters.

PROFESSOR HELLMAN: Well, that's obviously, you know, a very awkward thing to be doing, but I suppose that when a letter goes out to the subject-judge, as I assume it does, saying this is to inform you that there is a special committee that is investigating such-and-such a complaint, that that letter could say, you know, we inform you that this is what the statute provides, this is what the rule provides, and I think that a judge would abide by what the rule and the statute says when he or she has been told about it.

It's not something that somebody would know until that happens, but I think if it's in the letter that tells the judge about the investigation, that would probably make it unnecessary to have any other enforcement authority, any other enforcement action, excuse me.

JUDGE GRITZNER: Thank you.

JUDGE SCIRICA: Any other questions or comments from the Committee members?

JUDGE BARKER: Let me just, if I may, Mr. Chairman, for a second, add another word of thanks to both of you for adding substantially to our thinking and our understanding. Both of you are such stalwarts in this

field, and those of us who try to labor in these vineyards too know where to go to when you're speaking about them because it's always helpful.

Today is the same, so thank you.

PROFESSOR HELLMAN: Thank you very much and thank you for giving us a chance to express our thoughts on this.

JUDGE SCIRICA: Well, it's been illuminating and very helpful to us. Should you desire to submit any statement post-hearing of matters that you've thought about some more, or matters that have been raised here, we'd be happy to receive them.

PROFESSOR HELLMAN: Well, thank you. I'll be submitting my final version of my statement on Monday, I anticipate, and of course both of us are happy to respond to any additional questions, if there are any.

JUDGE SCIRICA: Good, good. With great thanks from the Committee, you're excused.

PROFESSOR HELLMAN: Thank you.

MR. WHEELER: Thank you.

JUDGE SCIRICA: Good. Our final witness is Mr. Raymond Cohen.

Mr. Cohen?

MR. COHEN: Good morning.

JUDGE SCIRICA: Good morning, Mr. Cohen.

MR. COHEN: Thank you for this opportunity.

JUDGE SCIRICA: Good.

MR. COHEN: My name, as you gather, is Raymond Cohen. I've never done anything like this before and I'm more-or-less a little nervous.

JUDGE SCIRICA: Well, we're happy to give you 15 minutes and you go ahead.

MR. COHEN: You'll have time to get out for lunch on time.

I'm just a hardworking citizen who finds it important to speak up when he sees something is wrong, and I appreciate the time you're giving me.

As Dr. Phil would say, how is this whole process working? The proposed amendments, in my opinion, do not go far enough in modifying the Rules of Judicial-Conduct and Judicial-Disability. According to Table S-22, out of 9,416 ethics complaints filed against federal judges over 10 years, including 130 by attorneys who presumably have something to lose, only five resulted in actions taken, and only one in 2011, zero in 2012 and 2013.

In effect, no judge has been held accountable for his or her ethical breach. The result is that in 99.95 percent of the complaints, no action is taken. The cases where actions were taken is 0.05 percent. A company with a similar percent had recently been fined $25 million because fewer than one percent of its employees earned any income.

In *U.S. v. Zaken Corp*, U.S. District Judge Dean Pregerson banned the Zaken Corp from advertising or selling work-at-home business opportunities and fined them $25 million. Those who take advantage of Americans searching for an honest day's work, depriving them of their savings will be held accountable.

The Judicial Conference needs to make additional changes in the misconduct rules so that meaningful results occur and judges are held accountable when ethical boundaries are crossed.

Those filing ethics complaints have an expectation of a fair hearing from the Judiciary, and this is not happening when 0.05 percent of the cases have action taken and 99.95 percent with no action taken.

New York State maintains a website for complaints against New York judges. Six decisions, all dated in 2014, are published on the New York website upholding ethics complaints against New York judges. These six decisions total more than 10 years' worth of actions taken on ethics complaints against the Federal Judiciary. Furthermore, New York has a PDF with 148 pages that list all the adverse ethics decisions against New York judges.

New Jersey, on its website, states that 40 percent of ethics complaints against New Jersey judges are investigated while 60 percent are dismissed.

This large disparity is certainly shocking to me, to say the least, and shows that reform is either long overdue, or we have very ethical federal judges.

Why should the status quo be changed? The decisions of the Federal Ethics Board are advisory and can be or are ignored because no enforcement actions follow these decisions. Most state judicial ethics committees have enforcement actions to back their decisions.

In post-politics, the Committee told the judge in Maryland five years ago that his membership in an organization violated two canons of ethics provoking his immediate resignation from the board, which was the appropriate behavior.

In 2010, three additional judges, including a Chief Justice from one of the Circuits were on the same panel. One judge said he did not feel compelled to resign and the other two did not respond.

Douglas Kendall who heads the Constitutional Accountability Center has succinctly stated the problem. The judicial ethics process is completely self-policing and unenforceable.

The Committee has Rule 11(g)(2) and four other Rules requiring that an order of a Chief Judge or an Appeals Committee forward their decision and supporting memorandum to the Conduct Committee. This needs to be changed. Either

the Conference saves the paper and stops the reports, which I hope doesn't happen, or they add teeth to the Rules that provides for enforcement against action against judges who violate the Rules or where the Committee doesn't follow its own Rules.

My recommendations are do the right, do what is right and have a meaningful process with published outcomes. This idea of having, you know, of creating a problem for public confidence in the Judiciary really, to me as a layperson is inappropriate. There's no other organization out there that uses that criteria, and while I do recognize the fact that, you know, you need to be judicious about it, to keep using that as a primary concern to me is repugnant.

