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January 9, 2008

Comments[1] on the Revised Rules of 12/13/07 Governing Judicial Conduct and Disability Proceedings

released by the Committee on Judicial Conduct and Disability
of the Judicial Conference of the United States
pursuant to 28 U.S.C. §358(c) and the request of Chief Justice John Roberts

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[1] These Comments are downloadable via http://Judicial-Discipline-Reform.org/judicial_complaints/DrCordero_revised_rules.pdf, in a file that also contains most of the shorter documents referred to here. Links to the larger ones are provided infra to make possible their separate downloading.

Note: If a link is not active when clicked or the Internet browser returns a 'file not found' message, copy and paste it in the browser's address bar, delete any period, comma, or semicolon after the file type, such as ….pdf or ….html, as well as any space anywhere in what must be a continuous string of characters, numbers, and symbols, and press enter.

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I. By announcing the Draft and Revised Rules on only one scarcely known website, holding only one hearing in an out of the way court, and not posting the comments submitted, the Committee circumvented its statutory duty to give notice and intended to minimize criticism that the Rules will not stop the judges' systematic dismissal of judicial complaints

1. On June 13, 2007, the Committee on Judicial Conduct and Discipline of the Judicial Conference of the United States[2] (hereinafter: the Committee) adopted a set of Draft Rules (DR)[3] to provide procedural details on the implementation of the Judicial Conduct and Disability Act of 1980 (28 U.S.C. §351-364; the Act) in light of the recommendations contained in the Breyer Report.[4] The Draft Rules were intended to replace the current rules adopted by the 12 regional circuits and 3 national courts[5], which patterned them after "the Illustrative Rules [that] were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee" (Revised Rules, page 2, Lines 38-40, hereinafter thus: p2:L38-40)[6].
2. The Committee released its Draft Rules to the public the following July 16, through an

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[2] The Judicial Conference of the United States is the Federal Judiciary's highest policy-making body. It is constituted of the Chief Justice of the Supreme Court, who is its presiding officer, the chief judges of the courts of appeals of the eleven numbered judicial circuits, the District of Columbia Circuit, the Federal Circuit, and the Court of International Trade, as well as a district judge from each judicial circuit. Its enabling provision is found at 28 U.S.C. §331; http://Judicial-Discipline-Reform.org/docs/28usc331_Jud_Conf.pdf.

[3] Http://www.uscourts.gov/library/judicialmisconduct/Rules_DraftPublicComment.pdf; see also the following footnote.

[4] Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice, September 2006; http://www.supremecourtus.gov/publicinfo/breyercommitteereport.pdf. This Report was produced by the Judicial Conduct and Disability Act Study Committee appointed by the Late Chief Justice William Rehnquist on May 25, 2004, and chaired by Associate Justice Stephen Breyer. The Act, the Breyer Report, and the Draft Rules, with useful navigational bookmarks added and links to the originals, can be downloaded through http://Judicial-Discipline-Reform.org/judicial_complaints/351_Breyer_rules.pdf.

[5] In addition to the 11 numbered federal judicial circuits and the federal District of Columbia, §363 of the Act includes within its scope of application the U.S. Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit.

[6] The rules of the various circuits can be downloaded through http://www.uscourts.gov/library/judicialmisconduct/index.html. Cf. Judicial Misconduct Procedures based on the Rules of the Judicial Council of the Second Circuit Governing Complaints Against Judicial Officers Under 28 U.S.C. § 351 et. seq.; http://www.ca2.uscourts.gov/judmisconduct.htm and http://Judicial-Discipline-Reform.org/judicial_complaints/CA2_complaint_rules.pdf.

announcement[7] made in only one place, namely, the little known portal to the websites of the Federal Judiciary at http://www.uscourts.gov/ [8]. The Committee's conduct contradicted the recommendation that it had made to the Judicial Conference, which the latter accepted, that the current rules be given maximum public accessibility by being posted on all judicial websites:

> In recognition of the increasing importance of on-line availability of information for the transaction of legal business, and at the suggestion of two members of Congress, the Committee to Review Circuit Council Conduct and Disability Orders [9] recommended that the Judicial Conference:
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> a. Urge every federal court to include a prominent link on its website to its circuit's forms for filing complaints of judicial misconduct or disability and its circuit's rules governing the complaint procedure; and
>
> b. Encourage chief judges and judicial councils to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services.
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> The Conference adopted the Committee's recommendations.[10]

3. Only the comments submitted by the public by August 27 were posted on the portal[11], but not those submitted between then and the end of the 90 days for public comment on October 15 [12],

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[7] Announcement: For Public Comment: Draft Rules Governing Judicial Conduct and Disability Proceedings; http://Judicial-Discipline-Reform.org/judicial_complaints/351_Breyer_rules.pdf at tbr:241-243.

[8] Many files cited here can be downloaded through that portal, which gives access to the webpages or -sites of the components of the Federal Judiciary, i.e., the Judicial Conference of the United States, the Administrative Office of the United States Courts, the Federal Judicial Center, and all the federal courts as well as other entities related to federal law. Many of those files can also be downloaded, frequently with useful navigational bookmarks added and links to the originals, from http://Judicial-Discipline-Reform.org.

[9] This Committee changed its name to Committee on Judicial Conduct and Disability in March 2007; http://Judicial-Discipline-Reform.org/judicial_complaints/Com_Rvw_Con&Dis_Orders.pdf at JC:730.

[10] Report of the Proceedings of the Judicial Conference of the United States, March 24, 2002, p58; http://www.uscourts.gov/judconf/sept02proc.pdf.

[11] This commentator's indication of August 23, 2007, of intended testimony at the September 27 hearing that the Committee posted on the Federal Judiciary's portal at http://www.uscourts.gov/library/judicialmisconduct/hearing/Cordero.pdf, are those that he submitted only to comply with the Committee's requirement stated in its July 16 announcement (ftnt. 7, supra) that "Requests to appear and testify at the hearing must be e-mailed by August 27 to the Office of the General Counsel, Administrative Office of the U.S. Courts, at JudicialConductRules@ao.uscourts.gov. Those who submit such requests will be asked to give a written indication of the testimony they intend to provide".

