

(Rev. 02-22-94)

Agenda F-18 (Summary)
Conduct and Disability
March 1994

**SUMMARY OF THE REPORT
OF THE JUDICIAL CONFERENCE COMMITTEE TO REVIEW
CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS**

The Committee to Review Circuit Council Conduct and Disability Orders recommends that the Judicial Conference:

Consider and adopt its proposed disposition of 18 recommendations addressed to the Judicial Branch by the National Commission on Judicial Discipline and Removal, as discussed in this report and the addendum thereto, and catalogued in the introduction to the report and the addendum pp. 2-10

As a result of discussions between the Executive Committee of the Conference and the chairman of this committee, the committee withdraws recommendations 1, 2a, 3, 12, and 17 and in lieu thereof recommends that the Judicial Conference:

Adopt a resolution (recommendation #19) which, endorsing in principle several recommendations of the National Commission on Judicial Discipline and Removal, recognizes that all circuits and courts covered by the Judicial Conduct and Disability Act, or the Administrative Office of the U. S. Courts, already have in place, or are in the process of adopting, the recommended practices, so that further Conference action is unnecessary as to those matters Addendum

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

Ex "C"

regarding confidentiality. While there no longer appears to be any substantial lack of uniformity in this area, such a resolution will place the judiciary on record in an important area of concern;

b. Approve modifying the Illustrative Rules to provide that copies be sent to the various relevant chiefs at the discretion of the chief judge of the circuit. The commentary would be modified to indicate that, while copies are ordinarily expected to be sent to the relevant chiefs, the chief circuit judge is free to direct otherwise if he or she wishes. The committee recommends that the Judicial Conference direct this committee to prepare and circulate a revision to the Illustrative Rules along these lines; and

c. 1) approve modifying the Illustrative Rules so as to provide for access by judiciary researchers to confidential materials in order to perform section 372(c) research expressly authorized by the Judicial Conference or this committee, and under appropriate requirements for shielding the confidentiality of such materials; and

2) direct this committee to draft and circulate such a modified Illustrative Rule. . . . pp. 16-22

3. 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 recommend[ed] that the 1980 Act be amended to impose it." Commission Report at 109.

This committee proposes that the Judicial Conference adopt a resolution that chief judge orders of dismissal set forth the allegations of the complaint and reasons for dismissal as required by Illustrative Rule 4(f). The committee notes that all circuits and courts

covered by the Act have adopted Rule 4(f) and have now indicated their intention to follow it, thus establishing national uniformity and making further action by the Conference unnecessary. . . . pp. 22-24

4. The Commission recommended "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." Commission Report at 109.

This committee strongly endorses the Commission's recommendation. The committee recommends that the Judicial Conference approve a resolution urging all circuits and courts covered by the Act to submit to the West Publishing Co.--for publication in F.3d--and to Lexis all orders issued pursuant to 28 U.S.C. § 372(c) that are deemed by the issuing circuit or court to have significant precedential value or to offer significant guidance to other circuits and courts covered by the Act. . . . pp. 24-26

5. The Commission recommended "that the Judicial Conference, assisted by the Administrative Office, reevaluate the adequacy of all data and reports gathered and issued concerning experience under the 1980 Act, including the system used to provide such data and reports in each circuit. The Commission also recommend[ed] that, as part of such general reevaluation, consideration be given to gathering and reporting data on complaints about bias on the basis of race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment." Commission Report at 110.

This committee recommends that the Judicial Conference adopt a resolution directing this committee, in consultation with the Administrative Office of the U.S. Courts, to reevaluate what data is required to be reported under 28 U.S.C. § 604(h) and to formulate and approve specific changes improving the accuracy and usefulness of the data reported. . . . pp. 27-28

6. The Commission recommended "that section 332 of Title 28, United States Code, be amended to require each circuit council to report annually to the Administrative Office of the U.S. Courts the number and nature of orders entered thereunder that relate to judicial misconduct or disability (including delay)." Commission Report at 110-11.

