

CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

P.O. Box 69, Gedney Station
White Plains, New York 10605-0069

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: judgewatch@aol.com
Web site: www.judgewatch.org

BY FAX AND BY MAIL
202-273-1108

June 12, 1998

Jeffrey N. Barr, Assistant General Counsel
Administrative Office of the U.S. Courts
One Columbus Circle
Washington, D.C. 20544

RE: The Federal Judiciary's Non-Enforcement of its Rule 17
Relating to 28 U.S.C. §372(c)

Dear Mr. Barr:

As you know, CJA's March 23rd Memorandum to the House Judiciary Committee chronicled (at pp. 6-7) your failure and refusal to discharge your duties to ensure proper oversight of §372(c) by the Administrative Office and Judicial Conference. Those duties are properly yours as Assistant General Counsel to the Administrative office and as secretariat to the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders -- a fact I have continually emphasized in my telephone conversations with you and in CJA's correspondence, going back nearly three years.

This particular letter is necessitated by your failure to follow through with proposals made in CJA's very *first* letter to you, dated July 20, 1995 (Exhibit "A"), which followed our *first* telephone conversation together. Such conversation and letter were shortly after my inspection at the Federal Judicial Center of publicly-available orders and memoranda on §372(c) complaints transmitted by the Circuits, pursuant to Rule 17 of the federal judiciary's 1986 Illustrative Rules Governing Complaints of Judicial Misconduct and Disability. At that time, I reported the results of my inspection, *inter alia*, the Second Circuit's non-compliance with Rule 17 -- whose purpose is to provide the public with substantive information about §372(c) complaints and their dispositions. As you know, the 1993 Report of the National Commission on Judicial Discipline and Removal, to which you were a consultant, recommended that:

"all judicial councils adopt and *strictly adhere* to Illustrative Rule 17 as it relates to the public availability of a chief judge's orders dismissing complaints or concluding proceedings and any accompanying memoranda...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". (Report, at p. 107, emphasis added)

This then was endorsed by the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders and approved by the Judicial Conference in March 1994.

CJA's July 20, 1995 letter to you enclosed our July 13, 1995 letter to the Second Circuit's Chief Deputy Clerk (Exhibit "B"), which we *explicitly* requested you to bring to the attention of the Committee to Review Circuit Council Conduct and Disability Orders (See, CJA's March 23, 1998 Memorandum, p. 6 & fn. 10). That letter particularized the Second Circuit's non-compliance with Rule 17, including the fact that notwithstanding that the Second Circuit Judicial Council modified its own local Rules, effective April 1, 1994, to accord with the Judicial Conference's March 1994 endorsement of Rule 17, the Circuit had not sent a single §372(c) disposition order to the Federal Judicial Center in the ensuing 14 months.

Moreover, based on my observation as to the other Circuits' inadequate and haphazard compliance, our July 20, 1995 letter proposed simple administrative procedures to ensure their regular and complete transmittals to the Federal Judicial Center:

"it would help matters immeasurably if the Circuits, rather than just sending their public orders to the Federal Judicial Center, often in batches, unaccompanied by any inventory, would inventory their transmittals and provide a certification that same is complete as to all public orders for §372(c) complaints disposed of during a given period." (Exhibit "A", p. 1, para. 3, emphasis in the original)

The letter observed that this would not be terribly difficult since the Circuits were already providing the Administrative office with statistical information relating to §372(c) complaints.

Last week, during my visit to Washington, I spent considerable time doing research at the Federal Judicial Center¹. In particular, I reviewed the materials relating to §372(c) complaints sent by the Circuits, pursuant to Rule 17. What I discovered were the sorry results of your failure to implement the sensible solution proposed nearly three years ago, to wit, hodge-podge compliance by the Circuits, transmitting materials to the Federal Judicial Center at irregular intervals, without inventories, and

¹ Because the Federal Judicial Center is housed in the same building as the Administrative Office, CJA's May 29th letter to you and Mr. Burchill suggested that you might like to take the opportunity to meet with me on either June 2nd or 3rd, when I would be there doing research. Indeed, on the morning of June 2nd, when I hand-delivered that letter to your office, together with the cert petition in *Sassower v. Mangano*, I reiterated to your secretary that I would be at the Federal Judicial Center if you wished to meet me. Neither you nor Mr. Burchill saw fit to arrange a meeting.

without certifications. To varying degrees, the orders disposing of §372(c) complaints are unaccompanied by the "docket sheet record" for those complaints, as called for by Rule 17(a) -- the consequence of which is that it is difficult or impossible to verify whether particular orders of Chief Judges were the subject of petitions for review to judicial councils.