[12] This commentator's Comments of October 13, 2007, discuss the Draft Rules in more detail than his indication of August 23 of intended testimony at the hearing (see preceding footnote); http://Judicial-Discipline-Reform.org/judicial_complaints/DrCordero_draft_rules.pdf They also provide a historical background to the Draft Rules more detailed than the

and no comments submitted by any judge were ever made public.[13]

4. On September 27, 2007, the Committee held a single public hearing in the whole nation on the Draft Rules, not at the Supreme Court, whose Chief Justice set in motion the process of reviewing the current rules and whose activities are so well covered by the Supreme Court press corps; not in Washington, D.C., at the Office of the Administrative Office of the U.S. Courts, which provides the secretariat for the Committee as well as the Judicial Conference; not at the U.S. Court of Appeals for the Second Circuit, of which the Committee chair, Senior Circuit Judge Ralph K. Winter, is a member and was its chief judge from 1997-2000, and which is also well covered by a press corps; but rather at an out of the way district court in Brooklyn, NY.[14] The transcript of the hearing was subsequently posted only on the portal[15], but not the official audio/visual recording of it.
5. The Committee posted a set of Revised Rules, dated December 13, 2007, only on December 21, just before the holiday season. In its announcement, it noted:

> The deadline for submitting the Rules for adoption by the United States Judicial Conference is mid-January. Therefore, any communications to the Committee should occur well in advance of that time. Such communications may be addressed to the Office of the General Counsel, Administrative Office of the U.S. Courts, One Columbus Circle NE, Washington, DC 20544.[16]

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summary provided here. They are accompanied by most of its shorter references and contain links to the larger ones. The Comments on the Draft Rules and those on the Revised Rules do not overlap and should be read as complimenting each other.

[13]Cf. Judges Impose Secrecy on Ethics-Rules Revision: Secrecy on the rewriting of federal misconduct rules is only deepening suspicions among critics who say judges have failed to police themselves adequately, by Marisa Taylor, MiamiHerald.com, October 26, 2007; http://www.miamiherald.com/news/nation/story/285048.html.

[14]In the same vein, the Breyer Study Committee did not publish any submissions from the public and held no hearing at all. By contrast, the previous similar body, the National Commission on Judicial Discipline and Removal, chaired by Robert W. Kastenmeier, "held six public hearings during 1992 and 1993, and submitted its final report on August 2, 1993"; http://Judicial-Discipline-Reform.org/judicial_complaints/on_Nat_Comm_Removal.pdf. See the 1993 Report of the Commission at http://Judicial-Discipline-Reform.org/judicial_complaints/1993_Report_Removal.pdf. In addition, two volumes of Research Papers of the Commission and one volume of Hearings transcripts were published and can be ordered through the Federal Judicial Center; http://www.fjc.gov/library/fjc_catalog.nsf.

[15]Transcript of the Public Hearing on the Draft Rules Governing Judicial Conduct and Disability Proceedings, held at the U.S. Courthouse, 225 Cadman Street, Brooklyn, New York, on September 27, 2007; http://www.uscourts.gov/library/judicialmisconduct/hearing/transcriptSept2707.pdf; see also the version with page numbers at the top of each page at http://Judicial-Discipline-Reform.org/judicial_complaints/transcript_27sep7.pdf.

[16]Http://www.uscourts.gov/library/judicialmisconduct/commentonrules.html. The announcement of the Revised Rules is included in a file containing those Rules enhanced by added navigational bookmarks; http://Judicial-Discipline-Reform.org/judicial_complaints/Revised_Rules_13dec7.pdf.

6. The Committee did not provide its e-mail address at the Administrative Office for any such communication to be sent to it, unlike what it did when it called for comments on the Draft Rules and asked that the public submit them in digital form by e-mail sent to JudicialConductRules@ao.uscourts.gov.[17] Consequently, those who happened to find out about the Revised Rules and wanted to submit comments that, precisely because they are critical of the Committee and its rules, must be all the more well-researched, thoroughly considered, and professionally presented, have had to scramble to do so, as did this commentator, and send them, certainly by e-mail to the Administrative Office, before "mid-January", a deadline whose impreciseness reasonably indicates that it is flexible enough to allow the Committee to read the few comments likely to be submitted.
7. Indeed, hundreds of people file judicial complaints every year (p12:L39-41) if not thousands (graph of Complaints Filed, p20 infra, and the comments thereto). But because of the way the Committee announced its Draft Rules and the place where it held its single hearing, only three people submitted comments and they were the only ones to testify at the hearing, where only one journalist showed up. By doing so, the Committee circumvented the duty placed on it by 28 U.S.C. §358(c):

> Any rule prescribed under this section **shall** be made or amended only after giving **appropriate** public notice and an opportunity for comment". (emphasis added)

8. Why would the Committee do that? Could it have been an effort on the part of the Committee, composed of experienced federal judges, to avoid criticism from the public for having produced Draft and Revised Rules that change none of the features in the current rules[18] that judges have so egregiously abused to exempt themselves from any discipline in the context of the inherently biased judges-judging-judges system of self-discipline set up under the Judicial Conduct and Disability Act? Let's examine what the Committee of judges provided for their peers or their complainants in the Revised Rules by comparison with the Draft Rules.

II. Far from being "mandatory", the Revised Rules are nothing but a template that any of the implementers is authorized to modify or suspend to fit whatever it is that in each case they feel like doing or not doing unconstrained by even guiding standards whether in their Commentaries or elsewhere

9. Revised Rule 2 (Rule) states that "Notwithstanding any rule of a judicial council to the contrary, these Rules are mandatory..." (p2:L3-4). However, any person or body that has anything to do with their implementation, namely, "a chief circuit judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States" (the implementers; p2:L4-6) is authorized to modify or suspend them if in his or its unimpeachable

[17] See footnote 7, supra.

[18] Outline of Comments Delivered at the Hearing on the Draft Rules; http://Judicial-Discipline-Reform.org/judicial_complaints/outline_graphs/pdf.

judgment he or it "expressly finds that exceptional circumstances render the application of a Rule in a particular proceeding manifestly unjust or contrary to the purposes of [the Judicial Conduct and Discipline Act of 1980] 28 U.S.C. §§ 351-364 or these Rules" (p2:L7-9). Consequently, the assertion that the Rules are mandatory is a vacuous pretension.

10. What is more, or rather less, the Committee deleted the provision in its Draft Rules that "the accompanying Commentaries are to be deemed authoritative interpretations of the Rules" (DRp3:L7-8).

11. By stripping its interpretations of any authoritative status, the Committee undermined the basis of its authority to draft those rules, that is, the Breyer Report, which found "that a major problem faced by chief circuit judges in implementing the Act was the lack of authoritative interpretive standards…Breyer Report, 239 F.R.D 212-15", as quoted by the Committee itself at p2:L23-25. Thereby the Committee left unmet what it deemed the reason for 'exercising its rulemaking power under section 358 of the Act', namely, the "need…to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act" (p2:L33-34).

12. Actually, what the Committee set out to accomplish through its Draft Rules was not just to guide, but rather to bind. This is what Judge Winter, the Committee Chair, stated at the public hearing on the Draft Rules:

> The Breyer Committee quite extensively went through the merits of many cases where discipline was not imposed or no special committee was appointed and the Breyer Committee was quite candid in concluding that the Act had not been administered well in many of the serious cases. And that's one of the reasons **we are now drafting rules that will bind chief circuit judges to doing things**…." (emphasis added; Transcript, p42:L13-16)[19]

13. Far from binding anybody, the Committee gave to all of the implementers Rule-modifying and suspending power and took back the status of its Commentaries as "authoritative interpretations of the Rules" (DRp3:L7-8). Likewise, it deleted the language in the Draft Rules that relied on the Code of Conduct for United States Judges[20] as a source of guidance in complaint proceedings:

> The Code of Conduct for United States Judges may provide standards of conduct applicable to proceedings under the Act, although it is not intended that disciplinary action be appropriate for every violation of the Code's provisions. As noted in the Introduction to the Code:
>
> > "Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the

[19] Http://Judicial-Discipline-Reform.org/judicial_complaints/transcript_27sep7.pdf.

