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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.

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.