And maybe that is a strong word, but no other organization uses that criteria and as judges everyday deciding cases where there's fraud and people concealing things, this is concealment as well, at least in my humble opinion, though I'm not a judge and I've given up practicing law, though I'm not a lawyer.

Do not protect those judges who are not doing their job. Most judges are hardworking, conscientious and do what they're supposed to do. But there's a small minority of judges who fail to do this, and I think one thing, listening to the conferring, you need to distinguish between judges who are disabled, and they should be given a

great deal of latitude, and judges who are just not doing their job. There should be two distinct pathways, in my opinion.

The Committee should make changes and should make its own changes before the court of public opinion or Congress demands that these changes be made. What could be concealed 20 years ago will become widely disseminated on the Internet by going viral where millions will view the message. This really undermines the policy of having confidence and, you know, whether the issue is known or unknown. This would seriously damage the reputation of the Judiciary and the individual judges involved.

For example, the Center for Public Integrity found that 10 percent of the federal judges had a financial interest in one of the parties to a lawsuit that they were adjudicating. Where was the Administrative Office or the Committee?

Eventually, concealment of material problems becomes public. For example, the December 6th, 2004 New York Times article stated that Judge Daniels of the Federal District Court of Manhattan took over three years to decide if Regina Adams would receive her ex-husband’s pension. Judge Daniels also took over three years to hear an appeal for a prisoner with HIV, who filed a petition challenging his state court conviction. By the time Judge Daniels got

around to deciding the case three years later, the prisoner had died.

That was 2004 and now we can jump to 2014. A more recent disclosure is from ABC Action News on July 30th, 2014. Steven Mozdzierz, and I butchered his name, is a former Marine who has had three surgeries on his knee following seven years in combat. He's been waiting over six years for Judge Barclay Surrick of the Eastern District of Pennsylvania to decide his case. And the six years is unacceptable in any case, and the fact that it's a veteran really is an outrageous action or inaction on his part.

Accountability is what is required, and failure to be accountable should be an ethics violation along with enforcement action. A judge should not be permitted to let cases languish, or decide cases on some of the issues and ignore other ones. Only the Supreme Court has the right not to decide a case, and ignoring issues is unacceptable and should be an ethics violation with consequences.

When judges know that violations go unpublished, even judges with stellar reputations will take advantage. Judge A, B and C heard a case. An ethics complaint could have been filed against all three judges; however, Judge A was arbitrarily chosen. He was the lucky one. Who do you think heard the ethics complaint? Judge B. Had Judge B found Judge A guilty, Judge B would have found herself

guilty as well.

This is a definition, I believe, of conflict of interest. Subsequently, the dismissal was appealed to the panel in the Circuit. Who participated in that decision? Judge C. One would say that maybe this is an isolated incident; however, when the original summary judgment was issued after oral argument was canceled, an en banc review was requested, which was denied. One half of the ethics panel was conflicted out since they had rendered a decision that was the basis of the ethics complaint.

In this situation that I describe above where Judge A, B, and C heard a case, no ambiguity exists, at least in my opinion, as to a conflict of interest since that is what Judge B is the definition.

Counseling doesn't help the complainant. You know, you take a judge and you counsel him, or discipline him, or do whatever. What happens to the decisions he's made? Are they reversed? Sure, they can go up on appeal, but of the cases appealed, what percent, what percent are actually heard for whatever, you know, due to economic reasons, et cetera. Counseling a judge is insufficient if it doesn't help the people who had the problem.

There has to be transparency, accountability and there has to be fairness. New York and New Jersey both have non-lawyers and non-judges on their panel. Furthermore,

expecting one judge to find another judge violated the Code of Conduct is ludicrous when they have lunch together. The Code of Conduct for ethics complaints should be exactly the same as for hearing lawsuits. By statute, 28 U.S.C. 47, a judge is not able to hear an appeal that he or she decided while in a lower court, even when the question may be easy of solution, as quoted, as to quote *Rexford v. Brunswick-Balke-Collender*. That's a Supreme Court case.

The Code of Conduct should be the same for ethics complaints, as well as hearing lawsuits. The Administrative Office needs to have administrative controls in place, and when you have each Circuit having its own system, it creates a lot more, it's a lot more difficult. And they should have non-lawyers and non-judges involved, as well as transparency, which is what New York and New Jersey does.

As I explained before, the public confidence is, to me, not a valid criteria, and as far as how high profile is concerned, if I have an ethics complaint, should I make it high profile in order that it gets heard? That doesn't seem right to me, but with the Breyer Commission statements in Rule 26, that seems to be the action. Post it in the Wall Street Journal or the Washington Post.

Hopefully the Committee will back its ethics decisions with enforcement action. We're in the 21st century and nothing is off-limits to the Internet, so this

public confidence thing can be a little bit more tricky than back in the 80s when this was originally discussed.

Does anyone have any questions?

JUDGE SCIRICA: Mr. Cohen, thank you very much. We appreciate hearing your views and we will certainly consider them.

Any questions or comments from the Committee?

MR. COHEN: Thank you for your time.

JUDGE BARKER: Thank you.

JUDGE SCIRICA: Good. Thank you.

The hearing is now adjourned and we thank everyone for their help in this matter.

(Whereupon, at 12:02 p.m., the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing was transcribed from an electronic sound recording of the proceedings in the above-entitled matter with revisions made to produce this final work product by and at the request of the Office of the General Counsel, Administrative Office of the United States Courts.

Steven Zeigler

30 October 2014
Date

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