[20] Code of Conduct for United States Judges, http://www.uscourts.gov/guide/vol2/ch1.html#date; and Checklist for Financial and other Conflicts of Interest, http://www.uscourts.gov/guide/vol2/checklist.pdf; both in one file at http://Judicial-Discipline-Reform.org/judicial_complaints/Code_Cond_Judges.pdf.

> text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system….(DRp5:L25-36, **deleted from the Revised Rules**)

14. That deletion was not enough and the Committee went ahead to reduce the Code to just an aspirational statement, not necessarily informative and definitively not prescriptive:

> Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general, the Code is in many potential applications aspirational rather than a set of disciplinary rules, and the numerous interpretative opinions represent only the advisory views of the Committee on Codes of Conduct with which there may be permissible disagreement and noncompliance. (p5:L23-27)

15. But that was still not enough to weaken the Rules. So the Committee stripped the guidance value off even mandatory rules:

> Similarly, the regulations governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations provide guidance in proceedings under the Act, although disciplinary action may not be appropriate for every violation of the regulations. (DRp6:L4-6, **deleted from the Revised Rules**)

> **Replaced by**: Even where specific, mandatory rules exist -- for example, governing the receipt of gifts by judges, outside earned income and financial disclosure obligations -- the distinction between the misconduct statute and the specific, mandatory rules must be borne in mind. (p5:L33-35)

16. What is more, it set up the circuit judicial councils –there are 12 regional circuits, the Federal Circuit, and 2 other national courts subject to the Rules under Rule 3(e, f) (p4:L22-26) and Rule 4 (p7:L17-22) - as the ultimate arbiters of whatever "misconduct" is:

> Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the Judicial Council of the Circuit subject to such review and limitations as are ordained by the statute and by these rules. (p5:L29-31)

17. Not satisfied with merely rendering misconduct decisions predicated on the violation of a provision of the Code of Conduct for U.S. Judges vulnerable to an attack of void for vagueness, the Committee opened the decisions of the circuit judicial councils to the graver attack of ex-post facto disciplinary decision. If federal judges cannot rely on the Code or even its "numerous interpretative opinions", not even "mandatory rules", as prior notice of the norms to which they are expected to conform their conduct, how could it be fair for them to find out only after being complained-about and privately or publicly admonished or censured, sanctioned, or even recommended for impeachment whatever it is that they were supposed to do or not to do? Did the Committee, consisting of judges well versed in the law, intend to provide their peers with another means to escape discipline?

18. In any event, there is no question that the Committee elevated each of 15 councils to the status of 'ultimate determiner of misconduct', and could not bring itself to expressly reserve such status for the implementer that logically should be entitled to it, namely, the Judicial Conference, the equivalent of the Supreme Court, which says what the law of the land is in the system of justice to which common people, those actually "…Under Law"[21], are subject. Nor could it reserve that status even for itself, that is, the Judicial Conduct and Disability Committee through which the Conference elected to exercise its authority under the Act, as provided for under 28 U.S.C. §331 4th paragraph[22]. On the contrary, by deleting from the Commentaries language on refusal to recuse as the basis of a complaint, the Committee reinforced the presumption that such complaint is merits-related and thus dismissable, thereby reinforcing the position of each judge as ultimate determiner of whether he -or she- should remain on a case regardless of a request for recusal and, of course, conducting or misconducting himself as he sees fit:

> The same standard applies to allegations concerning a judge's failure to recuse. An allegation that a judge should have recused is merits-related. The very different allegation that the judge failed to recuse for improper reasons is not merits-related. (DRp5:L40-41/p7:L1, **deleted from the Revised Rules**)

Retained in Rule 3(b)(2)(A): Any allegation that calls into question the correctness of a ruling of a judge, including a failure to recuse, without more, is merits related. (p4:L5-7)

A. The Committee caved in to the pressure of the fellow judges for freedom from any mandatory disciplinary rules

19. On all these key points the Committee caved in to the pressure of the class of persons 'Above Law', its peers. No doubt it was also aware that it will have to submit its Rules for adoption to the Judicial Conference, of whose 27 members 13 are chief circuit judges who will be actually voting on the replacement of the current rules patterned after "the Illustrative Rules [that] were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals" (p2:L38-40). They objected to having to comply with rules crafted by anybody else rather than be able to deal with complaints against their own as it suits the judges in each circuit. As the Chief Judge of the 9th Circuit, CJ Mary Schroeder, put it:

> "We have always been concerned in the 9th Circuit about maintaining the ability of our circuit to handle the issues relating to the West, and to try to avoid undue centralization in Washington," Schroeder said. "That is kind of a theme -- a tension between the role of circuit councils and the

[21] "Equal Justice Under Law" is the aspirational principle inscribed on the frieze below the pediment of the Supreme Court building and is supposed to guide the action of the Federal Judiciary as a whole.

[22] Http://Judicial-Discipline-Reform.org/docs/28usc331_Jud_Conf.pdf.

administrative office."[23]

20. Apparently, Chief Judge Schroeder is under the impression that "the issues relating to [judicial misconduct] in the West" are wilder than those that affect the judiciary and the public elsewhere in the nation and must be handled in a different way by its judges[24]. How representative is her statement of the notion shared by the other circuit judges of their circuits as separate fiefdoms carved out from "a nation under one law" and ruled by feudal lords entitled to handle their own systems of fealty independently of any royal authority? It can be very representative due to one key factor: There is no 'royal authority' in the Federal Judiciary because all Supreme Court justices as well as circuit and district judges enjoy lifelong appointment "during good Behaviour" and their salary "shall not be diminished during their Continuance in Office", as provided for under Article III, Section 1 of the U.S. Constitution[25]. In fact, neither the Constitution nor any statute thereunder give even the Chief Justice of the Supreme Court power to control any other judges or ask them for an accounting of their conduct, and not only can he not fire any judge, but also cannot even recommend to Congress on his own that anyone be impeached. He is just ceremonially "primo inter pares". His peers are not the associate justices, but rather the chief circuit judges and the district judges that compose the Judicial Conference, who are certainly not going to adopt policy to limit their own power in their courts. Consequently, what the Conference will not do to itself,

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[23]Circuits Wary of Plan for Policing Federal Bench, by Dan Levine, The Recorder, November 2, 2007, published by Law.com; http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1193907830481.

