

THE RELUCTANT TATTLETALE:
CLOSING THE GAP IN FEDERAL JUDICIAL DISCIPLINE

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INTRODUCTION

It is a rare thing when an attorney files a complaint of judicial misconduct against a federal judge; less than 1/800 of 1% of licensed attorneys in the U.S. do so in any given year.¹ For some, this is evidence that the federal judiciary is in very good shape, policing itself effectively so there is little to complain about.² Anecdotally, however, it is difficult to find an attorney who practices in federal court, who cannot relate at least one story about a judge's outrageous conduct, often recounting how that attorney, or a colleague, was victimized by the judge's behavior.

Often the gripes have nothing to do with ethical lapses. They complain about one judge who is a stickler on the rules or unwilling to make an exception on procedure, or another judge who is too quick or too slow to

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¹ See Judicial Conduct and Disability Act Study Committee, Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, (reprinted at 239 F.R.D. 116 (2006)) [hereinafter "Breyer Committee Report"] at 40, 42, noting that of the roughly 700 complaints of misconduct filed each year against federal judges (*i.e.* 2,108 complaints filed in the three-year period of 2001-2003), only 2% of them (*i.e.* roughly 14 per year) are filed by attorneys. With well over one million lawyers in the United States (the American Bar Association estimates the number at 1,162,124 at the end of 2007), that suggests that .0012% of the lawyers in America are filing complaints against federal judges each year – and that assumes that each attorney complaint comes from a different attorney. See http://www.abanet.org/marketresearch/2008_NATL_LAWYER_by_State.pdf (last checked August 6, 2008). If there are repeat-filers in this group, of course, the proportion is even smaller.

² See, *e.g.*, Stephen B. Burbank, *Politics and Progress in Implementing the Federal Judicial Discipline Act*, 71 JUDICATURE 13, 22 (1987) (“[The] small number of complaints that have survived to the investigative stage and the much smaller number that have resulted in sanctions are proof, not of the councils’ inactivity, but rather of the high caliber of the federal judiciary . . .”).

grant continuances. But mixed in, one is likely to hear complaints that may rise to the level of actionable misconduct.

These stories of judicial misconduct may include the salacious and newsworthy, such as a judge's posting of sexually explicit material on the Internet,³ a judge's soliciting bribes to cover gambling debts and making fraudulent bankruptcy filings,⁴ or a judge's sexual advances on court staff.⁵ More common, however, are the accounts of behavior that the attorneys alone would be fully aware of: judges' less-visible, less-public, and perhaps far more common ethical lapses, such as playing favorites, racial or gender insensitivity or bias, and abusive or arbitrary behavior from the bench. These attorneys do not, as a rule, take the additional step of filing complaints against the judges, however.⁶ So whatever misconduct they

³ See, e.g., Scott Glover, *9th Circuit's chief judge posted sexually explicit matter on his website*, LOS ANGELES TIMES, June 11, 2008, online at <http://articles.latimes.com/2008/jun/11/local/me-kozinski12> (last checked July 18, 2008) ("Alex Kozinski, chief judge of the U.S. 9th Circuit Court of Appeals, acknowledged in an interview with The Times that he had posted the materials, which included a photo of naked women on all fours painted to look like cows and a video of a half-dressed man cavorting with a sexually aroused farm animal.").

⁴ See, e.g., Pamela A. MacLean, *Federal Judiciary Asks House to Impeach Louisiana Judge*, NAT'L L. J. (June 20, 2008) online at <http://www.law.com/jsp/article.jsp?id=1202422429431> (last checked, September 3, 2008); see also Debra Cassens Weiss, *Misconduct Findings Against Federal Judge Forwarded to House*, ABA Journal, June 20, 2008, online at http://www.abajournal.com/news/misconduct_findings_against_federal_judge_forwarded_to_house/ (last checked July 18, 2008) ("The impeachment recommendation . . . summary says [U.S. District Judge Thomas] Porteous signed false financial disclosures to conceal income and gifts he solicited from lawyers appearing before him, making it impossible for litigants to seek his recusal in appropriate cases, the story says. The summary also says the judge committed perjury in a bankruptcy case 'while continuing his lifestyle at the expense of his creditors.' . . . Court papers say the panel found Porteous and his wife filed for bankruptcy using the names G.T. Ortous and C.A. Ortous. The couple later amended the court papers and supplied their real names. Porteous also was found to have concealed assets during the case, failed to identify gambling losses and omitted creditors. He continued to get short-term loans from casinos and renewed a loan six months before he sought to discharge his debts by signing a form that said he was not contemplating bankruptcy.").

⁵ See, e.g., Marty Schladen, *Probe of judge goes beyond sex allegations*, GALVESTON COUNTY DAILY NEWS, Jan. 20, 2008, online at <http://galvestondailynews.com/story.lasso?ewcd=efc95625a2bf886b&-session=TheDailyNews:4B5C49B0118801B6C9qipOA16A6F> (last checked July 18, 2008) ("[U.S. District Judge Samuel] Kent, 58, who was Galveston's lone federal judge from 1990 until last September, is under investigation after his case manager, Cathy McBroom, in May accused him of touching her in ways she didn't want."). Kent was reprimanded and took a 4-month leave-of-absence from his duties on the bench. *Id.*

⁶ See note 1, *supra*.

may recount to each other rarely finds its way into the judicial disciplinary process.

The effectiveness of that disciplinary process has been subjected to criticism and scrutiny from time to time over the years. Most recently, the Chief Justice in 2004 appointed a special committee chaired by Justice Stephen Breyer (which reported in late 2006),⁷ prompted by Congressional complaints about the Judiciary's administration of the federal judicial misconduct regime.⁸ The Breyer Committee's thorough-going inquiry into the judiciary's handling of the misconduct complaint process concluded that, for the most part, it works quite well.⁹ But we should not take too much comfort in the Breyer Committee's conclusions; perhaps the most serious deficiency in the system lies outside the focus of the Breyer Committee's inquiry, in the judicial misconduct that attorneys are unwilling to report—even informally—and which therefore is never acknowledged, much less addressed.¹⁰

This problem, the untold story of judicial misconduct, largely overlooked by the Breyer Committee,¹¹ is rooted in the reluctance of responsible parties, most notably attorneys, to come forward and raise misconduct issues when they see them.¹² There is little incentive for them

⁷ Breyer Committee Report, *supra* note 1, at 1 (describing the Committee's charge).

⁸ Arthur D. Hellman, *When Judges Are Accused: An Initial Look at the New Federal Judicial Misconduct Rules*, 22 NOTRE DAME J. L. ETHICS & PUB. POL'Y 325 (2008), available at <http://ssrn.com/abstract=1116703> at 5 ("At a meeting of the Judicial Conference in March 2004, Representative F. James Sensenbrenner of Wisconsin, the chairman of the House Judiciary Committee, lectured the judges about what he viewed as the 'decidedly mixed record' of the judiciary in investigating alleged misconduct in its ranks." *citing* F. James Sensenbrenner Jr., Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (March 16, 2004) (transcript available at <http://judiciary.house.gov/legacy/news031604.htm>)).

⁹ *See id.* at 8-9 (the findings and recommendations of the Committee).

¹⁰ The Breyer Committee devoted considerable attention to misconduct that is never a part of a formal misconduct complaint but nonetheless comes to the attention of the chief circuit judge, *see* Section II. A. 2 Category 2 misconduct – issues that come to the chief judge's attention through other means *infra*, but gave scant attention to potential misconduct that the chief judge never learns of. *See infra* notes 74-85 and accompanying text.

¹¹ "Largely overlooked" but not entirely overlooked. The Breyer Committee did acknowledge this issue, but gave it relatively little attention, apparently considering it to be a problem of minor importance. *Id.*

¹² Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375, 429-30 (1993) (A chief judge "reported that '[l]ocal lawyers are aware of the [complaint] process, but don't use it, are afraid to antagonize the judiciary."): Collins T. Fitzpatrick, *Building a Better Bench*, 44 No. 1 JUDGES' J. 16, 20 (2005) (Noting that chief

to do so, and ample reason for them to keep quiet. Indeed, attorneys involved in the judicial misconduct process, even involuntarily as subpoenaed witnesses, can suffer severe professional repercussions. The judiciary must confront and address this problem—finding ways to bring these complaints out and protect the attorneys involved—before it can defend the present system as sound.

At the very least, the judiciary can—within the current structure—do much more to encourage and facilitate anonymous complaints.¹³ But the Judicial Conference’s response to the Breyer Committee report—quite inconsistently with the spirit of that report and the substance of other changes prompted by that report—discourages anonymous reporting, and obscures its availability more than ever. And the attorneys who practice before the federal bench—arguably those best-suited to recognize judicial misconduct when they see it—continue to play the role of the three monkeys who “see no evil, hear no evil, and speak no evil,” or at least “speak no evil.”¹⁴ Anonymous complaints may be our best hope of obtaining attorney input and participation in the misconduct process, and for that reason, the system will be far better served if it welcomes them. That, and the more sensitive treatment of attorney witnesses, are essential elements of a meaningful judicial discipline system. The integrity of the judiciary, and the public’s confidence in it, require no less.

I. HISTORY OF JUDICIAL DISCIPLINE IN THE FEDERAL COURTS

“[W]e must not be deceived . . . into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for the law, which exists in the United States today.”¹⁵ So intoned Roscoe Pound in remarks to the American Bar Association in 1906 entitled “On Causes of Popular

judges may not “even know the extent of problems unless lawyers and court staff *overcome their fear* and speak up.” (emphasis added)).

¹³ Rules for Judicial-Conduct and Judicial-Disability Proceedings [“New Misconduct Rules”] at 9, Rule 6(d), *see infra* text accompanying note 54 (these nationwide binding rules replaced the previous “Illustrative Rules” and provide greater detail as to the complaint process. Rule 6(d) seemingly allows for anonymous complaints to be identified under Rule 5(b)). *See infra* Section IV. B. Anonymous Complaints.

¹⁴ *Herman v. Mercantile Bank, N.A.*, 143 F.3d 419, 423 n. 4 (8th Cir. 1998) (“Legend related to the ‘Three Wise Monkeys’ carved over door of Sacred Stable, Nikko, Japan, in BARTLETT’S FAMILIAR QUOTATIONS 919 (Emily Morison Beck, ed., 15th ed.1980).”); in this case, the attorneys at least “speak no evil” in the formal complaint process.

¹⁵ Sandra Day O’Connor, *Fair and Independent Courts: Remarks by Justice O’Connor*, 95 GEO. L.J. 897 (2007) (Justice O’Connor quoting Roscoe Pound in her remarks to a conference on the state of the judiciary in 2007).

Dissatisfaction with the Administration of Justice.”¹⁶ Dissatisfaction with the courts—which persists over 100 years later, perhaps in even greater measure¹⁷—has much to do with the confidence the public has in the judiciary and which, in turn, follows from fundamental principles of judicial accountability.

The years since 1906 have witnessed recurring criticisms of the federal judiciary, in terms of judicial conduct and accountability.¹⁸ Concerns in the late 1970s led to the adoption of the first legislation designed to heighten judicial accountability.¹⁹ Concerns ten years later prompted the appointment of a three-branch commission to examine its effectiveness.²⁰ Continuing concerns in 2004 prompted this latest inquiry and high-profile report, overseen by Justice Breyer.²¹ A brief overview of this history is helpful in understanding the perennial problem of the reluctant attorney complainant.

A. *The 1980 Act*

Prior to the administration of President Jimmy Carter, there was no means of disciplining federal judges short of the extreme constitutional remedy of impeachment.²² As might be expected in the post-Watergate era, calls for public accountability increased in the 1970s and Congress responded with a variety of proposals for policing misconduct in the Third Branch.²³

¹⁶ *Id.*

¹⁷ *Id.* at 897 (Justice O’Connor opines that Pound’s “words apply with at least equal force today as they did in 1906.”).

¹⁸ *See, e.g.*, Rep. Sensenbrenner’s remarks, *supra* note 8; *see also*, Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243 (1993) (“Prior to the passage of [the 1980 Act] . . . many commentators expressed the concern that a significant volume of judicial misbehavior and disability was being ignored.”) *cit*ing, *inter alia*, Carol T. Rieger, *The Judicial Council Reform and Disability Act: Will Judges Judge Judges?* 37 EMORY L.J. 45, 77 (1988) (questioning the “willingness of judges to ‘keep their own houses in order’”), and R.C. Wynn, *Calling for Impeachment*, TEX. LAW. Sept. 30, 1991, at 2 (“[I]t is obvious that the judiciary is not capable of policing itself.”); earlier history of criticism, and of Congressional initiatives to more vigorously enforce judicial accountability – including Senator Tydings’ efforts beginning in the 1960s – are referenced in Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 291-92 & n. 24-29 (1982).

¹⁹ *See, infra*, Section I. A. The 1980 Act.

²⁰ *See, infra*, Section I. D. Kastenmeier Commission.

²¹ *See, infra*, Section I. E. Breyer Committee.

²² Hellman, *supra* note 8 at 3.

²³ *See* Burbank, *supra* note 18 at 291-308 (presenting a good overview of the various

After considering and debating the various proposals, Congress ultimately enacted the Judicial Conduct and Disability Act of 1980 (“the 1980 Act”) adopting, for the first time, a procedure by which federal judges may be disciplined short of impeachment.²⁴ In the end, the process was entrusted to the judiciary, based very much on concerns for separation of powers and institutional judicial independence. Nonetheless, Congress promised to exercise continuing oversight over the entire judicial discipline regime.²⁵

The details of the 1980 Act are thoroughly summarized elsewhere;²⁶ for purposes of this article, a few basics will suffice. The process begins with the filing of a complaint by “any person” with the Clerk of the United States Court of Appeals in the circuit where the judge sits—alleging conduct “prejudicial to the effective and expeditious administration of the business of the courts.”²⁷ The Chief Circuit Judge then reviews the complaint and takes initial action which, for substantiated complaints, includes the appointment of a special investigative committee to do fact-finding on the complaint’s allegations.²⁸ Any discipline would then be imposed by the Judicial Council of that circuit, based on the report and findings of the special investigative committee.²⁹

The details of the 1980 Act’s implementation were the subject of rules drawn up by each circuit. The Judicial Conference of the United States approved “Illustrative Rules” in 1986, for the handling of misconduct complaints, but these were mere “model” rules offered as a suggestion to

competing proposals that ultimately led to the adoption of the 1980 Act).

²⁴ *Supra* note 8 at 14-17 (setting forth a brief history of the 1980 Act’s enactment).

²⁵ The legislative history suggests that it should be “vigorous oversight,” given Congressional skepticism on how well the judiciary would mind the store, with the possibility of further amendments, less deferential to the concept of judicial independence, if the judiciary did not adequately police itself under the 1980 Act. Burbank, *supra* note 18 at 288 (citing the Congressional Record at, *inter alia*, 126 CONG. REC. H8788 (daily ed. Sept. 15, 1980) (statement of Rep. Butler); *id.* at S13,858, S13,861 (daily ed. Sept 30, 1980) (statement of Sen. DeConcini)) and at 307-08 & n. 100-06 (discussing Congressional oversight).