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." Commission Report at 101-02.

This 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. . . . pp. 32-37

10. 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." Commission Report at 95.

The changes recommended by the Commission do not appear to effect any substantial change in current practice. This committee notes that (1) "habitual failure to decide" is already incorporated in the commentary to Illustrative Rule 1. This committee believes that (2) delay founded on improper animus or prejudice would clearly be a basis of complaint. The committee is less clear as to the advisability of (3) "egregious delay

constituting a clear dereliction of judicial responsibilities" because of its generality. As for any changes to the Rules, the committee agrees with the Commission that ordinary delay is best dealt with outside section 372(c), by administrative and other means. However, it might be helpful to modify the commentary to Rule 1 to read as follows (the possible new language is underlined): "While we have not made an effort to define the phrase with any precision, we note that habitual failure to decide matters in a timely fashion is widely regarded as the proper subject of a complaint. Delay in a single case ordinarily may be the proper subject of a complaint only where the delay is the product of improper animus or prejudice toward a particular litigant. There may also be unique situations, not susceptible to precise definition, where delay in a single case is of such an extraordinary or egregious character as to constitute a clear dereliction of judicial responsibilities, suitable for discipline under 28 U.S.C. § 372(c). The nature of such situations, if any, is best left to case-by-case determination."

This committee recommends that the Judicial Conference charge the committee with the responsibility of considering whether and to what extent to alter the language of the commentary to Rule 1 relative to this recommendation. . . . pp. 37-40

11. The Commission recommended "that the 1980 Act be amended to include as an additional ground for dismissal by a chief judge that the allegations in a complaint have been shown to be plainly untrue or incapable of being established through investigation." Commission Report at 98.

This committee agrees that the substance of this recommendation serves an important purpose, although further thought should be given to stating the precise standard. The committee recommends (1) that the Judicial Conference endorse modification of the Illustrative Rules so as to give effect to the substance of the Commission's recommendation, and (2) that the Conference charge the committee with the responsibility of preparing the language of a revised Illustrative Rule and/or commentary. . . . pp. 40-42

12. The Commission "endorse[d] Illustrative Rule 4(b) [which provides that a chief judge may undertake a limited inquiry into the allegations of a complaint] and recommend[ed] that the 1980 Act be amended to provide that a chief judge may conduct a limited inquiry into the factual support for a complainant's allegations but may not make findings of fact

about any matter that is reasonably in dispute." Commission Report at 102.

This committee affirms the Commission's endorsement of Rule 4(b). This committee recommends that the Judicial Conference, as a matter of record, approve a resolution specifically endorsing the provisions of Illustrative Rule 4(b) and urging all circuits and courts covered by the Act to continue to follow Illustrative Rule 4(b) when appropriate. . . . pp. 42-43

13. The Commission recommended "that the Illustrative Rules be amended to permit chief judges and judicial councils to invoke a rule of necessity authorizing them to continue to act on multiple-judge complaints that otherwise would require multiple disqualifications." Commission Report at 105.

This committee endorses this recommendation. This committee recommends (1) that the Judicial Conference endorse a modification of the Illustrative Rules to give effect to the substance of the Commission's recommendation, and (2) that the Conference charge the committee with the responsibility of preparing the language of a revised Illustrative Rule and/or commentary. . . . pp. 43-44

14. The Commission recommended "that a chief judge or circuit council dismissing for lack of jurisdiction non-frivolous allegations of criminal conduct by a federal judge bring those allegations, if serious and credible, to the attention of federal or state criminal authorities and of the House Judiciary Committee. In situations where the chief judge or circuit council believe it inappropriate to act as an intermediary, the Commission recommend[ed] that they notify the complainant of the names and addresses of the individuals to whose attention the charges might be brought." Commission Report at 97.