[24]Perhaps Chief Judge Shroeder had in mind the grave accusations of conflict of interests and favoritism involving more than $4.8 million in judgments and fees brought to her attention as chief circuit judge in a complaint against U.S. District Judge James C. Mahan and the preservation of the power of the 9th Circuit Judicial Council to exonerate him despite the appearance of blatant impropriety. See Appeals Court Dismisses Complaint Against Judge: Panel says that despite The Times' allegations of favoritism in judgments and fees, the jurist's ties didn't affect his impartiality, by Ashley Powers, Los Angeles Times Staff Writer, December 11, 2007; http://www.latimes.com/news/nationworld/nation/la-na-judge11dec11,1,5619088.story?coll=la-headlines-nation&ctrack=2&cset=true.

The accusations against former Nevada State and later U.S. District Judge James C. Mahan were first published in a series of articles of journalistic investigation entitled Juice vs. Justice, A Times Investigation in Las Vegas, They're Playing With a Stacked Judicial Deck; Some judges routinely rule in cases involving friends, former clients and business associates -- and in favor of lawyers who fill their campaign coffers, by Michael J. Goodman and William C. Rempel, Times Staff Writers, June 8, 2006;. http://www.latimes.com/news/politics/la-na-vegas8jun08,1,438348,full.story?ctrack=7&cset=true; see the whole series at http://Judicial-Discipline-Reform.org/judicial_complaints/Juice_v_Justice.pdf.

The LA Times investigation lasted two years and cost over $250,000. See a video of a panel consisting of LA Times Investigative Journalist Rempel and three university professors, who discussed responses to the judicial corruption thus exposed; mhtml:file://C:\Documents%20and%20Settings\Administrator\My%20Documents\initiatives\Juice%20v%20Justice\Responses%20to%20Judicial%20Corruption%205-4-07.mht.

[25]Http://Judicial-Discipline-Reform.org/docs/US_Constitution.pdf.

none of its Committees will either, including its Committee on Judicial Conduct and Disability.

21. This explains the Committee's incontrovertible surrender to the chief circuit judges and their peers apparent in Rule 5, which deleted the language in the Draft Rules that made it mandatory for a chief circuit judge to identify a complaint:

> Rule 5(a)(1) Subject to Rule 7, where information known to a chief circuit judge meets the standard of Rule 3(a)(2) and no complaint containing such information has been filed under Rule 6, a chief circuit judge **must** identify a complaint **and,** by written order stating the reasons, **begin the review** provided in Rule 11. Where a complaint filed under Rule 6 contains information constituting an identifiable complaint of misconduct or disability but the complainant does not claim it as such, the chief circuit judge **must** identify a complaint.(DRp8:L10-16, emphasis added; **deleted from the Revised Rules**)
>
> **Replaced by**: Rule 5(a) Identifying a Complaint. Subject to Rule 7, where information known to a chief circuit judge constitutes **reasonable grounds** for inquiry into possible misconduct or disability on the part of a covered judge and no complaint containing such information has been filed under Rule 6, a chief circuit judge **may** conduct an inquiry, **as he or she deems appropriate**, into the accuracy of such information. **If**, after such an inquiry, the chief circuit judge finds that there is **probable cause** to believe that misconduct has occurred or a disability exists, the chief circuit judge **may informally seek a resolution satisfactory to the chief** circuit judge, if feasible, and, **if failing** to obtain such a resolution, **may** identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is **clear and convincing** and no informal resolution has been achieved or is feasible, the chief circuit judge must identify a complaint. A chief circuit judge may not decline to identify a complaint because the person or persons making such allegations have not filed a complaint under Rule 6. (emphasis added; p7:L36-48. As to this awkward last sentence see ¶24 infra.)

22. Under the Revised Rules, even when the chief circuit judge has "reasonable grounds for inquiry into possible misconduct or disability", she is not dutybound to do anything, but only "may conduct an inquiry" and not necessarily according to some professional method of inquiry, but merely as "she deems appropriate"…such as a conversation over wine and lobster at a sponsor-paid judicial junket. Moreover, even after finding "probable cause to believe that misconduct has occurred or a disability exists", she does not have to identify a complaint; instead, she only "may informally seek a resolution satisfactory to the chief circuit judge", that is, not necessarily consonant with the requirements of the law, let alone the prescriptions of any Code of ethical conduct, but simply whatever happens to satisfy the chief in her unlimited discretion. More still, no duty to identify a complaint is triggered even by "failing to obtain such a resolution" through that informal approach, so that the chief only "may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11".

23. Even the preponderance of the evidence is not enough to impose the duty on the chief circuit judge to identify a complaint in order to nip in the bud any misconduct or disability for the sake of the people that are harmed by it and the administration of justice that is impaired thereby.

The chief can quietly sit on his hands until the misconduct or disability is blatant enough to be "clear and convincing", thus allowing the possibility that somebody else may file a complaint under Rule 6 and let the chief off the hook of complaining against one of his peers. Consequently, not even then does the chief come under the duty to identify a complaint. But if he does anything, it must first be to try the informal approach; only if "no satisfactory informal resolution has been achieved or is feasible, the chief is required to identify a complaint" (p8:L28-29).

24. Could the Committee have bent over backwards more strenuously in order to spare the chief circuit judges and their peers what their practice shows they consider to be the nuisance of handling judicial complaints? Yes, and it did. So that awkward last sentence of Rule 5(a) (¶21 supra) is the unwelcome orphan of a Draft Rules section that the Committee killed in revision:

> Rule 5(a)(2) A chief circuit judge:
>
> (A) may not decline to identify a complaint:
>
> (i) because the chief circuit judge deems otherwise cognizable allegations not to be credible, unless the sole source of information has been unreliable in the past; or
>
> (ii) because the person or persons making such allegations have not filed a complaint under Rule 6.
>
> (B) need not identify a complaint if it is clear on the basis of the total mix of information available to the chief circuit judge that the review provided in Rule 11 will result in a dismissal under Rule 11(c), (d), or (e). However, a chief circuit judge may identify a complaint in such circumstances in order to assure the public that highly visible allegations have been investigated. In such a case, appointment of a special committee under Rule 11(f) may not be necessary.[26]

[26]Rule 5(a)(2)(B) has been deleted from the Rule itself only for its content to reappear in the Commentary to Revised Rule 5 thus:

> In high-visibility situations, it may be desirable for the chief circuit judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored. (p9:L4-7)

The condemnation that was leveled at this express policy of deceit when contained in the Rule is well deserved by its formulation in this Commentary too because it "allows the chief circuit judge to mislead the public by pretending that he has identified a complaint against a judge and will investigate the information constituting an identified complaint, when in fact he has already decided that there is not going to be any such investigation and that the complaint is as good as dismissed but for the signing of the order to that effect. What kind of trust in the integrity of the process did the drafters intend to build in judges, complainants, and the public when they authorized the handling of complaints through deceit?", http://Judicial-Discipline-Reform.org/judicial_complaints/DrCordero_draft_rules.pdf, p19¶49 et seq.