²⁶ *See, e.g.*, Hellman, *supra* note 8 at 7-11.

²⁷ 28 U.S.C. § 353(a)(1) Of course, this is defined to exclude “merits-related” complaints; the rules are clear that the only recourse for a complaint based on the merits of a judge’s ruling in a case is regular judicial process: reconsideration or appeal. New Misconduct Rules, *supra* note 13 at 7-11 (Article II “Initiation of a Complaint” – Rules 5-10 discuss the complaint process in detail).

²⁸ *Id.*; 28 U.S.C. § 353(a)(1) & (c).

²⁹ *Id.*; 28 U.S.C. § 354.

the various circuits.³⁰ While most circuits adopted rules that closely tracked the Illustrative Rules, the rule-making power was vested entirely in the respective circuit councils.³¹

B. Impeachments of the 1980s

After a period of 50 years without a judicial impeachment, the 1980s saw three federal judges impeached and removed.³² Two of these judges, Harry Claiborne of Nevada and Walter Nixon of Mississippi, were convicted in criminal proceedings and were serving time in federal penitentiaries at the time of their removal.³³ Judge Alcee Hastings of Florida was acquitted in his criminal trial, but was removed nonetheless, in part for his behavior—lying or fabricating evidence—during the trial itself.³⁴

The 1980 Act played a role in two of these proceedings but certainly did not explain the impeachments: “The act was invoked actively in one case [Hastings], passively in another [Nixon], and ignored in the third [Claiborne].”³⁵ Nonetheless, for anyone concerned about judicial conduct, this spate of judicial impeachments was troubling, emphasizing the need to police judicial conduct more vigilantly in the future.³⁶

C. The 1990 Amendments to the Act

One of the most conspicuous embarrassments for the 1980 Act was that misconduct complaints were never filed under that Act in certain cases—

³⁰ Illustrative Rules Governing Complaints of Judicial Misconduct and Disability (hereafter “Illustrative Rules”) (Published by the Judicial Conference of the United States, November 15, 2000, (on file at the Administrative Office of the U.S. Courts and with the author), *superseded* by the New Misconduct Rules, *supra* note 13; Hellman, *supra* note 8 at 3. The original version of these rules, by Chief Judge James R. Browning (9th Cir.), Chief Judge Charles Clark (5th Cir.), and Judge Collins J. Seitz (3rd Cir.), was published in 1986 by the Federal Judicial Center, but is now out of print – see http://www.fjc.gov/library/fjc_catalog.nsf/autoframepage!openform&url=/library/fjc_catalog.nsf/DPublication!openform&parentunid=904050341D19652E85256CA30067161C (last checked August 6, 2008).

³¹ Hellman, *supra* note 8 at 11-12.

³² Mary Volcansek, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE at 1 (Univ. of Ill. Press, 1993).

³³ *Id.* at 48-63, 140-51.

³⁴ *Id.* at 102-16.

³⁵ *Id.* at 14.

³⁶ See Report of the National Commission on Judicial Discipline and Removal, 152 F.R.D. 265, 273 (1993) [hereinafter “Kastenmeier Commission Report”].

including cases involving judges convicted of crimes and ultimately impeached—upon which the chief judges and the judicial councils could take action.³⁷ The Act did not, on its face, give the chief judge jurisdiction to invoke the mechanisms of the 1980 Act absent a properly-filed complaint.³⁸ For this reason, when there were serious problems in judicial conduct, even when there were criminal prosecutions of judges, some chief circuit judges found themselves awaiting the filing of a formal complaint, feeling powerless to act until one was received.³⁹

Remedying this weakness in 1990, Congress amended the 1980 Act, specifically granting the chief circuit judge the power to “identify” a complaint based on information that comes to her or his attention.⁴⁰ This gave the chief judge the power to act on those matters that she learns of—*e.g.* the obvious and notorious cases, including the judges being criminally prosecuted—without awaiting the filing of a complaint, but it did nothing to remedy the problem that proper complaints were not forthcoming. Those most conspicuously aware of judicial misconduct—most notably the attorneys who practiced before the federal courts and the staff who worked there—with very few exceptions,⁴¹ simply would not file complaints.⁴²

³⁷ Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: a Legislative Perspective*, 76 Ky. L. J. 763, 781 & n. 83 (1987/88) (“After Judge Claiborne had been convicted and all his direct appeals had been exhausted, and indeed after he had commenced serving his prison sentence, not a single written complaint was filed with the circuit against him. It was the initial position of the Ninth Circuit that nothing could be done.”) *citing* Testimony of Ninth Circuit Judge Charles E. Wiggins, Conduct of Harry E. Claiborne, U.S. District Judge, District of Nevada: Hearing Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 2d Sess. 31 (1986) (“there was general perception that the act was triggered by a citizen complaint.”).

³⁸ Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, [hereinafter “1980 Act”] Pub. L. No 96-458, § 3(a), (c)(1).

³⁹ *See also*, Volcansek, *supra* note 32 at 83 (“Less than one month after the trial [acquitting Hastings], Chief Judge John Godbold . . . reported at a meeting of the circuit judicial council in early March that Hastings would presumably be resuming his duties because no complaint had been filed against him.” The next day two judges on the council announced their intention to file a complaint against Hastings. The implication is clear that absent a complaint, the chief judge would not have, and arguably *could* not have invoked the 1980 Act’s procedures).

⁴⁰ Judicial Discipline and Removal Act of 1990, Pub.L. No. 101-650, § 402(a), 104 Stat. 5122, 5122 (1990) (codified as amended at 28 U.S.C. § 372(c)(1) (Supp. IV 1992), later recodified at 28 U.S.C. §351 *et seq.* (“In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.”); *see also* Geyh, *supra* note 18 at 258-59.

⁴¹ *See supra*, note 1.

D. Kastenmeier Commission

The three impeachments of the 1980s revealed, among other things, just how cumbersome the impeachment process was, particularly for the Senate. With the prospect of further impeachments, an assortment of reform proposals—mostly Constitutional amendments—were made in Congress in and just before 1990.⁴³ While none of these made much progress legislatively, the Congress did agree that the issue needed a closer look, and included language in its 1990 Amendments bill to create a “National Commission on Judicial Discipline and Removal” to examine the issues.⁴⁴ The Commission would include representatives of all three branches of government, as well as from law school faculties and private law practice.⁴⁵ Former Congressman Robert Kastenmeier—previously of the House Judiciary Committee, who had been involved with the impeachments of the 1980s—was tapped to chair the Commission, which became known colloquially as the “Kastenmeier Commission.” Its charge was to

- (1) “investigate and study problems and issues related to the discipline and removal from office of life-tenured federal judges,”
- (2) “evaluate the advisability of proposing alternatives to current arrangements for responding to judicial discipline problems and issues,” and
- (3) “submit . . . a report on his findings and recommendations.”⁴⁶

Among other things, the Kastenmeier Commission closely evaluated the

⁴² The concern was squarely raised by Seventh Circuit Executive Collins Fitzpatrick in 1988: “Why are there not more formal complaints? First, attorneys are often reluctant to file a judicial misconduct complaint for fear the judge might be prejudiced against their current or future clients.” Collins T. Fitzpatrick, *Misconduct and disability of federal judges: the unreported informal responses*, 71 JUDICATURE 282 (1988). One recent article in the *Business Times Bulletin* begins introduces the topic of the Breyer Committee with the attorney dilemma: “As counsel in a hotly contested case, you suspect that the president federal judge has engaged in judicial misconduct. What are your options? Should you overlook the alleged misconduct for fear of incurring the judges’ wrath and perhaps prejudicing your case?” Justin A. Thornton, *Complaints of Judicial Misconduct*, 14 No. 7 BUS. CRIMES BULL. 3 (2007). That article concludes simply, and somewhat unhelpfully, that “[f]iling a complaint of judicial misconduct is a serious matter and may, or may not, be the right thing to do.” *Id.*

⁴³ See Kastenmeier Commission Report, *supra* note 36 at 274-75.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 275.

impact of the 1980 Act and the manner in which it had been implemented. In 1993, the Commission issued its final report, making a large number of recommendations, but generally “suggest[ing] that the judiciary was doing a good job” in shouldering its responsibilities for self-regulation under the Act.⁴⁷ The Commission did express concern, however, that attorneys are reluctant to file complaints, observing that “[t]he Act is obviously not serving its purpose to the extent that knowledgeable individuals with meritorious complaints are unwilling to file them because of fear or adverse consequences to themselves or their clients once their identities are known.”⁴⁸

E. Breyer Committee

Unlike the Kastenmeier Commission, which included all three branches of government, the Breyer Committee was a judiciary-sponsored initiative, staffed and carried out entirely by the Third Branch. Its charge was to “look into the matter” of “criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented.”⁴⁹ The Breyer Committee interpreted this charge to ask the basic question of “whether the judiciary, in implementing the [1980] Act, has failed to apply the Act strictly as Congress intended, thereby engaging in institutional favoritism.”⁵⁰ Recognizing this as a narrow question, the Breyer Committee did not consider the desirability of statutory amendments or otherwise examine alternative approaches, as had the Kastenmeier Commission.⁵¹ Rather, it limited itself to an examination of the actual implementation of the present Act, mostly by reviewing the complaints actually submitted and critically analyzing the judiciary’s handling of each of those complaints.⁵²

The Breyer Committee concluded that the 1980 Act had been “properly

⁴⁷ Hellman, *supra* note 8 at 4; Kastenmeier Commission Report, *supra* note 36 at 362 (“The system of formal and informal approaches to problems of misconduct and disability within the federal judicial branch is working reasonably well.”)

⁴⁸ See Kastenmeier Commission Report, *supra* note 36 at 345.

⁴⁹ Breyer Committee Report, *supra* note 1 at 1 (The Chief Justice “asked the Committee to examine the Act’s implementation, particularly in light of the recent criticism, and to report its findings and any recommendations directly to him.”)

⁵⁰ *Id.* at 2.

⁵¹ *Id.* (“The question is a narrow one. It does not ask us to rewrite the Act . . . [or] consider revision of the ethical rules . . . [or] to study other similar proposals for change. It does not seek comparisons with state, foreign or other disciplinary systems . . . [or] demand the assistance of academic experts.”)

⁵² *Id.* at 2-3 (“It does require us to undertake a practical task, namely to examine the actual implementation of the Act in practice . . .”).

implemented . . . in respect to the vast majority of the complaints filed,” but that the “high-visibility cases”—those that attracted the attention of the media or the Congress—were mishandled almost 30% of the time, an error rate deemed “far too high.”⁵³ Accordingly, the Committee made a number of recommendations, urging more aggressive and transparent action on these public judicial misconduct complaints, as well as the adoption of mandatory and uniform national rules for the handling of such complaints, to replace the merely advisory “Illustrative Rules.” Those new rules, which embody many of the recommendations of the Breyer Committee, were circulated for comment in December 2007, and formally adopted by the Judicial Conference of the United States in March 2008.⁵⁴

However, because of the limited scope of the Breyer Committee’s inquiry, its focus was on filed complaints and notorious cases. It paid little attention to the problem of the reluctant complainant, or to any potential misconduct that goes unreported either formally or informally.

II. UNREPORTED MISCONDUCT

Attorney reluctance to complain is evident throughout the history of judicial ethics and misconduct. Once such example was described by John T. Noonan, Jr., (now a judge on the Ninth Circuit U.S. Court of Appeals) in his book on bribery:

Albert W. Johnson . . . had his own career of unrequited crime. . . . [His] selection [as a federal judge in 1925] was criticized by the local . . . bar and press. In the next two decades Johnson’s behavior far exceeded the prophecies of his most pessimistic critics . . . but nothing came of it. Only after he had been on the federal bench *for eighteen years* did Johnson encounter a lawyer who became sufficiently aroused to bring him to book.⁵⁵

Judge Noonan has expressed his own surprise that it took so long before an attorney came forward to complain about Johnson’s outrageous conduct or to demand accountability,⁵⁶ but attorney reluctance has very deep roots.

⁵³ *Id.* at 5.

⁵⁴ Hellman, *supra* note 8 at 6-7 (outlining the proposals from the Judicial Conference’s Committee on Judicial Conduct and Disability and discusses the adoption of the new rules).

⁵⁵ John T. Noonan, Jr., *BRIBES* (MacMillan Pub’g Co. 1984) at 572-73 (emphasis added). Congress investigated the attorney’s charges, and “[d]uring the subcommittee’s hearings—indeed after a single day on the witness stand—Johnson resigned, later renouncing even his pension rights to avoid any risk of impeachment.” *Id.* at 573.

⁵⁶ Telephone conversation with Judge John T. Noonan, Jr., July 28, 2008. Of course,

Indeed, the introduction of a formal complaint process in the 1980 Act did little to overcome that reluctance. As early as 1990, Congress had already responded to the concern that there was misconduct in the system that no one was reporting in formal complaints;⁵⁷ even the most notorious conduct, impeachable offenses, were going unreported through the established judicial misconduct complaint process.⁵⁸ The 1990 amendments did not address the problem of reluctant complainants directly, as already noted, but instead allowed a short-cut by which a chief judge, *if already aware of the misconduct*, could act on her own motion.⁵⁹

A. *Three Categories of Judicial Misconduct*

This innovation effectively distinguished three separate categories for judicial misconduct matters which are relevant for considering issues of judicial discipline.

1. Category 1 misconduct – formally-filed complaints

First, there are misconduct incidents that are the subject of formally-filed complaints. These are easily documented, and the Breyer Committee devoted the bulk of its attention to how these were handled, and whether they were handled properly.⁶⁰ We can call this Category 1 misconduct.

2. Category 2 misconduct – issues that come to the chief judge’s attention through other means

Second, there are misconduct incidents that are never formally complained of, but that are brought to, or otherwise come to, the attention of the chief circuit judge.⁶¹ For these, the statute—post 1990—empowers the chief judge to “identify” a complaint and thereby dispense with the

this incident predated the 1980 Act, and the lack of a formal reporting mechanism may have contributed to attorneys’ reluctance to complain about the bribery

⁵⁷ See discussion of the 1990 amendments, intended in part to address this problem, *supra* at Section I. C.

⁵⁸ *Supra* notes 37-42 and accompanying text. This is not particularly surprising, however. Potential complainants who read in the newspaper that a federal judge has been charged with a felony are unlikely to feel that it would necessary or even helpful to file a complaint alleging that the felony may constitute judicial misconduct.

⁵⁹ *Supra* note 40 §402(a).

⁶⁰ *Supra* note 8 at 2-4 (describing the method used by the Committee to choose complaints and evaluate how they were handled).