This committee endorses the Commission's recommendation in principle, noting that it is limited to non-frivolous allegations of criminal conduct that are dismissed simply because not germane to the section 372(c) process. In such cases, the suggested alternatives seem reasonable. The committee recommends that the Judicial Conference charge the committee with the responsibility for preparing the language of a revised Illustrative Rule and/or commentary. . . pp. 45-47

15. The Commission recommended "that the Judicial Conference adopt a uniform policy on the limitations a judicial council

research access to confidential materials be afforded only pursuant to the express authorization either of the Judicial Conference or of this committee.

We recommend that the Judicial Conference (1) approve modifying the Illustrative Rules so as to provide for access by judiciary researchers to confidential materials in order to perform § 372(c) research expressly authorized by the Judicial Conference or this committee, and under appropriate requirements for shielding the confidentiality of such materials; (2) direct this committee to draft and circulate such a modified Illustrative Rule.

* 3. Reasoned, Nonconclusory Chief Judge Orders of Dismissal

The Commission recommended "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 recommend[ed] that the 1980 Act be amended to impose it." Report at 109.

Research by Commission consultants suggested that the practice, followed in some circuits, of issuing conclusory, boilerplate orders of dismissal tended to result in a substantially higher percentage of dismissals that appear troubling or "problematic" to an outside observer. Possible explanations for such a relationship are easy to imagine. Without fully detailed rationales in writing, there may tend to be less discipline in the chief judge's private formulation of the bases for dismissal. The very process of spelling out reasons in writing may serve to hone the chief judge's reasoning and point out problems that may not be apparent upon a cursory examination of the complaint.

Also, boilerplate orders fail to assure the public that the court is effectively implementing section 372(c), since none can tell. By leaving complainants in the dark about the reasons for dismissal, use of boilerplate orders compromises the Act's important symbolic value in providing the public with an opportunity to have its complaints considered thoughtfully and fairly.

The argument for this practice, of course, is that it consumes less time. However, delegation of the task of drafting routine dismissal orders, as is common practice and as the Commission also recommended (see below), minimizes any required expenditure of scarce judge time.

By the same token, corrective action orders that fail to describe the correction--which Commission consultants found were

the exception but still not uncommon--fall short of assuring the public and the complainant that the corrective action was indeed sufficient under the circumstances.

This committee is persuaded by the Commission's reasoning, and endorses the substance of the Commission's recommendation. This committee believes, however, that only two circuits have recently followed a practice of issuing boilerplate orders in a significant percentage of section 372(c) matters. This committee has spoken to both circuits about this matter, and both circuits have agreed to change their practice and adopt a policy of issuing fully reasoned orders of dismissal. While the issue may be mooted, we think it is nonetheless desirable for the Conference to place formally on the record its agreement with the Commission on this matter, thereby making clear to Congress that the courts take the Commission's recommendations seriously.

The committee proposes that the Judicial Conference adopt a resolution that chief judge orders of dismissal set forth the allegations of the complaint and reasons for dismissal as required by Illustrative Rule 4(f). The committee notes that all circuits and courts covered by the Act have adopted Rule 4(f) and have now indicated their intention to follow it, thus establishing national uniformity and making further action by the Conference unnecessary.

4. Dissemination of Public Section 372(c) Orders

The Commission recommended "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." Report at 109.

This committee endorses the Commission's recommendation.

In making determinations under the Act, many chief judges operate in substantial ignorance about what other circuits have done in similar situations. Since only a handful of public section 372(c) orders have been published--and since the unpublished public orders are not available on the computerized information systems, Lexis and Westlaw--there is at present no practicable way for a chief judge to learn how other circuits are interpreting section 372(c) and the Illustrative Rules. To some extent, of course, chief judges and staff share information informally, especially in connection with serious matters, but this sort of communication is far too limited and episodic to substitute for publication.