> (C)may decline to identify a complaint if the matter has been resolved by informal means. (DRp8:L17-32, **deleted from the Revised Rules**)

25. In the vacuum left by that deletion, the chief circuit judges are now allowed to disregard allegations of misconduct and disability brought to their attention by another person if only they consider them "not to be credible"…no need to conduct any inquiry whatsoever even if the allegation is "otherwise cognizable", for if in doubt, the benefit cuts in favor, not of the public or the integrity of judicial process, but rather of the peers, who after all are their friends and colleagues, not to mention, persons 'Above Law and every suspicion'.
26. While "Judicial councils retain the power to promulgate rules consistent with these Rules" (p3:L20), they need not bother to do so. They adopted their current local rules, but that entailed acknowledging them as a constraint on their action that in theory forces them to handle all judicial complaints filed with them uniformly in their own circuit. Now they can simply pretend to apply the single set of national "mandatory" Rules only to modify or suspend them systematically to "handle the issues relating to" their local peers and themselves as it most advances both their individual and judicial-class interests. Given that the sets of facts of two complained-about judges are never exactly the same, nothing is easier than to seize on an element particular to a case and craft a form of words in order to "expressly finds that exceptional circumstances render the application of a Rule in a particular proceeding manifestly unjust or contrary to the purposes of 28 U.S.C. §§ 351-364 or these Rules" (p2:L7-9).

B. By making the Rules in effect not mandatory and its Comments to them non-authoritative, the Committee has ensured that their implementation by the 15 judicial circuits and national courts will be inconsistent

27. Through the double whammy in its Revised Rules of empowering implementers with modifying and suspending authority while withdrawing the language that in its Draft Rules required that its "Commentaries are to be deemed authoritative interpretations of the Rules" (DRp3:L7-8), the Committee has not just left unsatisfied its acknowledged need for Rule-implementing guidance, but has in fact managed to leave in worse shape a situation that was already very bad due to its dismal implementation record:

> "To meet the reform goals presented by the Breyer Committee," said Judicial Conduct and Disability Committee chair Judge Ralph K. Winter, "and in order **to ensure the consistent application of the Act throughout the Judiciary**, our Committee concluded that a set of rules or guidelines governing the proceedings under the Act needed to be drafted and published for comment. For example, the Breyer Report noted that **in many critical areas the Act provided little guidance** as to the disposition of complaints filed or when chief circuit judges are themselves required to initiate complaints."[27] (emphasis added)

[27]Public Comment Invited on Judicial Guidelines, The Third Branch, Newsletter of the Federal Court, vol. 39, number 8, August 2007; published monthly by the Administrative

28. Not only has the Committee defeated its original purpose "to ensure the consistent application of the Act throughout the Judiciary", but it has also ensured that it will be inconsistent. This can be easily illustrated, for one only has to imagine a chief circuit judge who modifies or suspends some Rules and then appoints a special investigative committee, who in turn modifies or suspends some Rules too before its report ends up in the hands of the circuit judicial council, who also modifies or suspends other Rules, which is likewise done by the Judicial Conduct and Disability Committee only for the Judicial Conference to do the same. After so many persons participate in guidance-free chipping away at the Rules even in a single case and in as many cases as they want, what probability remains there for consistency within a circuit, not to mention at the national level? None, except that instead of the implementers simply disregarding the current rules, as they do now, the Revised Rules will make inconsistency legal by empowering the implementers to disregard them by merely claiming "exceptional circumstances".
29. What kind of justice system would we end up with if detectives, such as FBI investigators, U.S. attorneys, district judges, circuit judges, and Supreme Court justices were mandated to apply criminal and civil law provisions except whenever they 'expressly found that exceptional circumstances render their application manifestly unjust or contrary to the purposes of the law'? If each of these officers were entrusted with the equivalent of Presidential pardon, what incalculable harm would be inflicted upon the fundamental legal principles of reliability of notice, expectation of punishment, and non-arbitrary and uniform law enforcement throughout the procedural stages of any case? Why are judges entitled to fashion for themselves a system of discipline where any of their peers can let them off the hook by merely claiming "exceptional circumstances"?
30. By caving in to the implementers' wishes for implementing freedom, the Committee has diminished the Rules as a means of assuring the public that their complaints against judges will be handled by other judges effectively, impartially, and uniformly pursuant to a body of pre-established procedural provisions aimed at guaranteeing "Equal Justice Under Law". It has left them reduced to a means by which judges can proceed in an ad hoc way to guarantee that their complained-about peers can continue undisciplined to "engage in conduct prejudicial to the effective and expeditious administration of the business of the courts", thereby knowingly defeating the purpose of the Act set forth at 28 U.S.C. §351. Since this is the foreseeable consequence of its revision and works in its own and its peers' vested interest in disposing of complaints against themselves and evading the discipline that they could entail, the Committee must be deemed to have intended the inconsistent implementation of the Rules and, therefore, to have stated only as a pretense for public consumption that "Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform proceedings under the Act" (p3:L14-16). Hence, the Committee has turned the Revised Rules into a sham!

Office of the U.S. Courts Office of Public Affairs; http://www.uscourts.gov/ttb/2007-08/public/index.html.

III. Since the Revised Rules reinforce the judges' means to continue the systematic dismissal of judicial complaints that allowed them so to implement the current rules that out of the 7,462 complaints filed in the 1997-2006 period they disciplined only 9 judges, the Rules are a sham!

31. In the 10-year period 1997-2006, the official statistics on judicial complaints published by the Administrative Office of the U.S. Courts show that out of the 7,462 complaints only 9 judges were disciplined.[28] These AO statistics reveal the systematic dismissal of judicial complaints by the chief circuit judges and the circuit judicial councils[29]. They dismissed those complaints out of hand without any investigation, for in those 10 years they appointed only 7 special investigative committees. This point was confirmed by Committee Chairman Judge Winter:

> As I understand the draft proposed rules, they are intended to meet the criticism that chief judges have been too reluctant to identify complaints and to appoint special committees.[30]

32. If those complaints had been identified and those special committees had been appointed as they were supposed to, a number of judges would have been found to have not only 'engaged in conduct prejudicial to the administration of justice', but also committed acts spanning the scope of the criminal code. This follows from the fact that despite judges having abused the Act's system of judicial self-discipline to exempt themselves from any discipline or liability and place themselves above the law, judges cannot gabble out the weaknesses of their human condition and steel themselves invulnerable to the temptation to grab benefits accessible through their office. This is all the more so since it is not because of their incorruptible character that judges are either nominated by the President or confirmed by the Senate, but rather because they fit the mold of these political representatives in a process that is commonly set in motion by power brokers in the two major parties.[31] Consequently, they can stray into criminal activity in the same proportion as the rest of the population.

33. The Bureau of Justice Statistics of the U.S. Department of Justice has determined that 1 in every 31 persons in the adult U.S. population is either in prison or jail or on probation or parole, i.e., under correctional supervision.[32] If this ratio is applied to the total number of 2,184 judicial

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[28] All the tables of these official AO statistics have been collected in one PDF containing also links to their originals and can be downloaded from http://Judicial-Discipline-Reform.org/judicial_complaints/complaint_tables.pdf.

