included in the local rules of each district court, and (3) urging each circuit council to consider other ways by which to increase awareness of and education about the 1980 Act among lawyers, judges, court personnel, and members of the public.

9. Use of Committees to Dissipate the Threat of Retaliation

The Commission recommended "that each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation to the chief judge of serious complaints against federal judges. Such groups should also work with chief judges in efforts to identify problems that may be amenable to informal resolutions and should initiate programs to educate lawyers and the public about judicial discipline. The Commission also encourages other institutions, including the organized bar, to take an active interest in the smooth functioning and wise administration of formal and informal mechanisms that address problems of judicial misconduct and disability." Report at 101-02.

The committee endorses this recommendation in principle, but believes that at this initial stage each circuit and court should have discretion whether and in what way to implement this proposal. The Commission was greatly concerned about the problem of the potential section 372(c) complainant who declines to file a complaint for fear of retaliation by the judge complained against. As the Commission reasoned: "The Act is obviously not serving its purpose to the extent that knowledgeable individuals

Ex "B"

with meritorious complaints are unwilling to file them because of fear of adverse consequences to themselves or to their clients once their identities are known. Lawyers are more likely to file meritorious complaints than non-lawyers. Yet, testimony before the Commission, surveys, and interviews with attorneys reveal a widespread reluctance among members of the bar to file a complaint. This type of risk aversion is common among those who appear frequently in federal court, notably government lawyers." Victims of sexual harassment are another prominent category of potential complainants who may be reluctant to come forward.

This problem, or perceived problem, of the threat of retaliation may be especially acute because, absent commission of an impeachable offense, the judge complained against may be expected to continue to hold office even if subjected to discipline under section 372(c). A complaining attorney may well have to appear again before that judge. Many attorneys believe, accordingly, that the filing of a complaint could threaten their livelihood.

Under the Act and Illustrative Rules, as amended in 1990, an aggrieved person who fears to file a formal complaint can complain informally and/or anonymously to the chief judge, who may then "identify" a complaint. If the chief judge is to investigate the matter, however, most likely any anonymity would be quickly lost, and at that point the complainant would stand alone, or might well see himself or herself as standing alone, against the judge complained against. In addition, some

potential complainants may believe that judges, including the chief judge, will protect their own. However far-fetched such a concern may seem to judges, such complainants may fear adverse consequences if they come forward to any judge, including the chief judge. For this reason, the current system still may strongly discourage even informal or anonymous meritorious complaints in many situations.

If a potential complainant has the option to funnel a complaint through a responsible and well-respected committee, this collective involvement should help dissipate the perceived threat of retaliation. Such a group might follow the avenue of seeking redress informally by bringing the matter to the attention of the chief judge, or where appropriate it could file a formal complaint. The person aggrieved will likely believe retaliation less likely in light of the participation of such a group in raising the matter, and will likely believe that the support of the bar will provide protection if retaliation were attempted.

In actual practice, bar groups already have served this function on an ad hoc basis in a number of section 372(c) matters. In an 11th Circuit matter, for example, two bar groups complained that a magistrate judge had ordered a lawyer arrested and hauled before him in handcuffs and chains because a conflict had made it impossible for the lawyer to appear at a hearing. The Eleventh Circuit Judicial Council issued a stern public

reprimand of the magistrate judge. In the Fifth Circuit, a similar committee system is currently is use.

It should be pointed out that the argument for this kind of proposal does not entirely depend on the supposition that there exists a substantial amount of serious and unremedied judicial misconduct that could be identified and dealt with if the perceived threat of adverse consequences were dissipated. Even if the amount of unreported and unremedied misconduct is minor, the credibility of the judicial discipline system demands that the judiciary be able to reassure the bar and the public that the § 372(c) mechanism, and related informal methods of resolving discipline problems, are a realistic option even for those who might fear retaliation.

The proper task and authority of these committees would have to be carefully spelled out. Presumably each committee would be available to receive grievances against federal judges that the grievants do not choose to bring directly to the attention of the chief judge either informally or through the filing of a section 372(c) complaint. If the committee deems a grievance to be serious and credible, the committee could then bring the matter to the attention of the chief judge, either formally or informally. In appropriate cases, the committee could bring together similar charges raised by different grievants in a single complaint (for example, in a hypothetical situation in which several attorneys charge a judge with abusive treatment of

counsel, or several attorneys charge a judge with independent acts of sexual harassment).

The question of how such committees could best be constituted needs further consideration. In large circuits, a circuit-wide committee might be too distant to properly fulfill its role; in others, a circuit-wide committee may be a realistic choice. Perhaps new committees could be constituted at the district or circuit level, or additional functions could be assigned to existing committees, such as the advisory committees for the study of local court rules and internal operating procedures appointed by each district and circuit court under 28 U.S.C. § 2077(b).

While these are promising concepts to explore, there is, of course, considerable value in actual experience. For that reason, the committee, rather than recommend any specific format, proposes that the Conference urge the circuits and courts covered by the Act to consider how best to confront this problem. The experience of circuits and courts, on an individual basis, in experimenting with these ideas could serve as a "laboratory" for the benefit of all.

The committee agrees that each circuit should take such reasonable steps as it deems practicable to encourage persons with justified grievances to come forward without fear that they will suffer adverse consequences if they do so. The committee further believes that utilization of committees at the district and/or circuit levels may assist with this problem, and at least

will serve to make it clear that the courts are anxious to do all within their power to provide ways for persons with genuine grievances to present them without fear of retaliation.

> *The committee proposes that the Judicial Conference recommend to the individual circuits and courts covered by the Act that they consider whether and what committee(s) or other structures or approaches, at the district or circuit level, might best serve the purpose of assuring that justified complaints are brought to the attention of the judiciary without fear of retaliation.*

10. Decision-Making Delay

The Commission recommended "that Illustrative Rule 1(e) be revised to 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. Discipline under the 1980 Act may be appropriate, however, for (1) habitual failure to decide matters in a timely fashion, (2) delay shown to be founded on the judge's improper animus or prejudice against a litigant, or (3) egregious delay constituting a clear dereliction of judicial responsibilities." Report at 95.

The Commission, while deeply concerned about the problem of decision-making delay, recognized "that delay most often lends itself to administrative measures best worked out through informal means and that, therefore, any adjustments in formal mechanisms should be designed primarily as a support for, and backstop to, administrative approaches." Circuit councils