



Report
of the
National
Commission
on Judicial
Discipline
& Removal

August 1993

EXHIBIT "A"

After reviewing the actions taken by judicial councils following the report of a special committee and by chief judges in concluding proceedings on the basis of corrective action, and in light of the results of our surveys of judges, the Commission concludes that, as implemented, the Act's substantive standard has not proved to be a serious threat to judicial independence.

Dismissals. Congress anticipated that the great majority of complaints filed under the Act would and should be dismissed as not in conformity with the Act, frivolous, or directly related to the merits of a decision or procedural ruling. Statistics provided to Congress have consistently vindicated the prediction (95 percent of the complaints filed and not withdrawn through 1991 were dismissed by chief judge); yet, prior to the Commission's studies, it was not possible to assess with any confidence whether those dismissals were appropriate.

Because the Commission had access to both dismissal orders and the complaints to which they related, it was able to overcome the major barrier to a rigorous evaluation noted above. It should be recognized, however, that the Act's substantive ambiguity, which results from the breadth of its conduct standard, is itself a barrier. Nonetheless, the Commission is satisfied that the Act's substantive ambiguity has not created a serious problem by permitting the dismissal of complaints that should have been investigated.

Most complaints filed under the Act have been outside the Act's intended jurisdiction, frivolous, or directly related to the merits of a decision or procedural ruling. Most of the troublesome dismissals identified (which as a whole constituted 2.5 percent of the sample reviewed) were the result of precipitous action, the chief judge having dismissed the complaint at a stage when further investigation was warranted. Although many circuits have on occasion been careless in identifying the proper ground for dismissal, very few of the troublesome dismissals could be laid to the elasticity of the Act's substantive standards. Four problem areas warrant specific attention.

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Merits-relatedness. As noted in the FJC study, "[o]ne source of confusion in applying the merits-relatedness standard is the interplay between a 'direct relationship' to the merits and the availability of an appellate remedy." The authors then describe "a number of arguably meritorious complaints that were dismissed as merits-related on the ground that some appellate remedy did, or might exist," arguing that

"some inquiry by the chief judge into the factual support for the complaint might have been more appropriate." As an example of a merits-related dismissal the authors deem clearly incorrect, they cite a complaint by a pro se litigant that the docket entries in the case had been falsified; the complaint specified six specific entries. The authors also discuss two complaints that alleged improper ex parte communications and that were dismissed, in whole or part, as merits-related.

The Commission agrees with the authors of the FJC study that, although the availability of appellate review may be "one reason merits-related complaints are not cognizable," "[t]he core reason for excluding . . . [them] is to protect the independence of the judicial officer in making decisions, not to promote or protect the appellate process." The Commission does not believe, however, that the extent of the problem identified (6 troublesome merits-related dismissals out of 469 complaints in the sample) warrants a statutory amendment or revision in the Illustrative Rules, or indeed, that the problem is readily amenable to formal clarification. Many of the troublesome dismissals arising from an arguably over-expansive view of merits-relatedness might have been avoided if the chief judges of two circuits that accounted for most of the problems had more freely availed themselves of assistance in reviewing the complaints and preparing non-standardized dismissal orders. Such dismissals might also have been avoided if reasoned dismissal orders analyzing this ground of dismissal were easily available and if, as a result, a body of interpretive precedents were to develop. Later in this chapter of the Report, the Commission makes recommendations that are addressed to the questions of assistance for chief judges and developing a body of interpretive precedents. If adopted, they may provide procedural solutions to a problem of substantive ambiguity.

Delay. Far more vexing is the question whether, and in what circumstances, judicial delay constitutes an appropriate ground for complaint under the 1980 Act. The Illustrative Rules provide that "the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that purpose." In commentary, however, the rulemakers note "that habitual failure to decide matters in a timely fashion is widely regarded as the proper subject of complaint." Although there is very substantial agreement with the Illustrative Rules' approach in the eight circuits sampled, in seven of which complaints of isolated delay are dismissed as merits-related, testimony before the Commission from lawyers and judges, and surveys

authorized to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the Act.

The Commission recommends that council rules regarding confidentiality should be nationally uniform. The relevant provisions of the Illustrative Rules should be adopted to that end, but the uniform rules should not provide for automatic transmittal of a copy of complaints to the chief judge of the district court and the chief judge of the bankruptcy court. They should, however, authorize a chief judge to release information, with appropriate safeguards, to government entities or properly accredited individuals engaged in the study or evaluation of experience under the 1980 Act. If action by the judicial councils or the Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

Chief Judge Orders. The Act requires that a chief judge's written order dismissing a complaint or concluding a proceeding state the chief judge's reasons. Seven of the twelve complaint dismissals identified as troublesome by the Commission's consultants were concentrated in two circuits in which, at least in past years, the chief judge did not delegate and frequently relied on form dismissals that do not articulate reasons for the stated conclusions. Earlier in this chapter of the Report the Commission recommended that chief judges avail themselves of assistance in reviewing complaints and preparing orders disposing of them, in part because of the causal connection suggested in the FJC study. That is another reason (in addition to the Act's requirement) why chief judge orders dismissing complaints or concluding proceedings, or memoranda accompanying them, should include a non-conclusory statement of the allegations of the complaint and the reasons for the disposition. Still another reason is that such a non-conclusory statement may be critical to a complainant's ability to understand the action taken as well as to the understanding of those engaged in oversight or evaluation (whether or not such orders are, as also recommended, uniformly available). The chief judges interviewed expressed no doubt that non-conclusory orders would facilitate evaluation of the integrity and credibility of the judiciary's implementation of the Act. *

The Commission recommends that, as provided in Illustrative Rule 4(f), a chief judge who dismisses a complaint or concludes a proceeding should "prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition." This memorandum should "not include the name of the complainant or of the judge or magistrate whose conduct was complained of." In the case of an order concluding a proceeding on the basis of corrective action taken, the supporting memorandum's statement of reasons should specifically describe, with due regard to confidentiality and the effectiveness of the corrective action, both the conduct that was corrected and the means of correcting it. If action by the judicial councils or Judicial Conference does not result in national uniformity on the issue within a reasonable period of time, the Commission recommends that the 1980 Act be amended to impose it.

Publication of Orders. As noted earlier, problems arising from the Act's substantive ambiguity might best be addressed through the development of a body of interpretive precedents. The dissemination of some decisions might also help other judges to assess their conduct. At present, even those few orders required by the Act to be publicly available may not be easy to locate. Moreover, assuming the Commission's recommendation that chief judge orders dismissing complaints or concluding proceedings be publicly available is adopted, availability does not guarantee ease of access. Early in the implementation of the Act, some orders were published, but many orders have no precedential value, and publication is not otherwise an unmitigated good. What is needed is a system for the dissemination of information about the resolution of complaints, including selective publication, whether in reporters or computerized information systems.

The Commission recommends that the Judicial Conference devise and monitor a system for the dissemination of information about complaint dispositions to judges and others, with the goals of developing a body of interpretive precedents and enhancing judicial and public education about judicial discipline and judicial ethics.