[29] The Supreme Court Justices and the Chief Judges Have Semi-annually Received Official Information About the Self-immunizing Systematic Dismissal of Judicial Conduct Complaints, But Have Tolerated It With Disregard for the Consequent Abuse of Power and Corruption; http://Judicial-Discipline-Reform.org/docs/SCt_knows_of_dismissals.pdf.

[30] Transcript of the Public Hearing on September 27, 2007, p42:L13-20; see ftnt. 15.

[31] See the case study of U.S. James C. Mahan in Juice v Justice, http://Judicial-Discipline-Reform.org/judicial_complaints/Juice_v_Justice.pdf.

[32] Probation and Parole in the United States, 2006, by Lauren E. Glaze and Thomas P. Bonczar, BJS Statisticians, Bureau of Justice Statistics Bulletin, December 2007, NCJ

officers in the Federal Judiciary[33], 70 such officers should currently be correctional supervisees. Yet, *none* is, a fact that defies statistical probabilities however much the 1/31 ratio applicable to the general population were refined to represent only white male top government professional employees, such as most federal judges are. It is the result of an inherently biased judges-judging-judges system that allows life-tenured judges to cover for each other and exempt themselves from any ethical, civil, and criminal liability through the systematic dismissal of judicial misconduct complaints.

34. Instead of ensuring that judges administrate "Equal Justice Under Law", that system generates a vicious circle of abusive exercise of judicial power. It begins with one instance of abuse by a judge that is either supported by his peers for a share of the material benefit involved or just tolerated by other colleagues who prefer to enjoy the moral benefit of continued camaraderie with the members of the judicial class rather than identify a complaint and be retaliated against with ostracism as a disloyal pariah; thereafter all of them must cover up for the first judge, lest they incriminate themselves as active or passive accomplices. This first instance proves that abuse of judicial power is beneficial at no risk, so other judges follow suit, either alone or with others who have become inured to the abuse or who tolerated it.

35. Thus is set in motion a self-reinforcing judicial modus operandi where wrong is routinely done and tolerated; and where abuse of power goes on unpunished to become absolute power and to corrupt absolutely. The Administrative Office classifies the wrongs alleged in judicial complaints under these categories: abuse of judicial power, demeanor –which includes judicially unbecoming or abusive language or treatment of others-, prejudice, bias, conflict of interests, bribery, corruption, undue decisional delay, incompetence, neglect, and mental or physical disability that prevents the discharge of all the duties of office[34]. It is complaints alleging such serious wrongs on the part of their peers that the judges dismiss systematically, without any investigation. They are bound to do so because their survival has become interdependent[35] as a result of having followed the motto that is their only guidance in handling

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220218; http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus06.pdf, box on p.2; also at http://Judicial-Discipline-Reform.org/judicial_complaints/Probation_Parole.pdf.

[33]Table 1.1 Total [federal] judicial officers, Judicial Facts and Figures, Administrative Office, http://www.uscourts.gov/judicialfactsfigures/2006/Table101.pdf; also at http://Judicial-Discipline-Reform.org/judicial_discipline/judicial_officers.pdf.

[34]See the categories of misconduct listed on the AO statistical tables (ftnt. 28 supra) and the definition of misconduct in Rule 3(b) (p3:L35 et seq). Oddly enough, unlike the tables compiled under the current rules, that definition in the Revised Rules does not include the concepts of conflict of interests, neglect, and incompetence. Are judges not misconducting themselves when they rely on summary orders to avoid reading the parties' papers, researching for authorities, and citing precedent to motivate their otherwise fiat-like decisions? Cf. The Decisions of District Judge David Larimer in *DeLano* and *Pfuntner*, http://Judicial-Discipline-Reform.org/docs/J_Larimer_re_DrCordero.pdf.

[35]The Dynamics of Organized Corruption in the Courts, http://Judicial-Discipline-Reform.org/Follow_money/Dynamics_of_corruption.pdf.

such complaints: 'judges can do no wrong'. Judicial history proves that such is their motto: In the 219 years since the creation of the Federal Judiciary in 1789 by Article III of the U.S. Constitution only 7 judges have been impeached and removed from the bench[36]. Therefore, it is responsible as within the bounds of historical and current facts as well as knowledge of the human condition to affirm that the judges' inveterate riskless practice and toleration of those wrongs have generated a system of coordinated judicial wrongdoing.[37]

36. However, the Revised Rules will put an end to this coordination of judicial wrongdoing. The Committee of judges drafting them has found more precise and effective advisory language to convince their peers of their evil ways and persuade them to apply the law to complaints against them as they apply it to complaints against others. The Rules will make them realize that the material and moral benefit that they gain from abusing judicial power does not justify the harm that they cause to the integrity of judicial process and to individuals, who either are denied their rights or must continue spending an enormous amount of effort, time, and money to try to vindicate their rights while enduring tremendous emotional distress.

37. Although the language of the current rules has proved more impenetrable than that of the Tax and Bankruptcy Codes and more difficult to apply than the laws on mergers and acquisitions or shareholders derivative suits that judges apply daily, the clearer language of the Revised Rules will finally allow them to understand how to handle judicial complaints so as to hold their peers accountable for their misconduct or disability. Thanks to these Rules' words, the judges will even learn at last how to identify complaints against each other and even how to set special investigative committees on each other. The text of the Rules will give them the courage to steer away from the loopholes of finding "exceptional circumstances" and proceed bravely to recommend their mutual impeachment, undaunted by the prospect of exposing themselves to criminal indictments or the loss of the lifelong above-average salary and senior judgeship sinecure. The Words of the Revised Rules will inspire them to find in themselves the way to do what they always wanted to do but did not know how: the Right Thing, to apply "Equal Justice Under Law" to their brethren and protect instead judicial process and…*What a bunch of NONSENSE!* To pretend otherwise turns the Revised Rules into a sham![38]

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[36] The list of impeached federal judges has been compiled by the Federal Judicial Center, whose board is chaired by the Chief Justice and whose mission is to conduct judicial research and develop and implement education programs for the judicial branch (28 U.S.C. §620 et seq.); http://www.fjc.gov/history/home.nsf >Judges of the U.S. Courts>Impeachments of Federal Judges.

[37] For an example of coordinated judicial wrongdoing in its manifestation as a bankruptcy fraud scheme, see The Salient Facts of The DeLano Case, showing a bankruptcy fraud scheme supported or tolerated by bankruptcy, district, and circuit judges, other court officers, trustees, and debtors; http://Judicial-Discipline-Reform.org/judicial_discipline/case_summary.pdf.