⁶¹ *Supra* note 40 and accompanying text; *see also, generally*, Geyh, *supra* note 18.

requirement that a formal complaint be filed.⁶²

Once a complaint is identified, the full mechanisms come into play for the investigation and adjudication of the alleged misconduct.⁶³ The Breyer Committee examined a few of these instances, particularly the high-publicity cases that garnered significant press attention.⁶⁴ The publicity afforded these incidents ensured that the chief circuit judges were aware of these issues, and the Breyer Committee specifically urged that chief judges should be quicker to identify complaints in these circumstances, *i.e.*, when the misconduct issue attracts public attention.⁶⁵

This type of misconduct, which the chief circuit judge is aware of, but for which no formal complaint is filed, can be referred to as Category 2 misconduct.

3. Category 3 misconduct – misconduct issues that the chief judge never learns about

Third, there are misconduct incidents that never see the light of day, misconduct that is never discovered, at least not by the chief circuit judge or anyone else willing or able to address it.⁶⁶ This is a category of misconduct to which the Kastenmeier Commission gave only limited attention,⁶⁷ and to which the Breyer Committee gave even less.⁶⁸ This third specie of misconduct is the great unknown—we suspect it is there, but we do not know how much of it there is. It can be referred to as Category 3

⁶² 28 U.S.C. §351(b); New Misconduct Rule 5, *supra* note 13 .

⁶³ For an overview of the procedures, see Part II. C. of Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 217 (2007).

⁶⁴ *Supra* note 8 at 67-69 (describing how the Committee classified complaints as high-publicity and how these complaints were reviewed).

⁶⁵ *Id.* at 8 (The Review Committee “should stress the desirability, in appropriate cases, of . . . chief judges’ identifying complaints . . . particularly where alleged misconduct has come to the public’s attention through press coverage or other means”).

⁶⁶ *Supra* note 12 (a large majority of federal judges surveyed by the Justice Research Institute believe that there are valid judicial misconduct complaints that are not filed).

⁶⁷ See Kastenmeier Commission Report, *supra* note 36 at 345-46 (the less-than two pages of the entire report (of over 150 pages) dedicated to the problem of disincentives to filing of complaints, and the accompanying problem that misconduct perceived by a potential complainant will remain entirely unaddressed).

⁶⁸ See Breyer Committee Report, *supra* note 1 at 102-04. The Breyer Committee apparently “considered studying this aspect of the problem but staff could not identify a reasonable approach to studying the matters that would pinpoint the type of conduct that should be complained about.” Email correspondence with Tom Willging, August 6, 2008 (on file with the author).

misconduct.

B. Is Category 3 Misconduct a Serious Problem?

In a recent conversation with Tom Willging, key judiciary staff on these issues, the author unimaginatively characterized Category 3 misconduct as the elephant in the room that no one was willing to acknowledge. Willging observed that “we don’t know whether it is an elephant or a mouse in the room, because we have no current knowledge of how prevalent this third category of misconduct may be.”⁶⁹ He was, however, quick to acknowledge that this is a gap in the system, something we can never be sure that we have addressed adequately.⁷⁰

The Breyer Committee did not, in fact, ignore this problem completely. In a brief section near the end of the report, entitled “Dealing with problems not likely to produce complaints under the act,” the Committee identified three areas of concern that its analysis had not yet touched.⁷¹ The first was conduct that did not rise to the level of judicial misconduct, but needs to be corrected anyway, such as bad manners or sarcasm.⁷² The second included actions which appear to be misconduct, but which are actually merits-related, and therefore beyond the scope of the 1980 Act.⁷³ The third was the problem of Category 3 misconduct:

Third, other behavior that would seem to fall within section 351(a)’s definitions may never produce a complaint because *only the bar is aware of it, and lawyers are reluctant to file* a formal complaint about a judge before whom they must appear regularly. A chief circuit judge said, for instance,

[i]f someone on the court of appeals is losing it or is out of control, his colleagues see that If it’s a district judge, often the judge’s colleagues are the last to know, so lawyers will come to me. [But a]ttorneys and the bar don’t want to file complaints against judges The lawyer’s business is to appear before the judge. The lawyer can’t blithely file a complaint.⁷⁴

In this passage, the Breyer Committee acknowledged the problem, but not

⁶⁹ Telephone conversation with Tom Willging, Federal Judicial Center, June 10, 2008.

⁷⁰ *Id.*

⁷¹ Breyer Committee Report, *supra* note 1 at 102.

⁷² *Id.*

⁷³ *Id.* at 103 (“ . . . such as judges’ failure, typically inadvertent, to recuse in cases in which they may have even very minor stock ownership in one of the parties”).

⁷⁴ *Id.* (emphasis added). This is not an excerpt – this quoted passage is the entirety of the Breyer Committee’s description of the problem of attorney reluctance.

the *seriousness* of the problem, of Category 3 misconduct. While noting that the judges' colleagues are the last to know, and that the lawyers have to be the one that reports the misconduct, this chief judge observes that "lawyers will come to me." Certainly if and when they *do* come to the chief judge on an informal basis, the problem can be appropriately addressed, but given the strength of attorney reluctance, it is hard to imagine that affected lawyers will be quick to approach the chief circuit judge in such cases.⁷⁵ Indeed, the Breyer Committee's response to this concern, or lack thereof (discussed later in this article),⁷⁶ suggests that the Breyer Committee, perhaps relying on this chief judge's statement that attorneys *do* come to him, did not consider attorney reluctance to be a serious problem in the administration of the 1980 Act.⁷⁷ The Committee focused far more attention, therefore, on the chief judges' response to Category 2 misconduct, giving relatively little to the need to uncover Category 3 misconduct.⁷⁸

Because Category 3 is unknown—be it elephant or mouse—and because it is difficult to address,⁷⁹ it is convenient to ignore it, and an uncharitable critic might accuse the federal judiciary of doing precisely that. The scant attention given to this Category 3 misconduct in the Breyer Committee Report is particularly striking given how painstakingly they analyzed the handling of Category 1 and Category 2 misconduct, and the strength of their recommendations for addressing the deficiencies in these first two categories.

Indeed, the Breyer Committee did at least mention the problem, as if

⁷⁵ Judges may perceive themselves to be far more approachable than attorneys perceive them to be. Undoubtedly some attorneys who know the chief judge well, or on the basis of a longstanding relationship, personal or professional, may be comfortable approaching the chief with an issue as delicate as, *e.g.* the alcoholism of a fellow judge. But it is difficult to imagine that young attorneys, still trying to establish themselves in the legal community, would feel comfortable making such an approach.

⁷⁶ See *infra* Section IV.A.

⁷⁷ It is not clear whether the Breyer Committee saw it as only a minor problem, unworthy of serious attention, or whether they saw it as a problem beyond the scope of their charge. See the discussion that follows, *infra*.

⁷⁸ It is possible that many of the complaints we hear from attorneys about judicial behavior – in the barroom across the street from the courthouse, as postulated in the introduction – may involve merits-related conduct, not cognizable as misconduct under the statute. Such merit-related conduct cannot be fairly considered as Category 3 misconduct, of course. To the extent that attorneys' failure to file complaints comes from the recognition that the complaint is merits-related and not cognizable under the act, such reluctance is entirely appropriate. This article should not be read to lament the failure of attorneys to file meritless or frivolous complaints.

⁷⁹ See *infra* Section IV.

they agreed that it was germane to their inquiry, even if they were dismissive of its importance. That treatment suggests a more likely explanation, that the Breyer Committee saw this issue as minor issue—a mouse⁸⁰—and that the problem, particularly given its dubious magnitude, was far too difficult to address with the Committee’s limited time and resources.⁸¹ Accordingly, the Breyer Committee focused its energies elsewhere, on issues more clearly within the scope of its narrow mandate.

The Kastenmeier Commission, in contrast, had a much broader charge than the Breyer Committee: “to investigate and study problems and issues related to the discipline and removal from office of life-tenured federal judges [and] . . . to evaluate the advisability of proposing alternatives to current arrangements for responding to judicial discipline problems and issues.”⁸² And the Kastenmeier Commission did acknowledge the problem of Category 3 misconduct suggesting that it is a serious and genuine one. In particular, it cited surveys conducted for the Commission, demonstrating “a widely shared perception that some meritorious complaints are never filed” and “a widespread reluctance among members of the bar to file a complaint.”⁸³ Nonetheless, it devoted less than two pages of its Report (of over 400 pages) to the problem and its proposed solution.⁸⁴ The Breyer Committee merely mentioned the problem, noted that the Kastenmeier Commission’s proposed solutions had not borne fruit, and added its endorsement to those earlier, and largely unimplemented, ideas.⁸⁵

But the fact that we can never be sure of the extent of Category 3 misconduct does not mean that we can or should assume it away. Quite the contrary, there are compelling reasons to believe that it exists and is substantial.

In particular, the chief judges themselves recognize that most of the

⁸⁰ The author’s discussions of this topic with judiciary staff confirm that they uniformly perceive Category 3 misconduct to be “closer to a mouse.” Telephone conversation with Tom Willging of the Federal Judicial Center, June 10, 2008; Email from Jeffrey Barr of the Administrative Office of the U.S. courts, July 30, 2008 (“I believe category 3 misconduct is a mouse in any well-run circuit.”) (on file with the author); telephone conversation with Bret Saxe of the Office of the General Counsel, Administrative Office of the U.S. Courts, June 24, 2008.

⁸¹ Willging draws this conclusion. Email correspondence with Tom Willging, August 8, 2008 (on file with the author).

⁸² Kastenmeier Commission Report, *supra* note 36 at 275, quoted in greater length at note 46.

⁸³ *Id.* at 345-46.

⁸⁴ Proposed solutions to the problem are discussed *infra* at Section IV.

⁸⁵ *See infra* at Section IV. A.

genuine judicial misconduct that occurs never finds its way into formal complaints.⁸⁶ When interviewed for the Kastenmeier Commission, “[a] majority of judges indicated that less than forty percent of the true misconduct coming to their attention was ever the subject of a complaint.”⁸⁷ Another judge observed, “In my experience here, the most serious allegations of misconduct never hit the complaint process.”⁸⁸ Of course, the judges can only comment on what they are aware of (*i.e.*, misconduct in Category 1 or 2), but if most of the true misconduct, and the most serious misconduct, is coming to the chief judges’ attention outside of any formal process, we can have little confidence that the chief judges are aware of it all.⁸⁹

The chief judges have also recognized that they are not hearing everything, and that they will not get this information unless attorneys can be persuaded to participate in the process. Their frustration is evident in their comments: “[T]he bar knows the most about misconduct; there must be some way to tap into that knowledge”;⁹⁰ “I wish there were a vehicle by which lawyers could better air their grievances, without the concern or fear of retaliation.”⁹¹ Long-time circuit executive Collins Fitzpatrick, who has extensive experience with the 1980 Act, has expressed his concern that

⁸⁶ Geyh, *supra* note 18 at 256-59.

⁸⁷ *Id.* at 259.

⁸⁸ *Id.* at 256; Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability and Judicial Independence under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 131 (1993) (apparently quoting the same judge in an almost-identical statement); of course, these statements were made in the context of asserting how *informal* methods can be in addressing judicial misconduct, and the judges making those comments may believe that they are, in fact, aware of almost all the misconduct that happens. That does not diminish the fact that the formal complaint process misses a lot of misconduct, and that the integrity of the system depends heavily on these informal communications.

⁸⁹ *Supra* notes 61 and 83. It is clear that some chief judges and court staff can work hard at opening the door to this type of informal communication. The Seventh Circuit, through statements of the chief judge, as well as the work and reputation of its Circuit Executive, Collins Fitzpatrick, has sent a message that they are receptive to such informal complaints. *E.g.* “Chief Judge Frank Easterbrook, who presides over the 7th U.S. Circuit Court of Appeals, asked lawyers and judges to be on the look-out for aging, cranky, deteriorating judges who might need a call from the top judicial officer in the circuit.” *An All-Points-Bulletin: Be on the Lookout for Aging, Cranky Judges*, NAT’L L. J. (May 21, 2008). While one may question Chief Judge Easterbrook’s use of the word “old” here, as it may suggest age-based bias, the message is clear that Chief Judge Easterbrook wants to know of problems with the judges in his circuit, and is ready to act on such information if it comes his way.

⁹⁰ Unnamed chief circuit judge *quoted in* Barr & Willging, *supra* note 88 at 134.

⁹¹ *Id.* at 191.

chief judges may not “even know the extent of problems unless lawyers and court staff overcome their fear and speak up.”⁹²

There is also reason to believe that sexual misconduct may be more prevalent than is reflected in Category 1 and Category 2. In a particularly thorough and probing background study for the Kastenmeier Commission, Willging and fellow judiciary staff attorney Jeffrey Barr cite a chief judge who “expressed the opinion that such matters are the ‘untold story’ of judicial misconduct.”⁹³ Obviously, this chief judge was aware of some of it—making it Category 2 misconduct—but the chief judge appears to have the impression that there is more of it out there. This concern was confirmed in the Kastenmeier Commission hearings:

Testimony presented to the Commission about allegations of sexual harassment of female law clerks by federal judges tended to corroborate the assessment that there was an ‘untold story’ here.⁹⁴

While these comments strongly suggest that *some* Category 3 misconduct is out there, none of this documents *how much* Category 3 misconduct is out there, and opinions vary widely on the elephant v. mouse question. Most judges and judiciary staff appear to adhere to the mouse hypothesis, convinced that word gets around about these types of problems.⁹⁵ But whether word *does* get around to the chief circuit judge—and whether we can build a judicial discipline system on the assumption that it will—is a question that calls for empirical study.⁹⁶ It does not appear that anyone has undertaken such a study yet, certainly not the Breyer Committee. But if the federal judiciary is to maintain that this is not a

⁹² Fitzpatrick, *supra* note 12 at 20.

⁹³ Barr & Willging, *supra* note 88 at 142.

⁹⁴ *Id.* at 142-43 (citing Transcript of Hearings Before the National Commission on Judicial Discipline and Removal at 26-33, 59-76, 80-81 (Jan. 29, 1993) (testimony of Barbara Safriet, Associate Dean, Yale Law School) (discussing the extent and nature of sexual harassment of female law clerks by judges)).

⁹⁵ Note 80, *supra*. Judges, often dismayed by the audacity and chutzpah of attorneys who appear before them, may find it hard to believe that these same attorneys are too timid to raise complaints, at least informally. Of course, an attorney will be far more willing to stake out bold positions when pressing the case of her client. The same attorney may well be loath to raise the hackles of a judge absent a duty of zealous representation. See discussion *infra* at Section III. Why Judicial Misconduct Goes Unreported.

⁹⁶ The empirical work could be done by anonymous survey of attorneys practicing before the federal courts. While the logistics of such a survey would pose challenges, there is no reason to believe they are insurmountable. The concern here is not so much that the such a survey has not been done, as that no one in the judiciary seems to think that one is warranted.

serious problem, someone should undertake the empirical work to confirm that.