Moreover, over the past 2-1/2 years, since December 28, 1995, the Second Circuit has *not* transmitted to the Federal Judicial Center a single §372(c) order, be it from its chief judge or judicial council. Nor has it transmitted the docket sheets for any of the §372(c) complaints filed in the Circuit, whose numbers may be gleaned from the statistical tables in the Administrative Office's published Annual Reports. According to the 1996 Annual report (Exhibit "C-1"), 48 complaints were filed in the Second Circuit in the 12 months ending on September 20, 1996, with 5 pending at the end of that period. According to the 1997 Annual Report, 40 complaints were filed in the Second Circuit in the 12 months ending on September 20, 1997, of which 12 remained pending (Exhibit "C-2").

It appears that only in the 5-1/2 months immediately following my July 7, 1995 in-person conversation with the Second Circuit's Chief Deputy Clerk -- a conversation reflected by CJA's July 13, 1995 letter to her (Exhibit "B") -- did the Second Circuit comply with its filing obligations. This may be seen from its letters, dated from July 12, 1995² to December 28, 1995, transmitting materials to the Federal Judicial Center. Copies of those letter are annexed (Exhibit "D"). The Federal Judicial Center's §372(c) files contain *nothing* from the Second Circuit after December 28, 1995.

There is no excuse for such recurrence of total non-compliance by the Second Circuit -- or the irregular, incomplete, and uninventoried transmittals of the other Circuits, particularly when CJA's July 20, 1995 letter (Exhibit "A") provided you with sensible and easy-to-implement procedures to ensure the completeness and accuracy of these materials, which are supposed to be centralized at the Federal Judicial Center. Your failure to follow-up on the procedural suggestions in that 1995 letter -- minimal as they were -- foreshadowed your failure to follow-up on the more substantive matters presented by CJA's subsequent nearly three-year correspondence. The responsibility was -- and remains -- yours.

² The first sentence of the July 12, 1995 letter of the Chief Deputy Clerk to Roger Karr, Manager of the Federal Judicial Center's Information Services (Exhibit "D-1") begins "It has come to my attention" and the third sentence begins "I am informed". As may be recognized from our July 13, 1995 letter (Exhibit "B"), the Chief Deputy Clerk learned of the Circuit's non-compliance with its filing obligations from my July 7th in-person conversation with her. It may be noted that the Chief Deputy Clerk July 25, 1995 letter to me (Exhibit "E") made no acknowledgment of that fact and, additionally, did not answer the questions posed by the July 13, 1995 letter.

June 12, 1998

Please bring this letter -- and all our previous ones -- to the attention of the Judicial Conference and, in particular, to the attention of its Committee to Review Circuit Council Conduct and Disability Orders, so that immediate curative action may be taken as to the serious procedural and substantive issues we long ago presented.

Finally, inasmuch as yesterday's "oversight" hearing of the House Judiciary Committee concerned not only the Judicial Conference and Administrative Office, but the Federal Judicial Center -- and a copy of this letter is being sent to the House Judiciary Committee -- an additional comment is fitting. Last week, as in the past, the Federal Judicial Center demonstrated itself to be an appropriate central repository for publicly-available §372(c) orders. It is a "user-friendly" facility, enabling citizen "oversight" of what's going on throughout the Circuits with §372(c). Never is this more important than when -- as now -- essential oversight is deliberately *not* being performed by the Administrative Office and Judicial Conference.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc.

Enclosures

cc: Counsel, House Judiciary Committee
Republican Majority Side: Tom Mooney, Mitch Glazier, Blaine Merritt
Democratic Minority Side: Perry Apelbaum, Robert Raben
Federal Judicial Center
ATT: Roger N. Carr, Manager, Information Services