[38] The Draft Rules Governing the Processing of Judicial Misconduct Complaints Will Not Stop Their Systematic Dismissal by Federal Judges, Who Thus Self-exempt From

38. Judicial complaints will not be handled any differently from the way they have been handled for over more than the last quarter century since the passage of the Judicial Conduct and Disability Act of 1980, Revised Rules or no Revised Rules, so long as judges are judging their peers and must look after themselves for fear of ending up incriminating themselves, being incriminated, retaliated against, or outcast from the judicial old-boy network. What the Committee can do is muster the courage to acknowledge that an inherently biased self-discipline system insulated from external review through layers of secrecy cannot work effectively. It can only continue aggravating the appearance of lack of impartiality and deteriorating public trust in the integrity both of judicial process and of those officers that took an oath upon becoming judges "to administer justice without regard to persons, and do equal right" to the layman and the judge. (28 U.S.C. §453)[39]

39. Under those circumstances, the brave and right thing to do would be for the Committee to abstain from recommending to the Judicial Conference any Draft or Revised Rules at all. Instead, it should recommend that the Conference request that Congress abrogate the Act and enact A Citizens Board for Public Judicial Accountability and Discipline Act. The Board would consist of apolitical people of indisputable high moral character and public service credentials, proposed by public interest groups and appointed from among them by the President with the consent of the Senate, and neither related nor accountable to any officer or body of the Federal Judiciary. It would be empowered to receive and investigate with subpoena power complaints against any judicial officers predicated on their misconduct or disability, to be filed as public documents and disposed of in public proceedings. It would have the power to suspend judicial officers during the course of the investigation and/or the disposition of the complaint, to censure any of them publicly, to recommend their impeachment and removal from office, to refer complaints, any aspects thereof, or information obtained during their investigation to the U.S. Attorney General for criminal investigation, and to require that the complained-against judges or the Judiciary compensate the parties injured by the misconduct or disability complained about or any attempt to cover it up.

40. Fat chance!, for no group of men and women has ever given up voluntarily their power and the privileges that come with it just because they were dutybound to avoid even the appearance of impropriety and claimed integrity, fairness, and respect for the law as their distinguishing character traits. Nevertheless, the outline of some key elements of that Board and its functioning can serve to establish an enlightening contrast with the current failed system of judicial self-discipline and its inevitable failure in the future despite the discounted adoption of the Revised Rules.

Accountability for Their Coordinated Wrongdoing; http://Judicial-Discipline-Reform.org/judicial_complaints/dismissals_despite_rules.pdf.

[39] Http://Judicial-Discipline-Reform.org/docs/28usc453_judges_oath.pdf.

IV. By providing that special committees may be barred from disclosing information about judges' criminal conduct to prosecutors and grand juries but citing no authority therefore, the Committee strengthens the judges' power of secrecy to engage in cover ups and protect their "Above Law" status

41. It is quite astonishing that Rule 5 does not mandate the chief circuit judge to identify a complaint regardless of the gravity of the alleged misconduct or disability and instead allows him to 'resolve' it through nothing more than an informal approach and if it satisfies only him. In the system of justice handmade for persons 'Above Law', there is no need for a mandatory provision to cause the "Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors" through which common people subject to "Equal Justice Under Law", like "The President, Vice President, and all civil Officers of the United States shall be removed from Office" (Const. Art. II. Sec. 4).

42. The only requirement is that "the chief circuit judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue" (p8:L41-42). Speedy eagerness on the part of "the particular judge" is all is need in principle to make any "matter" or "issue" go away. So if he shows alacrity in reaching "an informal resolution", which "is one agreed to by the subject judge and found satisfactory by the chief circuit judge" (p8:L37-38), then even "high Crimes and Misdemeanors" can be disposed of under the rug of peerage without having to identify a complaint. Hence, the following dialogue describes a realistic situation entirely covered by the Revised Rules since it can reasonably be assumed to have been envisaged by the Committee, whose members must have heard many similar situations described at trials or read about in appellate briefs.

District Judge Robertson: Hi, Chief! Did you want to see me?

Chief Circuit Judge Gabrielli: Yes, Bob, come in. Close the door.

DJ Robertson: What's up?

CJ Gabrielli: Sit. How is your prima donna case coming along?

DJ Bob: Have you been following it?

CJ Gabrielli: Like everybody else in the City. It is showtime: Godfather on trial!

DJ Bob: I'm grateful it was assigned to me, Gaby.

CJ Gaby: You bet, old boy. I saw you talking to his lawyer.

DJ Bob: That was a good call to let cameras in. All TV newscasts open with it.

CJ Gaby: Not even Judge Judy gets as much exposure. But, I meant in the parking lot.

DJ Bob: What what do you mean? Was he there?

CJ Gaby: Wasn't that like an ex-parte contact?

DJ Bob: Oh, you mean last night. Ya, we crossed path briefly.

CJ Gaby: That late at night? Your and my court had closed for hours.

DJ Bob: You are right. He said he had come to drop some papers in the after-hours box.

CJ Gaby: It looked more like he was filing it with you. His car pulled in right next to yours and…

DJ Bob: What a coincidence! He saw me there when I…

CJ Gaby: He gave you an envelope and climbed right back in his car and drove a…

DJ Bob: Gaby, what's going on? What's all this about?

CJ Gaby: You tell me. Do you always grin from ear to ear when an opposing party files with…

DJ Bob: I…it was dark, you couldn't have seen his my face nobody was round he's a joker…

CJ Gaby: Easy, BobbySon. No need to come unglued. I was the one in the dark, in the corner, another fight with Angie on the cellular, got distracted and out of the elevator on the wrong parking floor, where neither you nor I, none of us is supposed to park there. After she hung up on me, I realized I had lost my way…in more than one sense. Have you too, Bob? It wasn't a coincidence. You planned to meet him there.

DJ Bob: It is not what you think, Gaby. It was nothing.

CJ Gaby: I thought you said it was a filing. How much did that mobster lawyer file with you?

DJ Bob: Gaby! What are you saying there?!

CJ Gaby: Tell me! You can talk to me. We've known each other for more than 15 years. You can talk to me.…Come on!…Gosh, Bob, spit it out!…Now!

DJ Bob: Fifty.

CJ Gaby: Fifty grand!? Is that all this is worth to him?! He could get life, his third strike.

DJ Bob: Not the case. A ruling, some minor evidence out.

CJ Gaby: I see. You're going to string him along. One of many. For havens sake, Bob, you can't do that. Not once, not…

DJ Bob: Gaby, please, it is no big deal. Not like Gambino Senior killed anybody, at least not in this case. It's only dealing. A bunch of junkies! Why should we care for them when they don't care for themselves?

CJ Gaby: They are hooked! And they hook others. What about all the mischief they cause to buy ano…But that's not the point and you know it, Bob! You just can't do that!

DJ Bob: You are not the only one that has problems at home, you hear me! I've got two boys in college and it is killing me. Ivy League. Good boys, mine. That's $41K a year…

CJ Gaby: For two in college it is not…

DJ Bob: What are you talking about?! For each! That's tuition alone. Plus room and board, not in a dinky dormitory…I have a name to maintain. They live in a hotel-like residence, for people of our standing…and security too, my boys. And a car for each. And I fly them in every time I can, need to see them. The phone bill is…Those casebooks! Even $130 each! Those authors are the real extortionists. Gaby, please, I can hardly make ends meet! It is not as if I wanted to get rich! I just need…

CJ Gaby: You're making over $150,000 a year! and with all your speeches and…But that's not the point either. You just can't rationalize anything you want! You just can't do that.