In the meantime, judicial misbehavior that escapes the chief judge's attention, large or small, frequent or exceptional, is unaccounted for in the system and, for all practical purposes, unremediable Category 3 judicial misconduct. And attorneys, who will almost always be aware of judicial misconduct when it occurs, remain reluctant to point it out.

III. WHY JUDICIAL MISCONDUCT GOES UNREPORTED

Misconduct goes unreported whenever people who are aware of the misconduct choose not to file a complaint under the 1980 Act (which would make it Category 1 misconduct) or otherwise bring it to the attention of the chief judge (which would make it Category 2 misconduct). While it is possible to posit a scenario in which *no one* is aware of the judicial misconduct—perhaps if a judge embezzles court funds so skillfully that no one ever detects it—this would be the exceptional circumstance. In most situations of true judicial misconduct, *someone* is aware of it, often aggrieved or at least disillusioned by it.⁹⁷ It remains in Category 3, however, whenever that person chooses to keep quiet.

Most often, those close to the system, watching the judges in action and hanging on the judges' decisions,⁹⁸ will be best positioned to see and recognize judicial misconduct when it happens. These will be the attorneys practicing before the court.⁹⁹ Chief judges have acknowledged that the few complaints brought by attorneys tend to be the ones requiring disciplinary action.¹⁰⁰ One chief judge observed: "It's very difficult for a practicing

⁹⁷ The author frequently encounters lawyers who express skepticism that judicial discipline procedures for federal judges can ever be effective in policing misconduct, particularly for life-tenured Article III judges. But there is nothing lighthearted in that observation; it is usually accompanied by genuine regret, if not bitterness about this "fact of life."

⁹⁸ No pun intended; indeed, in a capital case it would be the client, not the attorney who "hangs" on the judges' decision.

⁹⁹ Court staff are also extremely well-positioned to see and recognize judicial misconduct when it happens. Much of the discussion of attorney incentives *infra* can be applied to court staff as well. Certainly the potential for anonymous complaints would be equally applicable to court staff as to practicing attorneys. See generally Geyh *supra* note 86 at 257-58, discussing court insiders, that is, court employees working alongside the judges, and how they may be even less likely to file complaints than attorneys because of the possible negative consequences it could have on their careers.

¹⁰⁰ *Supra* note 86 at 258; see also Richard L. Marcus, *Who Should Discipline Federal Judges, and How?* 49 F.R.D. 375, 390 (1993) (a majority of surveyed chief judges agree

lawyer to file a complaint; they're in constant practice before the judge. Yet, those are the complaints that tend to require some action or caution on my part."¹⁰¹

A. *The problem of attorney incentives*

1. The value of an attorney's goodwill with the court

To fully appreciate why attorneys are reluctant to file judicial misconduct complaints, it is essential to understand the importance to an attorney that she establish the goodwill of the court. As a practical matter, sometimes an attorney's greatest asset, at least for a litigator or criminal law practitioner, is the credibility and respect she or he enjoys with the judges; given the judges' "human proclivity to be more receptive to argument from a person who is both trusted and liked."¹⁰² Attorneys cultivate that credibility and goodwill, building it over time, indeed, over the course of a career.¹⁰³

Attorneys frequently seek and accept appointments to court committees, providing pro bono assistance to the court (usually on issues such as local rules or ADR), at least in part because this helps them build goodwill with the judges.¹⁰⁴ This is especially important for young or new lawyers, who

that some valid complaints are filed, however they "believe that there are valid complaints that are not filed as well"; it is not clear from Marcus's description whether the judges are referred to the Category 2 misconduct that they hear of through informal means, or whether they are referring to suspected Category 3 misconduct of which they are never informed).

¹⁰¹ Geyh, *supra* note 18 at 258.

¹⁰² Justice Scalia and Bryan Garner emphasize the importance of an attorney's relationship with the judges and the court: "An ever present factor . . . and one that you can always influence, is the human proclivity to be more receptive to argument from a person who is both trusted and liked." Antonin Scalia & Bryan A Garner, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* at xxiii-iv (Thomson/West 2008). Scalia & Garner conclude the introduction to their book by suggesting that some attorneys are inherently likeable, those who are not should "work on it." *Id.* at xxiv. Obviously, as explained *infra*, an attorney who is working on being trusted and liked by the judges should not antagonize them by filing misconduct complaints.

¹⁰³ *Id.*

¹⁰⁴ See, e.g., Taylor Pendergrass, *Getting Something for Nothing: Pro Bono is an Investment That Pays*, 34 COLO. LAW. 85, 86 (No. 7, July 2005), ("No price can be put on the value of building a working relationship with court staff for new attorneys... 'As a judge, I have taken special note of those attorneys who appear *pro bono*, particularly in challenging, 'high maintenance' cases,' notes Judge Glowinsky. 'These attorneys stand out in my mind because I recognize that they are providing an essential service to the courts and the community.'"). Positive relationship and reputation building with court staff and judges is equally valuable for attorneys who are not new to practice.

are still trying to establish relationships and reputations with the court.¹⁰⁵

Lawyers' eagerness to ingratiate themselves with the bench is also manifest in their sometimes obsequious behavior with judges. As one commentator wryly observed:

No one has yet invented a protractor fine enough to measure the angle to which even the most respectable lawyers bow and scrape before judges. No matter what their personality, when approaching the bench they tend to sound like Eddie Haskell of "Leave It to Beaver" talking to June Cleaver. They compliment the judge's appearance, lavish him with honorifics, pore over his decisions, praise his erudition, double over with laughter at even his lamest jokes.¹⁰⁶

There are numerous times when an attorney's goodwill with the court will be important.¹⁰⁷ When there is the need for an extension of time, an emergency order, or any minor indulgence.¹⁰⁸ Judges exercise enormous power in how strictly they will enforce rules, and when they will make exceptions.¹⁰⁹ An attorney who has abused the court's goodwill—for example, by demanding a hearing, when in fact the attorney's evidence proffered at the hearing is inadequate, or by bringing frivolous motions—will have a difficult time getting the court's indulgence in the future.¹¹⁰ An attorney who has built, usually over a period of many years, a reputation as a straight-shooter and a good citizen in the court community, in contrast,

¹⁰⁵ *Id.*

¹⁰⁶ David Margolick, *THE LAW: AT THE BAR; The lonely view from the bench for the new judge who must undergo a rite of passage*, N.Y. TIMES (January 6, 1989) online at <http://query.nytimes.com/gst/fullpage.html?res=950DE1DC1E39F935A35752C0A96F948260> (last viewed August 4, 2008). Margolick goes on to observe that unseasoned judges are not always "sufficiently self-aware to realize that these lawyers are groveling before the robes rather than the intellect." *Id.* For this reason, judges may be inclined to overestimate the candor of the attorneys they speak with, and correspondingly underestimate the attorneys' reluctance to raise issues of perceived misconduct of judicial officers.

¹⁰⁷ Neil Dishman, *Deadline Extensions in Federal Court: The Procrastinator's Guide*, 93 Ill. B.J. 354, 357 (2005) (In his section entitled *Keeping Your District Judge Happy*, Dishman explains that it is "crucial to stay in the good graces of the district judge..." for no other reason than the discretion the judge uses in granting extensions).

¹⁰⁸ *Id.* The importance of staying in the good graces of a judge similarly extends any situation where the judge is exercising his or her discretion to grant or deny a request from counsel.

¹⁰⁹ *Id.*

¹¹⁰ *E.g., Jovanovic v. In-Sink-Erator Div. of Emerson Elec.*, 201 F.3d 894, 897 (7th Cir. 2000) (Because "[C]ounsel was late in filing papers with the court on a number of occasions, he missed deadlines that he had requested, and he misrepresented to the court the status of his application for admission to practice before it...", the lower court judge did not abuse his discretion in denying counsel's request for an extension of time).

may get the benefit of the doubt in judicial consideration of his or her special requests.¹¹¹

2. The loss of that goodwill when a complaint is filed

It goes without saying that much if not all of the attorney's goodwill, so painstakingly acquired, is lost when she files a misconduct complaint against the judge.¹¹² The Kastenmeier Commission, discussing the Department of Justice's role in judicial discipline, noted that DOJ lawyers, for example "will not risk *souring relations* between the Department and a federal judge by making a complaint under the 1980 Act."¹¹³ In fact, the attorney who complains may well alienate other judges on the bench, who may feel kinship with their colleague and view the accusation as an attack on the bench as a whole.¹¹⁴ Or, just as likely, the other judges may become suspicious of this lawyer who dares to complain about judges, wondering if they may be next. Either way, it is virtually impossible to imagine a scenario where the attorney who complains about judges on the federal bench will remain in the good graces of that bench after doing so.¹¹⁵

¹¹¹ *E.g.*, *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 362 (7th Cir. 1997) (an attorney's reputation of being "among the bar's most conscientious in following . . . rules and meetings deadlines" is a factor a judge can use when exercising her discretion in granting an extension).

¹¹² *See, e.g.*, Geyh, *supra* note 100 at 429 ("One of [the chief judges] reported that '[l]ocal lawyers are aware of the [complaint] process, but don't use it, are afraid to antagonize the judiciary.'"); *id.* at 429 n. 180 ("Surveys done by the Justice Research Institute for the [Kastenmeier] Commission confirm that lawyers are deterred from filing complaints by fear that their careers will be harmed."). Professor Marcus notes that even chief judges are reluctant to file – *i.e.* identify – a complaint, preferring to address perceived problems in an informal way, avoiding such a confrontational move; he quotes one chief judge who says, "If you identified a complaint, you'd establish an adversarial relationship with the judge," and another who notes that "a formal complaint might have gotten the judge's back up." Marcus, *supra* note 12 at 417. Even life-tenured federal judges, therefore, recognize that they lose goodwill with their colleagues by proceeding under the misconduct statute. A similar fear applies *a fortiori* to attorneys who appear in court.

¹¹³ *Supra* note 36 at 324 (emphasis added). The Kastenmeier Commission recommended that DOJ promulgate guidelines for its attorneys, acknowledging that even "an explicit formal policy . . . would not eliminate litigators' understandable reluctance to risk alienating a judge before whom they regularly appear." The Commission Report goes on to observe that "[t]his problem, not unique to government lawyers, is shared by the trial bar generally." *Id.* at 326.

¹¹⁴ This is the same "guild favoritism" mentality cited in the Breyer Committee Report, *supra* note 1 at 1. The committee was concerned that the judiciary may close ranks on the merits of the complaint itself. But the closing of ranks can also play out in more general terms, to the detriment of the complaining attorney, as suggested here.

¹¹⁵ There may well be counter-examples. There are certainly scenarios where a judge's

The exceptional attorney who is willing to raise such issues may also alienate fellow members of the bar.¹¹⁶ Few attorneys will want to be associated with the pariah who dares attack or accuse the judges.¹¹⁷ This is another type of “goodwill” that may be lost when an attorney files a misconduct complaint; the potential for professional isolation will create even stronger disincentives for lawyers to file a misconduct complaint.

There are undoubtedly examples of attorneys who have suffered from judicial misconduct, and who have enjoyed the support of their colleagues in the bar in their quest for justice, but these are difficult to document because of the confidentiality of misconduct proceedings. In the case of Judge John McBryde in Fort Worth—who held an Assistant U.S. Attorney in contempt when she refused to violate a sealing order entered by another federal judge in another district—the attorney was in a poor position to undertake the risks of filing a formal complaint; indeed, she had already been held in contempt. The U.S. Attorneys in the two affected districts therefore cooperated with each other in filing jointly a complaint of judicial misconduct.¹¹⁸ This, however, appears to be an exceptional circumstance.¹¹⁹

misconduct is so egregious that her fellow judges will welcome the filing of a misconduct complaint. A miscreant judge tarnishes the image of the bench overall, and judges will not close ranks around an embattled judge if the latter is bringing disrepute on the court and the bench. In these situations, we have even seen *judges* willing to file complaints against fellow judges. *See, e.g.* Volcansek, *supra* note 32 at 83-84, describing how two judges filed misconduct charges against fellow judge Alcee Hastings, after Hastings’s acquittal on criminal charges. Presumably, these judges would not have begrudged an attorney who came forward to file that complaint against Judge Hastings. As already noted above, Hastings was later impeached and removed from office. *Id.* at 115.

¹¹⁶ *See, e.g.*, “For Kozinski’s Tormentor, It’s Personal” *Daily Journal*, June 25, 2008, p. 1 (Describing how the attorney who publicized Chief Judge Kozinski’s inclusion of sexually explicit material on his private website was condemned by fellow bar members, who “have trashed [the attorney] in virulent blog posts calling for his bar card or his head, or both.”). In using this example, I do not mean to take the side of this particular attorney, who may well have ignoble ulterior motives in raising the complaint. *Id.* Nor do I pass judgment on the merits of that complaint, which remains pending before the Third Circuit Judicial Council, as far as we know. The fact remains that his action, whatever his motives and whatever the merits, prompted a strong negative response from fellow attorneys, a response he could have avoided by keeping quiet.

¹¹⁷ *Id.*

¹¹⁸ Christin Beiderman, *Temper, temper: Judge John Henry McBryde ruled his court like a minor despot, angering lawyers and fellow judges*, Dallas Observer (October 2, 1997) (online at <http://www.dallasobserver.com/1997-10-02/news/temper-temper/1> (last checked August 8, 2008)).

¹¹⁹ For a counter-example, *see* note 184 and accompanying text, *infra*.

3. Incentives to raise issues of judicial misconduct

In their background study for the Kastenmeier Commission, Barr and Willging analyzed the “Benefits to Complainants” in the current misconduct procedure, and found very little there. In the case of litigants, they concluded that it “does not seem to be enough to justify the burden the Act imposes on the courts.”¹²⁰ Indeed, “[t]he only benefit these complainants receive is the opportunity to articulate a complaint about a trial judge’s action and to get a response At least for a moment, the complainant has captured the attention of the chief judge.”¹²¹ For a litigant, this kind of attention may have value.¹²² For an attorney, however, the attention of the chief judge is more likely the type of attention the attorney must studiously avoid.¹²³

Attorneys, of course, have an investment in the integrity of the legal system. It is in everyone’s interest, on a macro level, for our judicial system to function untainted by ethical lapses or other misconduct.¹²⁴ Every attorney who is a part of this system—who spends his or her working life pursuing justice on behalf of her clients—benefits if corruption and misconduct are rooted out of the system. Restated, while attorneys may not want to file complaints of misconduct, it is not because they don’t care; indeed, most are deeply offended by unethical behavior on the bench.¹²⁵

Moreover, attorneys have a prescribed ethical duty to report unethical behavior when they see it, set forth in the Model Rules of Professional Responsibility, Rule 8.3.¹²⁶ The jurisprudence on this issue is developed

¹²⁰ Barr & Willging, *supra* note 90 at 151.