This is by no means a new idea. In 1986, the drafters of the Illustrative Rules said much the same: "[P]ublication of some of the chief judges' dismissal orders--as contrasted with mere public availability--would surely improve the operation of the mechanism. For the most part, the fifteen chief judges with responsibility under this statute have been making decisions about issues under the statute quite unaware of how the same or similar issues have been treated in other circuits and without the benefit that flows from scholarly critique. A body of

published precedent can only be helpful to us all." Commentary to Illustrative Rule 17.

As the Commission recognized, such publication should be selective, since many--indeed most--dismissal orders lack precedential value. The majority of complaints are insubstantial, and even orders disposing of substantial complaints may often be so fact-specific as to be worthless outside the immediate situation. On the other hand, some orders do determine knotty legal issues in the application of the Act and would be of interest to other circuits. As is done with court of appeals opinions, it should be left to each circuit to determine which of its public orders merited publication.

The committee believes that publication of selected § 372(c) orders by West Publishing Co. in F.3d is the best course. This is at once the easiest option--since no new publications or procedures are required--and the option that would effect the widest dissemination of section 372(c) orders, since F.3d is almost universal. Since any orders published in F.3d will automatically be picked up on Westlaw, the committee also believes that all orders published in F.3d should also be submitted to Lexis.

The committee recommends that the Judicial Conference approve a resolution urging all circuits and courts covered by the Act to submit to the West Publishing Co. -- for publication in F.3d -- and to Lexis all orders issued pursuant to 28 U.S.C. § 372(c) that are deemed by the issuing circuit or court to have significant precedential value or to offer significant guidance to other circuits and courts covered by the Act.

14. Allegations of Criminal Conduct

The Commission recommended "that a chief judge or circuit council dismissing for lack of jurisdiction non-frivolous allegations of criminal conduct by a federal judge bring those allegations, if serious and credible, to the attention of federal or state criminal authorities and of the House Judiciary Committee. In situations where the chief judge or circuit council believe it inappropriate to act as an intermediary, the Commission recommend[ed] that they notify the complainant of the names and addresses of the individuals to whose attention the charges might be brought." Report at 97.

The committee endorses the Commission's recommendation in principle.

The Commission learned that the policy of the House Judiciary Committee when it receives complaints against federal judges--and it receives many--ordinarily is to forward the complaint to the appropriate circuit, or to advise the complainant that his or her proper recourse is to file the complaint in the appropriate circuit. This policy ordinarily includes complaints alleging criminal misconduct (although the Committee may look at a complaint plausibly alleging potentially impeachable misconduct).

In the course of implementing section 372(c), however, some circuits have ruled that certain instances of alleged criminal conduct did not fall within section 372(c)(1)'s definition of misconduct subject to the Act, *i.e.*, "conduct prejudicial to the

effective and expeditious administration of the business of the courts." For example, both the Second and Ninth Circuits have ruled that allegations that a federal judge committed perjury concerning matters that occurred before the judge's appointment to the federal bench were beyond the coverage of the Act. These rulings assert that there is some range of purely personal behavior of a judge--in some circumstances even criminal behavior--that has no relationship to judicial performance and is therefore not cognizable under section 372(c). It is obviously a difficult question to determine the extent to which private behavior can be said to affect the administration of the business of the courts.

Given these rulings, the Commission was concerned that dismissal by a circuit on jurisdictional grounds of non-frivolous allegations of criminal conduct forwarded by the House Judiciary Committee--without bringing those allegations to the attention of proper authorities, including the Committee itself, or at least advising the complainant that he or she may do so--entails a serious risk that no one will undertake whatever investigation of those allegations may be appropriate. Actual criminal conduct might then go unpunished. Such a situation might also cause the House Judiciary Committee to reconsider its current practice of routine referral to the judiciary of complaints of judicial misconduct, including criminal misconduct.