DJ Bob: This one time, Gaby, give it to me this one time.

CJ Gaby: It is never once. You too get hooked. They hook you. Then everything goes. Soon it…

DJ Bob: No, no! Just for them, while in college.

CJ Gaby: It is never for one purpose only. As soon as it is possible to get more, new 'needs' appear from nowhere. I know! She does it, Bobby. It's never enough; then she complaints…

DJ Bob: Not me! I promise. Just for the kids, they are good kids. You know them.

CJ Gaby: I do. Very fine young men that…

DJ Bob: Plan to go to law school, both, in my footsteps! I can't disappoint them!

CJ Gaby: That can take years!

DJ Bob: Now you've got it! I have to look ahead. I can't stomach the thought that one day they don't have enough for…Please, Gaby, give me this, for them! If you had kids, wouldn't you…

CJ Gaby: If only she…You put me in a bind. If word gets out we have a major scandal that can…

DJ Bob: Won't happen, has never happened. You know it. Never! None of us will let it happen. We all have our little things. But I'll be more discreet, won't do it again here.

CJ Gaby: And never in civil cases, where a party can get hurt without…

DJ Bob: But if both are wealthy, then they won't mind a few…

CJ Gaby: No! I say no! Just the prosecution may lose. That's what I give you! And never in blood crimes. Do you hear me?

DJ Bob: Yes, Chief, I promise. You won't regret it. Thank you. Why don't you come for dinner, with Angie, and you see my boys. They'll be home for the long weekend. Then you can quiz them again, as you used to. You'll see they are worthy it.

CJ Gaby: I'll try. I'll tell her…if I can. Hey, I have an idea. Why don't you come home for poker, I call the gang. And you see her; then you can tell me what you think.

DJ Bob: Sure, Gaby, I'll do that for you. But I am a disaster at poker.

CJ Gaby: All the better for me! You're flush, you can afford it.

DJ Bob: Yes, Sir! I can!…But you, well, what you need…He said that, the lawyer, invited me to a party, private, with company for fun. I could ask him to send them over for…

CJ Gaby: He said that?! Gosh, it has been so long! And longer since it meant anything. All this pressure at home, at work. We need it. Then it can't be at home. But Kim has a cottage by the lake. He can prepare the place nicely. We could go there, say, to fish.

DJ Bob: The old boys need it too. It can be a whole new experience!, meaningful and lasting.

CJ Gaby: I hope so! I'm glad we were able to resolve that other matter satisfactorily first.

43. When you have power to get away with anything, you can muster the imagination to justify everything. This is particularly so when there is nobody to require you to do anything you do

not want to do; and what you *are* required to do, you can leave undone because you have a most effective means to do so: The power of secrecy!

44. So even "The name of the subject judge must not appear on the envelope" of a complaint filed by a complainant, as provided under Rule 6(c). (p10:L1-2; p44:L12-14) Likewise, the chief circuit judge can issue a complaint-disposing order as well as a non-public version of the order (p18:L31). This is so reminiscent of shadow reports in malpractice and product liability litigation, not to mention a double set of accounting books.

45. There is solid foundation for the concern about the enormous scope for abuse in a cover up of the authority to release to the public a sanitized order while issuing also a non-public version of the same order, the one that may be based on the incriminating facts found by either the chief circuit judge or the special investigative committee:

> A special committee may be barred from disclosing some information to a prosecutor or grand jury under the Act. This provision is discussed in the Commentary to Rule 23. (p21:L42-44)

46. What an astonishing statement! Obstruction of justice as the express policy of judges intent on covering up for their peers. The Committee does not cite any provision of the Act barring a special committee, or for that matter anybody else from the chief circuit judge to the Judicial Conference itself, from providing truthful and complete information about a judge's criminal conduct to a prosecutor or a grand jury. On the contrary, this is what the Committee states:

> Rule 13(b) Criminal Conduct. If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by 28 U.S.C. §§ 351-364 in an effort to avoid compromising any criminal investigation. (p21:L11-14)

47. By making a reference to the whole Act, the Committee betrays its realization that it found no provision in it that could possibly lend support to its implication that §§351-364 may not permit a special committee to consult a prosecutor. By necessity, it declares open season on the entire Act for its peers to fish for a fair game wording that they can hook and press into service. It not only confirms its lack of support, but also reveals its lack of straightforwardness by resorting to the pretense that "the Commentary to Rule 23" is the place where it discussed the 'provision' that "A special committee may be barred from disclosing some information to a prosecutor or grand jury under the Act". However, that Commentary contains no such discussion at all!

48. On the contrary, in the Commentary to Rule 23, the Committee asks and answers thus:

> The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. §360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule? (p34:L24-29)
>
> With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of a complaint at any stage. (p34:L36-37)

49. Neither in that answer nor anywhere else in the Commentary does the Committee dare say that through §360(a) of the Act, Congress meant to provide that "a special committee **may** be barred from disclosing **some** information to a prosecutor or grand jury under the Act" (emphasis added). Neither §360 nor the Commentary provide any exception describing the circumstances under which the leeway inherent in the words **"may"** and **"some"** would come into play. Moreover, in accordance with principles of statutory construction, it is quite obvious that if Congress had wanted to discriminate in favor of federal judges, let alone special committees investigating them, by considering them a special class deserving of special protection through an exception to the Constitutional principle of "equal protection of the laws" so that they would be immune from a subpoena of a U.S. or state district attorney and exempt from having to testify before a grand jury, Congress would have had to provide therefor explicitly and state the rational basis for such special treatment in light of a compelling state interest clearly set forth. But Congress did nothing remotely akin to that anywhere in §360, or the rest of the Judicial Conduct and Disability Act, or anywhere else in the whole of the U.S. Code.
50. So where did the Committee, composed of federal judges who know better, come up with the astonishing statement that the criminal conduct of their peers can be kept secret because special committees that have obtained information thereabout may by something somewhere in the Act be "barred" and thus entitled to refuse to disclose it in defiance of a prosecutorial or grand jury subpoena? But if a special committee member did appear before a prosecutor or a grand jury in response to their subpoena, is the Committee stating that the member could not only refuse to answer **"some"** questions, but could also simply withhold whatever information about a judge's criminal conduct the member in her unlimited discretion deemed herself "barred" from disclosing? Would the Committee recommend that the member defend herself from a charge of not only obstruction of justice, but also accessory after the fact, by invoking the whole of "the Act" as a bar to disclosing?
51. The power of secrecy in the judiciary is a means to escape any control in the exercise of power. Uncontrolled power, which can allow itself to do anything without having to account to anybody, is the hallmark of absolute power. That is the power that corrupts absolutely.
52. Has the Committee and their peers lost their way too?

Respectfully submitted,

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