¹²¹ *Id.*

¹²² *Supra* note 12 at 429, (“...it is clear that some complaints have no desire to maintain confidentiality. Organizational complainants may go so far as to call press conferences to trumpet their accusations.”).

¹²³ *See, e.g.,* Geyh, *supra* note 18 at 307 (“The processes of mandamus, reversal, and recusal require the victims of judicial misconduct to complain formally and on the record. Victims unwilling to risk alienating the judge before whom their case is pending or before whom they may appear in future cases will not employ such quasi-disciplinary mechanisms.” (footnote omitted)).

¹²⁴ Nikki A. Ott & Heather F. Newton, *A Current Look at Model Rule 8.3: How is it Used and What are Courts Doing About It?* 16 *GEO. J. LEGAL ETHICS* 747, 766 (2003) (“The public image of the legal profession is . . . enhanced as lawyers function within a framework of integrity to provide consistently high levels of service to clients and the community at large.”).

¹²⁵ *See supra* note 97.

¹²⁶ *See, e.g.,* Model Rules of Prof. Resp. 8.3 (2002):

mostly in the context of the parallel duty to report misconduct or ethical lapses by other attorneys.¹²⁷ The so-called “snitch rule” is controversial in any case; even where the rule is in place, enforcement is problematic. Indeed, it has been described as “one of the most under-enforced, and possibly unenforceable, mandates in legal ethics.”¹²⁸

Rule 8.3(b) takes the obligation beyond the duty to report fellow attorneys, imposing also a duty to report the misconduct of judges.¹²⁹ But this would presumably be even more difficult to enforce. Indeed, the author has been unable to find any instance of attorney discipline where this provision or a similar one was applied.¹³⁰ It is not surprising that bar authorities are slow to take up such cases; sanctioning the attorney who has been subjected to the misconduct of a judge could easily be characterized as punishing the victim.¹³¹

On the other hand, the duty to report misconduct of a judge applies equally to the attorney who may benefit from the judge’s misconduct, where, for example, the judge shows partiality on the bench. Here, of course, the attorney is not the victim, but the beneficiary of the misconduct.¹³² Certainly in those circumstances, it would not be “punishing

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- (a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial questions as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
 - (b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.
 - (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

¹²⁷ See Model Rules of Prof. Resp. 8.3(a) *id.*; see generally Ott & Newton, *supra* note 124.

¹²⁸ Ott & Newton, *supra* note 124 at 747-48.

¹²⁹ *Supra* note 126 (quoting Rule 8.3(b)).

¹³⁰ *Id.* at 760 (“[O]nly two jurisdictions, Illinois and Arizona, have sanctioned an attorney solely for violations of rules analogous to Model Rule 8.3, [although] sanctions in conjunction with other ethical violations have become more common.”).

¹³¹ The attorney who has suffered at the hands of a miscreant judge may present a very sympathetic case, if someone then tried to prosecute the lawyer for failure to complain against the judge. Given that a decision to complain will almost certainly subject the attorney to adverse consequences vis-à-vis the judge and the court, *see* Section III. A. 2 *supra* and Section III. A. 4 *infra*, enforcement of 8.3(b) in this way would move that attorney from an unfortunate position to an impossible one.

¹³² Of course, there are circumstances where a judge’s misconduct benefits no one, such as when a judge sexually harasses court staff or attorneys appearing before him. *See, e.g.* the misconduct proceedings against Judge Samuel Kent, *supra* note 5.

the victim” to discipline the attorney for her silence, so an ethical inquiry against the attorney who benefits from the judge’s misconduct would be far easier to justify.

In addition, active enforcement of an ethical rule like this may not only coerce reluctant attorneys to report misconduct, it may also mitigate the negative perception of the attorney who complains.¹³³ Whereas the attorney who complains now may be perceived—particularly by the bench—as a whiner or a troublemaker, active enforcement of a “duty to report” rule would make the attorney look a little more like someone who is simply trying to comply with his ethical obligations.¹³⁴ Nonetheless, for whatever reasons, the bars of the various states are not pursuing these cases.

4. Disincentives to raise issues of judicial misconduct

The most obvious disincentive, as already discussed above, is the loss of goodwill with the bench.¹³⁵ But this characterization may understate the extent and intensity of those disincentives, which relate to the attorney’s standing and reputation in the bar.¹³⁶

The experience of the “snitch rule” for fellow attorneys is instructive, if not entirely analogous, in terms of the difficulty of enforcement and the arguable unfairness and unreasonableness of expecting full compliance.¹³⁷ Indeed, whatever incentives may exist for attorneys to participate in the judicial misconduct process, the incentives for the practicing lawyer to keep quiet are far more compelling.¹³⁸

The problems and dynamics associated with reporting the misconduct of fellow attorneys are quite different than those associated with complaining against a judge. The term “snitch” conjures images of the childhood classroom, where no one wants the reputation as a tattletale, and anyone who “tells on” his classmates risks social ostracism.¹³⁹ Little wonder

¹³³ Vivian E. Berg, *The Snitch Rule: Does it Work?*, 67 N.D.L REV. 381, 383 (1991) (Berg commenting on how Rule 8.3 of the Rules of Professional Conduct can “offer some comfort to the lawyer who decides to report misconduct.”).

¹³⁴ *Id.*

¹³⁵ See discussion *supra* at Section III. A. 2 The loss of that goodwill when a complaint is filed.

¹³⁶ See note 116 *supra*; see also the discussion of ethical duties and ethical pitfalls, *infra*, at Section III. B. Conflicting ethical duties.

¹³⁷ See generally Ott & Newton, *supra* note 124 at 749-54

¹³⁸ See, generally, *supra* note 42 and accompanying text.

¹³⁹ *Supra* note 127 (Ott & Newton saying, “Lawyers, who in many respects depend

attorneys are reluctant to snitch on their colleagues. But reporting a judge's misconduct is like going straight to the principal to fink on the teacher. Who has the guts to do that?¹⁴⁰ "Suicidal" is the adjective that comes to mind, and while that term is certainly hyperbolic—as no one's life is actually threatened—the consequences of filing complaints about judges could well threaten an attorney's career.¹⁴¹

The potential impact on an attorney's career of filing a complaint of judicial misconduct cannot be overestimated. Consider, for example, a judicial misconduct proceeding that took place in the Ninth Circuit in the 1990s.¹⁴² A judge was being investigated for alleged misconduct, and the special investigative committee had come to town to take evidence, subpoenaing a number of witnesses, primarily practitioners who practiced in that court. One of the attorneys subpoenaed to testify seemed most reluctant, as his testimony was not entirely favorable to the judge in question; he nonetheless appeared and testified. That attorney observed after testifying, in comments off the record made directly to the author, that he would need to relocate, that he did not feel he could be effective practicing law in this district any longer after giving the testimony. The author was surprised, thinking that this might be an overreaction, although it is certainly more likely to be a problem in smaller cities, where there are few federal judges: alienate one and it may be difficult to carry on a federal

upon their reputation among members of the bar and extended legal community, may think twice about reporting the actions of another lawyer if the ripple effect of being labeled a snitch could create havoc in their own lives.”)

¹⁴⁰ Indeed, the chief judge herself—the principal in the school analogy—may fear of a hostile reaction, or even retaliation, dissuading her and judicial council from taking appropriate action. As one chief judge put it, “If the Chief Judge invokes the judicial council, none of the district judges likes it. You create more problems than you solve, the hostility of the district court, and the Chief Judge of the district court” Unpublished interview with federal judge (on file with Barr & Willging) (quoted in Geyh, *supra* note 87, at 268). Fitzpatrick notes that even the chief judge may fear retaliation: “Sometimes a chief judge does not want to take action against a problem judge who is likely to be the next chief judge. Even though he or she is appointed for life, concerns about retaliation from the next chief judge can color the process.” Collins T. Fitzpatrick, *Building a Better Bench*, 44 No. 1 JUDGES' J. 16, 19-20 (2005).

¹⁴¹ Indeed, the literature uses the word “suicide” in discussing this issue: “Ask a lawyer how he or she feels about reporting judicial misconduct and see if the answer includes ‘professional suicide,’ a fate far from what anyone would—or should have to—contemplate within allegiance to an ethical code.” Vivian E. Berg, *The Snitch Rule: Does it Work?*, 67 N.D. L. Rev. 381, 383 (1991).

¹⁴² The author of this article was the staff to the Ninth Circuit special investigative committee at the time, and speaks from personal experience with this most confidential matter. Care has been taken to conceal any identifying facts in order to comply fully with the confidentiality provisions of the Ninth Circuit's rules.

practice in that town. This attorney witness did, in fact, move to another federal district within five months of testifying—after the misconduct matter was resolved consistent with the testimony he gave—relocating and resettling his family in a new city, as did another attorney witness in that proceeding.¹⁴³

It would be nice if we could conclude that the repercussions ended there. Some years later, however, the attorney in question applied for an Article I judgeship in his new district and was surprised to find his previous testimony come back to haunt him. He was, in the first question of his interview for the judgeship, asked about his involvement in the misconduct proceeding, in the other district, almost a decade earlier.¹⁴⁴ He has credible reasons to believe that his candidacy for the judgeship was harmed, at least as to one influential member of the selection panel, as a result of this “taint by association” with the earlier proceeding.¹⁴⁵

This was an attorney who testified *involuntarily* under subpoena. It naturally follows that whatever damage he suffered professionally for his testimony—enough to prompt a complete relocation and, arguably, enough

¹⁴³ The proceeding and the identity of the witness must remain confidential as the judicial misconduct proceedings were never made public. The comments were made directly to the author, informally, outside the hearing. Follow-up confirmation of these facts was done with the witness by phone on July 3, 2008, who confirmed that the entire reason for his relocation was the damage he had sustained with the bench as a result of his testimony, and that the other attorney witness had relocated shortly after the incident as well.

¹⁴⁴ Telephone conversation of July 3, 2008, with the attorney/witness in question, *supra* note 143. It appears that the subpoena that attorney received, and complied with, continues to have a serious impact on his career. If the judge(s) on the selection panel misused confidential information, or otherwise unfairly treated the attorney in terms of his candidacy for a judgeship, it could be argued to be judicial misconduct under the 1980 Act: “conduct prejudicial to the effective and expeditious administration of the business of the courts” 28 U.S.C. § 351(a). But who will complain? Certainly not this attorney. He has suffered enough from alienating the bench earlier, when he had no choice but to appear and testify; he believes he would only damage himself and his career further, and probably irreparably, were he to file any type of complaint. *Supra* note 143.

¹⁴⁵ *Id.* The sensitivity of the matter, and the confidentiality associated with it, makes it difficult to be more specific about the basis for this conclusion. Certainly there is no particular reason to believe that this attorney would have been the one selected for the judgeship absent the “taint.” There were undoubtedly other highly-qualified, and arguably better-qualified candidates. The fact that the testimony was raised in the screening interview, and that one member of the committee apparently had no further interest in his candidacy as a result of his involvement in the earlier misconduct investigation, however, suggests that the attorney did, indeed, suffer some damage as a result of his earlier testimony before the special investigative committee. He may have lost the opportunity to be fairly considered for the post.

to kill his chances for a seat on the bench eight years later—would have been far worse had he been the complaining party who initiated the entire inquiry.

The rules governing the administration of the 1980 Act go to significant lengths to protect judges from scurrilous attacks, keeping the system highly confidential lest judges suffer unfairly at the hands of irresponsible accusers.¹⁴⁶ There is virtually no corresponding sensitivity for the harm attorneys may suffer as a result of their involvement in the process. Under these circumstances, the near certainty that the attorney will suffer professionally for *any* involvement in the process, it is not surprising that attorneys would shun any association with misconduct complaints or complainants, especially the initiation of the process. They may even go so far as to openly criticize their colleagues who dare to complain, thereby reaffirming their distance from any proceedings that may ensue.¹⁴⁷

B. Conflicting ethical duties

The practical realities of legal practice are not the only factor here; attorneys also have ethical obligations that must be respected even when it is inconvenient to do so.¹⁴⁸ But in this particular situation, there is no way to err on the side of ethical behavior, as complaining about judicial behavior is every bit as dangerous ethically as keeping quiet.

1. Duty to place the client's interests first

Of all the ethical duties a lawyer has, first and foremost is her duty to her client, to represent the interests of that client and to avoid conflicts with such interests.¹⁴⁹ It should be noted up front that raising an issue of judicial

¹⁴⁶ See Illustrative Rule 17 Commentary, *supra* note 30 at 44 (Justifying strict confidentiality provisions in Rule 17, the Commentary explains that “[t]he statute and its legislative history exhibit a strong policy goal of protecting judges from the damage that could be done by publicizing unfounded allegations of misconduct.”)

¹⁴⁷ See, e.g., the criticism from within the bar of Judge Kozinski's accuser, note 116, *supra*

¹⁴⁸ See discussion of Model Rule 8.3(b) in the text accompanying note 126, *et seq.*, *supra*.

¹⁴⁹ See Model Rules of Prof. Resp. Preamble: A Lawyer's Responsibilities, and Scope (2002):

(2) As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of

misconduct can never further the interests of the client in the case. The established jurisprudence of judicial misconduct makes it clear that the misconduct process cannot correct judicial errors in a case, and cannot produce a reversal of a judicial determination in a case.¹⁵⁰ If the judge's prejudice, bias, neglect, or alcoholism results in an adverse ruling for her client, the attorney's only recourse—for the benefit of the client—is judicial process: *e.g.* appeal.¹⁵¹ Filing a misconduct complaint may prompt some kind of remedial action to avoid such problems in future cases, and may produce an apology, but it cannot go back to redress the harms caused by the misconduct in terms of adverse rulings.¹⁵²

With this in mind, the attorney who is zealously representing her clients may actually face an ethical problem in filing the complaint.¹⁵³ If, by alienating the judges of the relevant bench,¹⁵⁴ this attorney damages her clients' prospects in an ongoing litigation, the attorney may well run afoul

honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

However, comment [9] of the preamble recognizes that because of the nature of the practice of law, "...conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living."; *see also* note 42 *supra*, comments made by Fitzpatrick and Thornton regarding the fears attorneys have about harming current and future clients because of retaliatory prejudice on the part of a judge in response to the filing of a judicial misconduct complaint.

¹⁵⁰ *See, e.g.*, Illustrative Rule 1(e), *supra* note 30 ("The judicial council of the circuit, the body that take action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that."); *see also Matter of a Charge of Judicial Misconduct or Disability*, 137 F.3d 650, 651 (DC Cir. 1998):

A judicial misconduct proceeding, however, is not an appropriate avenue by which to challenge the propriety of a judicial decision. *See* 28 U.S.C. § 372(c)(3)(A)(ii) (1994) [now found at 28 U.S.C. § 352(b)(1)(A)(ii)] (providing for dismissal of complaint that is "directly related to the merits of a decision or procedural ruling"); D.C.Cir. Jud. Misconduct R. 1(e) ("The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case.")