The committee endorses the principle of the Commission's recommendation, noting that it is limited to non-frivolous allegations of criminal conduct that are dismissed simply

because not germane to the section 372(c) process. In such cases, the suggested alternatives seem reasonable. The committee recommends that the Judicial Conference charge the committee with the responsibility for preparing the language of a revised Illustrative Rule and/or commentary.

15. Limitations on a Judge Implicated in the Criminal Process

The Commission recommended "that the Judicial Conference adopt a uniform policy on the limitations a judicial council should impose on a judge who is personally implicated in the criminal process. At a minimum that policy should include ordinarily relieving a judge under indictment from all judicial responsibilities through to the end of the criminal process and imposing appropriate constraints on judicial responsibility where a judge is under investigation." Report at 112.

Recognizing the difficulty and sensitivity of these issues, and believing that many chief judges might be unsure what to do when suddenly confronted with the problem of a judge who was personally implicated in the criminal process, the committee agrees that the promulgation of a uniform set of guidelines in this area by the Judicial Conference would meet an important need.

The committee shares the Commission's concern about the situation--which unfortunately has arisen several times during the last decade--in which a sitting federal judge is indicted. For one thing, the indicted judge--or even a judge who has only been targeted for criminal investigation--should not be able to

Accordingly, the committee recommends passage of a Conference resolution endorsing the Commission's recommendation that there be a unified policy regarding confidentiality. Such a resolution will place the judiciary on record in an important area of concern. No further Conference action is necessary.

* 3. Reasoned, Nonconclusory Chief Judge Orders of Dismissal

The Commission recommended "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 recommend[ed] that the 1980 Act be amended to impose it." Report at 109.

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substantially higher percentage of dismissals that appear troubling or "problematic" to an outside observer. Possible explanations for such a relationship are easy to imagine. Without fully detailed rationales in writing, there may tend to be less discipline in the chief judge's private formulation of the bases for dismissal. The very process of spelling out reasons in writing may serve to hone the chief judge's reasoning and point out problems that may not be apparent upon a cursory examination of the complaint.

Also, boilerplate orders fail to assure the public that the court is effectively implementing section 372(c), since none can tell. By leaving complainants in the dark about the reasons for dismissal, use of boilerplate orders compromises the Act's important symbolic value in providing the public with an opportunity to have its complaints considered thoughtfully and fairly.

The argument for this practice, of course, is that it consumes less time. However, delegation of the task of drafting routine dismissal orders, as is common practice and as the Commission also recommended (see below), minimizes any required expenditure of scarce judge time.

By the same token, corrective action orders that fail to describe the correction -- which Commission consultants found were the exception but still not uncommon -- fall short of assuring the public and the complainant that the corrective action was indeed sufficient under the circumstances.

This committee is persuaded by the Commission's reasoning, and endorses the substance of the Commission's recommendation. This committee believes, however, that only two circuits have recently followed a practice of issuing boilerplate orders in a significant percentage of section 372(c) matters. This committee has spoken to both circuits about this matter, and both circuits have agreed to change their practice and adopt a policy of issuing fully reasoned orders of dismissal. While the issue may be mooted, we think it is nonetheless desirable for the Conference to place formally on the record its agreement with the Commission on this matter, thereby making clear to Congress that the courts take the Commission's recommendations seriously.

12. Limited Inquiry by the Chief Judge

The Commission "endorse[d] Illustrative Rule 4(b) [which provides that a chief judge may undertake a limited inquiry into the allegations of a complaint] and recommend[ed] that the 1980 Act be amended to provide that a chief judge may conduct a limited inquiry into the factual support for a complainant's allegations but may not make findings of fact about any matter that is reasonably in dispute." Report at 102.

The committee affirms the Commission's endorsement of Illustrative Rule 4(b), which provides that "in determining what action to take" on a complaint filed under 28 U.S.C. § 372(c), "the chief judge may conduct a limited inquiry for the purpose of determining (1) whether appropriate corrective action has been or