¹⁵¹ Other options, such as motions for reconsideration, for retrial, for disqualification of the judge, etc., may also afford relief to the client, but again these are judicial decisions made under established court process, not administrative action taken under the misconduct statute.

¹⁵² Illustrative Rule 1(a), *supra* note 30 ("The [1980 Act's] purpose is essentially *forward-looking* and not punitive. The emphasis is on correction of conditions that interfere with the proper administration of justice in the courts." (emphasis added)); *see also* note 150 *supra*.

¹⁵³ *Supra* note 149.

¹⁵⁴ *See* the discussion of an attorney's loss of the goodwill of the judges and the court, *supra* Section III. A. 2.

of her ethical obligations to her clients by pursuing judicial misconduct charges against the judges who are presiding over that attorney's cases.¹⁵⁵ Indeed, the attorney who places the integrity of the system over the interests of his own client, choosing to file a complaint of judicial misconduct, does so not only at her client's peril, but at her own. A cautionary tale comes from the example of Douglas Schafer, an attorney who filed a complaint about a state court judge's acceptance of bribes, but ended up being disciplined himself.¹⁵⁶ Although this example comes from the Washington state judiciary—not the federal system—it illustrates the response of the bar when an attorney attacks a judge.¹⁵⁷

Schafer's client had been involved in the bribery scheme, and that is how Schafer learned of it. The bar's response, far from supporting the attorney who was attempting to expose judicial corruption, was to investigate the attorney. In the end, the bar disciplined Schafer for using privileged client information in his misconduct complaint, information that he should have kept confidential.¹⁵⁸ The misuse of privileged information is a serious offense, and any good intentions he may have had in exposing judicial corruption cannot justify this ethical lapse. But it is also clear that Schafer could have avoided a lot of trouble for himself if he, like most attorneys, had merely opted to keep his mouth shut.

2. Duty not to disparage the court

In addition, there is an ethical duty not to make charges with "reckless disregard for the truth," reflected in Model Rule of Professional Responsibility 8.2(a), so attorneys making charges of misconduct need to be

¹⁵⁵ See Thornton, *supra* note 42 (stating that an attorney risks "incurring the judges' wrath and perhaps *prejudicing [the] case*" if she files a misconduct complaint) (emphasis added).

¹⁵⁶ LaRue T. Hosmer & Daniel C. Powell, *Schafer's Dilemma: Client Confidentiality vs. Judicial Integrity a Very Different Proposal for the Revision of Model Rule 1.6*, 49 LOY. L. REV. 405, 405-26 (2003) (Detailing the ordeal Schafer went through to have his judicial misconduct complaint heard and the consequences he suffered as a result of his efforts to report the judge's misconduct).

¹⁵⁷ Compare the case of Stephen Yagman, *infra*, who was disciplined for complaining about the federal court. See also *Complaint of Judicial Misconduct*, 2 Cl.Ct. 255 (Cl.Ct.,1983) (Judge Kozinski, then presiding over the Federal Claims Court, publicly reprimanded and sanctioned two lawyers from bringing a judicial misconduct complaint under the 1980 Act, which the court deemed frivolous).

¹⁵⁸ *Id.* at 405-07. It is worth noting that Schafer's initial complaint against the judge was dismissed, and it was only because of his persistence in pursuing the issue after that perfunctory dismissal (1) that the judge was ever disciplined for the ethical breach, and (2) that Schafer himself became the focus of ethical inquiry. *Id.*

sure of their facts.¹⁵⁹ How much additional investigation, to confirm suspicions and to verify facts, must an attorney do to ensure that his judicial misconduct complaint does not violate this rule? As Schafer learned, attorneys who dare to cast the first stone may well see themselves—and their glass houses—come under a corresponding counter-attack.

Consider, for example, the case of Stephen Yagman, who accused a judge of the Central District of California of anti-Semitism, and made other disparaging comments about the judge in a letter to a legal publisher.¹⁶⁰ He came under attack for “impugning the integrity of the court,” and for attempting to create a basis for disqualifying this judge in the future.¹⁶¹ The judges of the Central District of California—after a two-day hearing—attempted to make an example out of him by suspending his license to practice law in that district.¹⁶² After a protracted legal battle, Yagman was vindicated by the Ninth Circuit, which (1) acknowledged that his allegations were protected by the First Amendment and (2) reversed the disciplinary sanction.¹⁶³

¹⁵⁹ Model Rules of Prof. Resp. 8.2(a) (2002):

A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer, or public legal officer, or of a candidate for election or appointment to judicial or legal office.

¹⁶⁰ After being sanctioned in one of his cases, Yagman was quoted as saying that the judge involved “has a penchant for sanctioning Jewish lawyers I find this to be evidence of anti-Semitism.” Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar*, L.A. Daily J., June 6, 1991, at 1 (quoted in *Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman*, 55 F.3d 1430, 1434 (9th Cir. 1995)). He also sent a letter to Prentice Hall, publisher of the *Almanac of the Federal Judiciary*, describing the judge as, *inter alia*, “ignorant, dishonest, [and] ill-tempered,” and referring to him as a “bully,” a “buffoon,” and a “sub-standard human.” 55 F. 3d at 1434 n. 3.

¹⁶¹ 55 F.3d at 1436-37 (discussing “impugn[ing] the integrity of the Court); 55 F.3d at 1434 n.6 and accompanying text (discussing evidence that Yagman “hoped to get the judge to recuse himself in future cases.”) and 55 F.3d at 1442 (discussing Yagman’s purported attempt to “judge-shop.”).

¹⁶² *Id.* 55 F.3d at 1435 (“the district court held that Yagman had committed sanctionable misconduct . . . and suspended him from practice in the Central District for two years.”).

¹⁶³ *Id.* at 1443. Yagman has a more storied history as the accuser of Judge Manuel Real in one of the more recent high-publicity misconduct matters. See Breyer Committee Report *supra* note 1 at 80 *et seq.* He is the exceptional attorney who is willing to complain against judges. Yagman has now been prosecuted and convicted for crimes entirely unrelated to his misconduct allegations. See Patrick Range McDonald, *Hoisted by His Own Petard: Stephen Yagman’s outsize arrogance, not his politics, done him in*, L.A. WEEKLY (June 27, 2007) available online at <http://www.laweekly.com/news/news/hoisted-by-his-own-petard/16707/> (last checked July 22, 2008).

Yagman can hardly be depicted as an innocent victim. His allegations were personal, vindictive, and mean-spirited; indeed, there was nothing professional or praiseworthy in how he pursued this attack on the judge and the court, or in his dubious motives. At the same time, however, his case, and all the publicity it garnered, sent a strong message to the rest of the bar: an attorney who dares to file an accusation against a judge or a court will certainly draw unfavorable attention to himself, including possible disciplinary action.¹⁶⁴

More specifically, those who disapprove of the decision to complain, including people empowered to enforce attorney discipline, may be quick to find fault with the accuser. When an attorney learns of judicial corruption, therefore, the attorney cannot raise the issue or file the complaint unless she is sure that her own house is in order.¹⁶⁵ At the very least, the accuser must do a thorough investigation and fact-checking to confirm the accuracy of what she has learned.¹⁶⁶ Otherwise, if her sources ultimately prove to be unreliable, she may well be found to have committed an ethical breach herself for making unsubstantiated accusations.¹⁶⁷

In other words, an attorney who is bound to report judicial misconduct under Rule 8.3(b), may be similarly restrained from making any such report

¹⁶⁴ Perhaps it was too easy to find fault with Yagman, and certainly his self-styled “whistle-blowing” activity – he was known for filing, and winning, civil suits against the Los Angeles Police Department (*see id.*) – should not have insulated him from prosecution for crimes and other ethical breaches he may have committed. On the other hand, he, like Schafer, may have escaped notice if he had been willing to keep his mouth shut. *Id.* (noting the conventional observation, strongly implied in the Los Angeles Times’s coverage of the case, that “Yagman’s renegade past . . . was the prime reason he ended up in court”). That is the inescapable lesson for other attorneys who watched the Yagman drama unfold.

¹⁶⁵ See the oft-quoted biblical injunction “He that is without sin among you, let him first cast a stone at her.” John 8:7 (KJV).

¹⁶⁶ Compliance with Model Rules of Prof. Resp. 8.2(a), *supra* note 159 **Error! Bookmark not defined.**, will require this at a minimum.

¹⁶⁷ Professor Marcus refers to this particular disincentive, in a slightly different context, drawing on surveys of lawyers conducted for the Kastenmeier Commission:

Surveys done by the Justice Research Instituted for the Commission confirm that lawyers are deterred from filing complaints by fear that their careers will be harmed. As a consequent, *the possibility that sanctions might be imposed on complainants who make groundless complaints* seems ill-advised. For the truly vexatious complainant, it appears unlikely that this prospect will hold much fear. For the diffident, *such as attorneys*, the possibility of sanctions might put off even those who might otherwise come forward.

Marcus, *supra* note 12 at 429 n. 180 (emphasis added).

by the strictures of Rule 8.2(a): “A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge”¹⁶⁸ The ethical attorney may, therefore, be stuck in a “damned if you do – damned if you don’t” scenario, where additional inquiry and confirmation of facts will only make the attorney’s position *more* difficult. Making the extra effort to confirm facts will (1) make it look like the attorney was on a campaign, pursuing an agenda to bring down the judge, and (2) potentially remove the doubt about the facts that could justify inaction (failure to file). The first will exacerbate the damage a complaining attorney will suffer with the bench, and the second paints the attorney into a corner: the confirmation of the facts will invoke obligations under Rule 8.3(b), *requiring* the attorney to file a complaint and to suffer the consequences of doing so.

With these as the promised fruits of further inquiry, the rational attorney who suspects wrongdoing will *not* inquire further. Indeed, given the overall balance of risks, it is no surprise that the attorneys will almost always follow the more conservative course, the path of least resistance, by turning a blind eye to the perceived misconduct and keeping quiet.

IV. SOLVING THE PROBLEM OF THE RELUCTANT ATTORNEY COMPLAINANT

The problem of reluctant complainants has no easy answers; otherwise it would have been resolved much earlier—by the 1990 amendments to the 1980 Act, by the Kastenmeier Commission, or even by the Breyer Committee. The 1990 amendments helped minimize the problem of unreported misconduct by creating Category 2, furnishing a means for addressing the unreported misconduct in that category. But the problem of the remaining Category 3 misconduct still begs for attention. And while the Breyer Committee acknowledged the problem,¹⁶⁹ it made only a token gesture to address it.

A. *Bar Committees*

To address the problem of attorney disincentives to come forward with complaints of judicial misconduct, the Kastenmeier Commission recommended “that each circuit council charge a committee or committees, broadly representative of the bar but that may also include informed lay persons, with the responsibility to be available to assist in the presentation

¹⁶⁸ *Supra* note 159.

¹⁶⁹ *See supra* text accompanying note 74.

to the chief judge of serious complaints against federal judges.”¹⁷⁰ The Judicial Conference of the United States [“JCUS”] formally endorsed this suggestion in 1994, urging the various circuits and courts to 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.”¹⁷¹

The JCUS endorsement was weak, of course, as it did not *require* the formation of such committees, but only urged circuits and courts to “consider” whether such committees or other approaches might serve the purpose of bringing reluctant complainants forward.¹⁷² The JCUS’s hopeful reference to “other structures or approaches” seemed to acknowledge that the “bar committee” approach was not a complete or ideal solution to the problem; at the same time, that reference seemed to emphasize the paucity of ideas for fixing it.

The weakness of JCUS’s suggestion may be partly to blame for the underwhelming response of the circuits, at least in terms of the actual formation or operation of such committees.¹⁷³ As of 2005, eleven years

¹⁷⁰ *Supra* note 36 at 346 (The proposed committee would work with the Chief Judge not only to identify possible misconduct, but also to “educate lawyers and the public about judicial discipline”). This idea for bar committees is much older, and was mentioned as early as 1978 – before the enactment of the 1980 Act – as a useful means of alerting judicial councils to problems in the circuit, thereby helping the councils be more effective in exercising their general supervisory powers:

Another step . . . would be the creation of committees in each circuit to consider complaints from lawyers and the public It would be desirable for each circuit to have a committee to handle complaints. To be effective, a committee must be well known by the bar. Perhaps it is best for the committee to have broad responsibilities as a conduit between the bench and bar and to receive occasional, specific support from the chief judge.

Steve Flanders and John T. McDermott, *Operation of the Federal Judicial Councils* at 34 (FJC, 1978).

¹⁷¹ Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 29.

¹⁷² *Id.*

¹⁷³ The Breyer Committee made the observation: “[A]s far as we can determine, the suggestion has been implemented in any form in only one circuit.” Breyer Committee Report, *supra* note 1 at 119. Consultation with Breyer Committee staff identified the particular circuit that reportedly had a functioning bar committee, but the Circuit Executive of that circuit declined to confirm it. Email exchanges, dated July 30, 2008 and August 1, 2008, on file with the author. The Breyer Committee’s other exception is a district court that had apparently created the position of “ombudsman” to “act[] on an informal basis to interface and address those matters lacking an institutional mechanism or forum for redress,” with the promise that all contacts with the ombudsman will be kept confidential.

after JCUS issued its endorsement of the concept, Fitzpatrick observed—after canvassing all the chief judges of the federal circuits—that “no circuit has created such a committee as of yet.”¹⁷⁴ The Breyer Committee offered little more, noting that one chief judge had proposed the creation of such a committee to the judicial council in that circuit, saying

Lawyers have fear of retaliation en masse Young lawyers are abused, they’re afraid of retaliation. Old timers don’t care so much, they’ve arrived So you could have older wiser heads be on such a bar committee.¹⁷⁵

Notwithstanding the chief judge’s support for the idea, that circuit’s judicial council rejected it.¹⁷⁶

The Breyer Committee acknowledged that this problem of attorney reluctance persists, however, and made specific note of the Kastenmeier Commission’s proposed “bar committee” solution. It is worth noting that the Breyer Committee was aware of the general ineffectiveness of the bar committee solution to date, but had nothing better to offer; instead, the Breyer Committee simply re-endorsed the bar committee approach, in language again notable for its weakness:

The councils should *ask* courts in the circuit to *encourage* the creation of committees of local lawyers whose senior members can serve as intermediaries between individual lawyers and the formal complaint process.¹⁷⁷

While this constitutes a token acknowledgement of the problem of Category 3 misconduct, it fails to bring meaningful emphasis or attention to the issue.

Id. at 104 (the quotes, taken from the Breyer Committee Report, are not attributed, but are presumably from district court documentation on their ombudsman’s office). Again consultation with the Breyer Committee staff identified that district, but that district court’s newly revised website contains no reference to the ombudsman any longer, and emails to that district asking for more information were not answered. Even if the position of ombudsman still exists in that district, however, it cannot be effective if the bar and the public remain unaware of it. One might also argue that the ombudsman’s jurisdiction would *not* include judicial misconduct concerns, because under the 1980 Act and accompanying rules, there *is* “an institutional mechanism or forum for redress” for redressing judicial misconduct. Email exchanges dated July 31, 2008 on file with the author.

¹⁷⁴ Fitzpatrick, *supra* note 140 at 20.

¹⁷⁵ Breyer Committee Report, *supra* note 1 at 104.

¹⁷⁶ *Id.*

¹⁷⁷ See the Breyer Committee’s Recommendation 5, *supra* note 1 at 119 (emphasis added).

Moreover, there does not appear to be any reason to believe that the suggestion will have any more impact now than it did 15 years ago when the Kastenmeier Commission and the JCUS first made it.

One might well argue, however, that the bar committee idea is not so much an idea that failed as an idea that was never tried. This proposal appears to be unpopular with the judges¹⁷⁸—otherwise it could have and would have been attempted in a number of courts already.¹⁷⁹

It is not at all clear that attorneys are any more enthusiastic about this proposal than the judges, or that bar associations will be willing to play this role. The chairpersons of this committee, whoever they may be, would have to associate their names with the complaints against the judges, and senior or not, precious few lawyers would want to assume that responsibility and all the negatives that come with it.¹⁸⁰

¹⁷⁸ In at least one circuit judicial council, the motion to create such a bar committee failed for want of a second, suggesting that very few judges (only one on that council) favored the idea. Email from Jeff Barr, July 30, 2008, and August 15, 2008, on file with the author. In another circuit, the idea generated a very strongly-worded objection from authorities in the circuit with responsibility for judicial conduct matters, suggesting that the disfavor is deeply felt. *Id.* The reason judges do not like the idea is not entirely clear, although it is not difficult to speculate. Certainly some judges will resist the notion of stirring up discontent, or encouraging attorneys to find fault with judicial behavior. Another possibility is that the judges simply distrust the attorneys, fearing that empowering attorneys in this way will only tempt them to use misconduct complaints as a litigation tactic or as some other means of manipulating the judicial process. *Id.* (speculating on reasons for judicial opposition). Of course, the bar—and any bar committee—will be intent on maintaining its credibility, and will therefore be unlikely to indulge frivolous or manipulative complaints. For this reason, the judges' fears would likely prove to be unfounded if a bar committee were ever formed.

¹⁷⁹ At least one alternative proposal for eliciting attorney comment of federal judges' conduct met a similarly early demise. In the post-Kastenmeier Commission era, then-Chief Judge J. Clifford Wallace asked Ninth Circuit Judge and judicial ethics expert John T. Noonan, Jr. to chair an ad hoc committee aimed at addressing the problem of attorney reluctance, among other things. Judge Noonan proposed to his committee the idea of calling senior members of the bar in each city to meet with a small committee of judges and have an informal discussion of the performance of the judges in that area. The hope was that (1) the seniority of the members of the bar, and (2) the informality of the "discussion" format might persuade the attorneys to be more candid about these things than they otherwise would be. The other judges on the committee showed no enthusiasm for the idea, and it, like the Kastenmeier Commission's "bar committee" suggestion, never saw the light of day. Telephone conversation with Judge John T. Noonan, Jr., July 28, 2008.

¹⁸⁰ See discussion *supra* at Section III. A. 2 The loss of that goodwill when a complaint is filed, and Section III. A. 4 Disincentives to raise issues of judicial misconduct.

And in at least the publicized examples, the bar association's track record of supporting attorney victims/complainants does not bode well.¹⁸¹ A particularly glaring example comes from the Western District of Pennsylvania 20 years ago. A female attorney was told by a federal judge, in the middle of a jury trial, that she could not use her birth name in his court; as a married woman, she would be referred to only by her husband's name.¹⁸² Her co-counsel was charged with contempt when he protested, and Ms. Wolvovitz was also threatened with jail time if she continued to use her birth name.¹⁸³ The incident prompted outrage throughout the country, with many letters of complaint; the National Organization for Women actually organized a protest in front of the courthouse, calling for the judge's resignation.¹⁸⁴ While one might expect a bar association to weigh in on behalf of its member, particular in circumstances as compelling as these, the Allegheny County Bar President, interviewed on television about the incident, declined to support the attorney or to lend any of the bar association's legitimacy to her cause.¹⁸⁵ This is a prime example of when a bar association could have, and arguably should have, rallied around the attorney to condemn a federal judge's behavior, but it did not find the will, political or otherwise, to do so.

¹⁸¹ See, e.g., note 156, *et seq. supra*, the case of Douglas Schafer, who brought a meritorious complaint against a judge for bribery, and whose bar association not only failed to support him, but chose to investigate and discipline him.

¹⁸² Associated Press, *U.S. Judge Won't Allow Lawyer "to Use That Ms."* (July 14, 1988) (online at <http://query.nytimes.com/gst/fullpage.html?res=940DE7DA113CF937A25754C0A96E948260> (last checked August 8, 2008)).

¹⁸³ *Id.*

¹⁸⁴ Telephone interview with Barbara Wolvovitz (the attorney involved in the case), August 11, 2008.

¹⁸⁵ *Id.* The television program *Pittsburgh 2Day* two weeks after the trial had Ms. Wolvovitz as a guest, as well as a NOW representative who was calling for the judge's resignation. The judge declined the invitation to appear on the program, but Thomas Hollander, President of the Allegheny County Bar appeared, and defended the judge: "The judge acted in a way following that that I think he deserves some credit for. He apologized. That doesn't often happen with members of the bench and the fact that he did so I think is a positive sign. He has served long, long and ably on the court. This is one of those things that unfortunately occurred and not until this stage of his career, and he's been on the bench for a long time. He is probably now sensitized to this point, and you will probably never see it happen in his courtroom and perhaps probably in no other courtrooms in Allegheny County We all reflect the times in which we grew up. I've been blessed fortunately to have a wife and a daughter who keep me on my toes, but not everybody does, and maybe not everybody in my generation shares my feelings." A video recording of that broadcast, graciously provided by Ms. Wolvovitz, is on file with the author. While the bar representative made important points (and acknowledged that the behavior could not be excused), it was clear that the bar would not take an active role calling for disciplinary action, even in this obvious and notorious case of judicial misbehavior.

One can only speculate what may have happened inside the court during this period, with all the letters and unflattering press coverage, but something prompted the judge to do a complete reversal and apologize.¹⁸⁶ This is a good example of an appropriate outcome, likely spurred by the publicity the event received. But it does not appear that the bar association was any help in pushing the court to deal with the situation.

Only when the proposed “bar committee” approach is actually implemented somewhere can we pass judgment on whether it is an effective solution to the problem of reluctant attorney complainants. Clearly the Breyer Committee felt that it was the best available solution, but until the judiciary has the will to try it, and unless the bar is willing to support it, we will never know. Up until now, the idea has been a non-starter.

B. Anonymous Complaints

Another approach that might encourage otherwise reluctant complainants to come forward is to explicitly authorize, and even encourage, anonymous complaints. The Kastenmeier Commission noted that “Congress was urged to permit anonymous complaints during the legislative process” that led to the adoption of the 1980 Act, but “the statute is silent on the subject.”¹⁸⁷ But although the concept of anonymous complaints appears to be fully consistent with the statute, the judiciary has never been willing to endorse or encourage the anonymous complaint as a proper means of raising issues of judicial misconduct.¹⁸⁸ The Illustrative Rules—adopted by the judiciary—stated clearly that “Anonymous

¹⁸⁶ Associated Press, *Federal Judge Apologizes in Fight Over Use of “Ms.”* N.Y. Times (July 15, 1988) (online at <http://query.nytimes.com/gst/fullpage.html?res=940DEED91E3EF936A25754C0A96E948260> (last checked August 8, 2008)). The judge also announced his retirement less than four months later. Associated Press, *Judge in Sexist Dispute Retires*, N.Y. Times (November 12, 1988) (online at <http://query.nytimes.com/gst/fullpage.html?res=940DE7DB143DF931A25752C1A96E948260> (last checked August 11, 2008)). One cannot know what formal complaints of misconduct may have been filed in response to the press coverage. It is probably a safe assumption, however, that given the judge’s apology and retirement announcement, any such complaints would have been concluded on the basis of corrective action taken. See Illustrative Rule 4(d), *supra* note 30 (“The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint or that action on the complaint is no longer necessary because of intervening events.”).

¹⁸⁷ *Supra* note 36 at 345.

¹⁸⁸ *Supra* note 38.

complaints are not handled under these rules.”¹⁸⁹ These rules also provided that the complaint “*must* be signed” and that “[t]he complainant’s address *must* also be provided.”¹⁹⁰

1. Anonymous Complaints as a Means of Raising Misconduct Matters from Category 3 to Category 2

But there appears to be something slightly disingenuous about the Illustrative Rules’ prohibition on unsigned complaints; because there was no statutory basis for refusing them, those rules also prescribed how such complaints should be handled.¹⁹¹ Immediately after saying that “[a]nonymous complaints are not handled under these rules,” Rule 2(g) specified that

anonymous complaints received by the clerk will be forwarded to the chief judge of the circuit for such action as the chief judge considers appropriate. See rules 2(j) and 20.¹⁹²

It appears that the Rules were attempting to discourage anonymous complaints—and to obscure the availability of this option to a complainant.

¹⁸⁹ Illustrative Rule 2(g), *supra* note 30.

¹⁹⁰ Illustrative Rule 2(f), *supra* note 30.

¹⁹¹ Indeed, the statute has always provided that complaints may be filed with the Clerk and must be forwarded to the Chief Judge – without distinguishing anonymous from signed complaints. 28 U.S.C. § 351(a) & (c):

(a) Filing of complaint by any person.--Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts, or alleging that such judge is unable to discharge all the duties of office by reason of mental or physical disability, may file with the clerk of the court of appeals for the circuit a written complaint containing a brief statement of the facts constituting such conduct.

* * *

(c) Transmittal of complaint.--Upon receipt of a complaint filed under subsection (a), the clerk shall promptly transmit the complaint to the chief judge of the circuit . . .

Arguably, therefore, it would have conflicted with the statute for the Misconduct Rules to direct the Clerk to reject anonymous complaints.

¹⁹² Illustrative Rule 2(g), *supra* note 30. The reference to Rules 2(j) and 20 did not appear in the original Illustrative Rules. See Burbank, *supra* note 2 at 23 (reproducing the original version of the Illustrative Rules). Rule 2(j) established how a chief judge can identify a complaint absent formal filing, and was added after the 1990 amendments to the 1980 Act created this possibility. Rule 20 was a catch-all provision that made clear that the chief judge and judicial council can consider information from any source, not just from misconduct complaints.

The Commentary to those Illustrative Rules also included a compelling discussion of the merits of anonymous complaints:

Anonymous Complaints

Whether an anonymous complaint should be accepted is a question of some difficulty. On the one hand, section 372(c) clearly contemplates a complainant whose identity and address are known and who therefore can receive notice of decisions taken, be offered the opportunity to appear at proceedings of a special committee, and be accorded the opportunity to petition for review if dissatisfied with the disposition of the complaint. On the other hand, a prohibition against anonymous complaints may effectively bar complaints from the two groups of citizens most likely to have knowledge of serious problems in the administration of justice: lawyers and court employees.

The resolution reflected in rule 2(g) is to require that complaints under section 372(c) be signed but to make it clear that chief judges, as chairmen of the circuit judicial councils, can, just as they always have, consider information from any source, anonymous or otherwise. This solution is consistent with congressional expressions of intention that informal methods of resolving problems, traditionally used under section 332, should continue to be used in many cases [footnote omitted]. Hence, under these rules, the formalities of the statute would not be invoked by an anonymous complaint, but the chief judge and the circuit council may nevertheless consider it. Information obtained from an anonymous complaint could also provide a basis for identification of a complaint by the chief judge under rule 2(j).¹⁹³

This commentary clearly acknowledges a role for anonymous complaints and sets forth the rationale for allowing them in this limited way. It is worth noting that the primary reason offered here for allowing some type of anonymous complaint is that failure to do so “may effectively bar complaints from . . . attorneys.”¹⁹⁴ The Kastenmeier Commission essentially agreed, commending the procedure of forwarding anonymous complaints to the chief judge, for possible “identification” of a complaint, particularly as a means of dealing with reluctant attorney complainants: “[T]he Commission believes this procedure has promise in addressing the bar’s unfortunate but understandable reluctance to incur a judge’s hostility by filing a complaint.”¹⁹⁵

¹⁹³ Illustrative Rules, Commentary to Rule 2, *supra* note 30, at 9-10.

¹⁹⁴ *Id.*

¹⁹⁵ *Supra* note 36 at 346.

While it is difficult to find concrete examples, Barr and Willging cite two circumstances where attorneys' inability to remain anonymous frustrated inquiry or action on allegations of serious misconduct.¹⁹⁶ In one case, the source/witness was "unwilling to come forward 'because he is a practicing lawyer' and . . . 'the realities of the law business all too often deter lawyers from publicly coming forward with information critical of judges.'"¹⁹⁷ In the other, the complainant was "unwilling to reveal her sources . . . unless she could do it in closed session . . . without the judge present."¹⁹⁸

Professor Marcus also cites an example related to him by a circuit executive:

A few years ago the Circuit Executive got a call from an attorney asking whether an attorney-complainant's name would have to be disclosed to the judge. The attorney was told that the practice in the circuit was that the complaints were not confidential; the response probably discouraged him from filing.¹⁹⁹

In none of these cases, it appears, were the misconduct allegations considered on their merits. The unavailability of anonymity served as a practical bar to such consideration.

In contrast, Fitzpatrick cites a compelling example where an anonymous complaint *was* received and proved to be highly effective in addressing a misconduct issue.

[O]ne circuit chief judge received an anonymous letter criticizing a judge for the way he was treating lawyers in the courtroom. Rule 2(g) of the Illustrative Rules provides for anonymous complaints to be given to the chief judge by the clerk. Without accepting the veracity of the allegations, the chief judge passed the letter on to the judge. A few days later, the judge called and was thankful for the information. He had discussed it at

¹⁹⁶ Barr & Willging, *supra* note 88 at 61-62.

¹⁹⁷ *Id.* at 61 (quoting the complainant in the case).

¹⁹⁸ *Id.* at 62; *see infra* note 229 for a more extensive description of this scenario.

¹⁹⁹ Marcus, *supra* note 12 at 429 (it is not clear who Prof. Marcus is quoting in this passage, as he attributes it to a circuit executive, but the quote refers to the circuit executive in the third person). This is offered as an example of how attorneys are reluctant to complain if they cannot file anonymously. It is also a compelling example of how Rule 2(g) has apparently been interpreted by judiciary staff to say that anonymous complaints were not permitted, even though there was a procedural route specified in that same rule that would get such complaints to the chief judge for appropriate action.

home with his family. They agreed he had been harsh, as he had also been harsh with them.²⁰⁰

Although this example was offered as evidence of the power of informal methods for addressing misconduct issues, it is noteworthy that the complaint was raised and addressed through an anonymous process.

2. Obscuring the Anonymous Complaint Option

Notwithstanding the provision in the Illustrative Rules (Rule 2(g) and commentary on the handling of anonymous complaints), the system clearly discouraged anonymous complaints. Rule 2(f) required a signature.²⁰¹ All of the misconduct complaint forms have blanks on them for the complainant to enter his or her name and address. Even the Rule that directed the Clerk of Court to accept them and forward them to the Chief Judge started out with the statement that anonymous complaints are “not handled under these rules.”²⁰² An unsophisticated complainant would most likely, in these circumstances, simply conclude that he was not permitted to file anonymously.

The Breyer Committee did not, however, explicitly comment on the desirability of maintaining—much less enhancing—this mechanism for anonymous complaints. The JCUS apparently interpreted this as license to further obscure the anonymous complaint option.²⁰³

The newly adopted, and newly binding, national rules for complaints of judicial misconduct have completely buried the possibility of anonymous complaints. No longer is there a rule entitled “Anonymous Complaints”; rather the relevant rule is entitled “Complainant’s Address and Signature; Verification.”²⁰⁴ The rule provides

(d) Complainant's Address and Signature; Verification. The complainant must provide a contact address and sign the complaint. The truth of the statements

²⁰⁰ See, e.g., Fitzpatrick, *supra* note 42 at 283. This was cited as an example of how informal mechanisms could resolve misconduct issues without formal application of the misconduct complaint procedures. But it is compelling to note that it was an anonymous complaint that set the process in motion.

²⁰¹ Illustrative Rule 2(f), *supra* note 30.

²⁰² *Id.* at Rule 2(g).

²⁰³ Or, perhaps, the judges on the JCUS Committee on Conduct and Disability, which drafted the new rules, simply viewed anonymous complaints as unimportant and excised the references to them in the rules because they saw no value in those provisions.

²⁰⁴ New Misconduct Rule 6(d), *supra* note 4.

made in the complaint must be verified in writing under penalty of perjury. If any of these requirements are not met, the complaint will be accepted for filing, but it will be reviewed under only Rule 5(b).²⁰⁵

The rule still requires the Clerk of Court to accept the anonymous complaint for filing, and still invokes the rule governing a chief judge's power to "identify" a complaint without formal filing (now Rule 5(b)). Accordingly, one could argue that there has been no substantive change to the rules in terms of the handling of anonymous complaints.

On the other hand, the message is stronger than ever that anonymous complaints are unwelcome. The potential complainant, examining the rules looking for an "anonymous complaint" option will no longer find that term in headings—it previously appeared, in boldface, as both a rule title and a heading in the commentary—or even in the text of the rules or commentary. Instead, they find Rule 6(d)'s insistence that "[t]he complainant *must* provide a contact address and sign the complaint . . . [which] *must* be verified in writing under penalty of perjury."²⁰⁶ The provision in the commentary to the Illustrative Rules that explained why anonymous complaints may be desirable, two paragraphs quoted in full above,²⁰⁷ has been struck completely.²⁰⁸ The complaint form attached to the new rules calls for name, address, and daytime phone number of the complainant.²⁰⁹ Even a sophisticated complainant, reading these rules, would doubt the appropriateness of submitting a complaint anonymously.

The irony here is striking, as the Breyer Committee strongly urged chief judges to be more pro-active in identifying complaints,²¹⁰ and the rules now obligate, rather than merely permit, the chief judge to make such an

²⁰⁵ *Id.*

²⁰⁶ *Id.* (emphasis added).

²⁰⁷ *Supra* at note 193.

²⁰⁸ There is no commentary to Rule 6 any longer beyond the simple statement "The Rule is adapted from the Illustrative Rules and is self-explanatory." There is some commentary to Rule 5(b) that explains how complaints that "do not comply with the requirements of Rule 6(d)" should be handled. New Misconduct Rule 5(b) Commentary, *supra* note 13 at 9. This commentary makes clear that the chief judge must act upon information that comes to her this way, but it never uses the term "anonymous," and it is not associated directly with Rule 6(d). The unsophisticated complainant is unlikely to find it or, even if he does, may not understand it as an invitation to submit his complaint anonymously.

²⁰⁹ New Misconduct Rules, Appendix (Complaint Form), *supra* note 13.

²¹⁰ Breyer Committee Report, Recommendation 2, *supra* note 1 at 110 (the "Review Committee should stress the desirability . . . of . . . chief judges' using their statutory authority to identify complaints when accusations become public.").

identification “[i]f the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible.”²¹¹ These and other recommendations of the Breyer Committee emphasized more active, robust and responsive administration of the 1980 Act.²¹² It is quite inconsistent with the thrust of the Breyer Committee’s recommendations, therefore, for the Judicial Conference to bury the possibility of anonymous complaints in its new rules. Moreover, as a matter of policy, this move is most unfortunate and ill-advised, particularly as there is no other meaningful innovation proposed to address the problem of Category 3 misconduct and the powerful disincentives for attorneys to file.

3. Problems with Anonymous Complaints

Encouraging and welcoming anonymous complaints is not a panacea, however, for the problem of Category 3 misconduct or for the reluctance of attorneys to come forward and file complaints. There are weaknesses in the concept that deserve attention.

a. There Ain’t No Such Thing as an Anonymous Complaint

One major objection to reliance on anonymous complaints is the concern that no complaint is truly anonymous.²¹³ If a judge makes intemperate remarks in a particular hearing, and an anonymous complaint is filed by one of the few people present about the judge’s behavior in that hearing, it may be quite easy to identify the likely complainant.

This is undoubtedly true, but it is in no way an argument for prohibiting or discouraging anonymous complaints. The complainant runs a certain risk of having her identity discovered when she files anonymously, but that risk is 100% if she files in the regular fashion (which would require her to put her name and address on the complaint). The option of filing anonymously can only encourage an otherwise reluctant attorney, or non-attorney complainant, to come forward.

b. Problems of the Right to Confront Accusers

²¹¹ New Misconduct Rule 5(a), *supra* note 4 (“If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge *must* identify a complaint.” (emphasis added)).

²¹² See generally Breyer Committee Report, *supra* note 1, at 107-26.

²¹³ The Kastenmeier Commission noted that . . . see *supra* note 48 and quoted passage in the text at note 48.

Another major objection to the concept of anonymous complaints is that it might infringe the judge's right to confront accusers,²¹⁴ a principle appropriately enshrined in the Sixth Amendment.²¹⁵ Recognizing and/or responding to anonymous complaints arguably leaves judges vulnerable to scurrilous attacks by mendacious individuals who can avoid any responsibility for their perfidy by hiding behind the wall of anonymity. The parade of horrors that follows raises the specter of the Inquisition or of witch trials.²¹⁶

While the Sixth Amendment's confrontation clause is normally applicable, by its very terms, only to "criminal prosecutions,"²¹⁷ the due process implications underlying it deserve deference and attention. Indeed, one district court has found right-to-confront-accusers protections in the terms of the 1980 Act itself.²¹⁸

Fairly read, the Act requires that a judge under inquiry have the right to confront all the evidence against him at whatever stage it is presented. This, of course, does not mean an accused judge has a right to re-confront old evidence at every stage where it is considered. But a judge under inquiry has the right under the Act to confront at some point all the evidence against him, and the Court so holds.²¹⁹

The D.C. Circuit, hearing the same case on appeal, also acknowledged the judges' due process rights, including the right to confront witnesses, in misconduct proceedings, although on the facts before it, declined to find a violation of those rights.²²⁰

²¹⁴ The presumed right to know the identity of one's accuser has caused some commentators to dismiss the idea of anonymous complaints without serious consideration. See, e.g., Fitzpatrick, *supra* note 42 at 282 ("The reluctance of active attorneys to complain is endemic to a system such as ours in which due process requires that the judge be informed of the identity of the complainant.")

²¹⁵ U.S. Const., amend. VI.

²¹⁶ The author once had the temerity to suggest to a federal judge the idea of expanding the concept of anonymous complaints in judicial misconduct proceedings. The judge dismissed the idea out of hand, making specific reference to the Inquisition and the terrible abuses that have resulted throughout history whenever anonymous accusations were tolerated.

²¹⁷ See, e.g., *Austin v. United States*, 509 U.S. 602, 608 n.4 (1993) (noting that the confrontation clause does not apply in forfeiture proceedings).

²¹⁸ *Hastings v. Judicial Conference of the United States*, 593 F.Supp. 1371, 1383 (D.D.C. 1984), *aff'd in part and vacated in part on other grounds*, 770 F.2d 1093 (1985), *cert. denied*, 477 U.S. 904 (1986)

²¹⁹ *Hastings, id.* (citation omitted).

²²⁰ *McBryde v. Committee to Review Circuit Council Conduct and Disability*, 83 F.Supp.2d 135, 168-69 (D.D.C.,1999) (recognizing due process implications in the judicial

The Kastenmeier Commission acknowledged confrontation-clause concerns, but qualified those concerns: “Fairness to a judge accused of misconduct (or disability) ultimately requires that he or she be permitted to confront an accuser, *although there is no logical imperative that an individual witness be identified as the initiator of the process.*”²²¹ Indeed, the right to confront the anonymous complainant is relevant only if the complaint itself is treated as testimony or other evidence. If the special committee and the judicial council take action after investigating an anonymous complaint, the due process right-to-confront requires only that they base their findings and decision on the evidence properly presented, and the testimony of witnesses whom the judge is offered an opportunity to cross-examine.²²² The fact that the original, anonymous complaint cannot be treated as competent witness testimony does not in any way undermine the legitimacy of the inquiry or the decision.²²³

One might still complain that false anonymous complaints will subject judges to the annoyance and frustration of baseless investigations. These burdens will materialize, however, only if the chief judge finds sufficient credibility or merit in the anonymous allegation and the evidence offered to support it (*e.g.*, courtroom transcripts, etc.) to justify identifying a complaint and commencing an investigation. Therefore, judges could be harassed and victimized by such baseless accusations only if the chief circuit judge were willing to act on such allegations or, in other words, only if the chief judge were complicit in the campaign of harassment.

misconduct process, but refusing to find a violation of the right to confront witnesses):

Finally, an alleged due process violation animates Judge McBryde's claims that the Special Committee, and accordingly the Judicial Council, relied on hearsay and other impermissible evidence in making its findings of fact. Thus, Judge McBryde maintains, he remained unable to confront witnesses and evidence against him [T]he Court finds that the hearsay, gossip, and other forms of evidence that may have contributed to the Special Committee's findings remained so ancillary to the bulk of the evidence upon which the Special Committee relied as not to present any potential due process violation.

²²¹ *Supra* note 36 at 345-46 (emphasis added).

²²² *See Davis v. Washington*, 547 U.S. 813, 832 n.6 (2006) (“[I]t is the trial *use* of, not the investigatory *collection* of, *ex parte* testimonial statements which offends [the confrontation clause].” (emphasis in original)).

²²³ This is not a situation analogous to the “fruit of the poisonous tree.” If a domestic violence victim files a complaint and later decides not to testify, the police can certainly pursue the prosecution based on other evidence that they may be able to gather. The fact that the original complainant is not available for cross-examination should have no effect on the proceedings overall other than to exclude that person's statements from the evidence.

The confidentiality of the process otherwise offers adequate if not complete protection for the judge from defamatory attacks from anonymous sources. And there is no reason to believe that anonymous complaints would make a chief judge any more likely to pursue frivolous and harassing investigations against her colleagues. If the anonymous complaint is not well grounded, the chief judge's preliminary limited inquiry should reveal that quickly enough, resulting in no action against the wrongfully accused judge.

If, on the other hand, the anonymous complaint is well grounded in fact, the chief judge will benefit from the information (as to the existence of a problem) and the focus it may provide as to the nature or severity of that problem. After a limited inquiry confirms that a potential problem exists, the chief can commence an investigation (by appointing a special investigative committee) based on the information she has acquired and confirmed, quite independent of any testimonial evidence contained in the complaint. The right to confront hostile witnesses is not diluted in any way by the fact that the identity of the original complainant (whose testimony is necessarily excluded from evidence in the disciplinary proceedings, in any case) is never revealed.

c. The influx of anonymous complaints may overwhelm the system

Another concern is that opening the door to anonymous complaints would overwhelm the system, inviting not only the complaints of Category 3 misconduct, but also a host of frivolous and vexatious complaints. Does the judiciary have the staff or resources to process all of these, or would the system cease to be workable?

One can only speculate on how many more complaints would come in if the judiciary were more inviting and solicitous of the anonymous complainant. Hopefully the more inviting approach would bring in any meritorious complaints regarding Category 3 misconduct – actionable conduct that presently slips through the cracks. Those will require serious work and investigation, as they should. But the influx of frivolous complaints will be unlikely to overwhelm the judiciary's resources, precisely because the frivolous anonymous complaint is so easily dispensed with. Unlike a formal complaint, which requires—even for frivolous complaints—that a formal, reasoned dismissal order be prepared and sent to

the complainant,²²⁴ the frivolous anonymous complaint can simply be set aside. Accordingly, staff processing anonymous complaints can devote their energies to verifying allegations—a far more meaningful use of their time and energies—rather than drafting formal and reasoned dismissal memoranda on frivolous complaints. And, for the same reasons, if complainants under the current system opt instead to file anonymously, the overall workload burden for the judiciary could well go down, even as the number of complaints goes up.

All told, the net impact of expanding the anonymous complaint option could be quite positive for judicial staff, as they would spend less time in the formalistic churning out of dismissal orders for meritless complaints, and spend more time verifying allegations of true misconduct. In any case, the easing of burdens in the handling of the frivolous complaints should provide some kind of off-set for the increase in complaints.

d. Attorney witnesses will still suffer, even if the complainant is protected

Of course, allowing complainants to remain anonymous will do nothing to protect the attorney witnesses who may be subpoenaed to testify. The compelling story of the reluctant witness in the Ninth Circuit misconduct hearing, described above,²²⁵ would have no happier ending if the complainant in that case had been anonymous. An anonymous complaint process will not solve all our problems.²²⁶ But it can remove some disincentives to filing the complaint in the first place.

In addition, of course, there are steps that can and should be taken to protect attorney witnesses victimized in the process. Again, the judges administering the 1980 Act must act with sensitivity, not just for the plight of an innocent-until-proven-guilty judge who has been implicated in the judicial misconduct process, but also for the plight of attorneys who testify (usually unwillingly) in that process.

The process already allows a special investigative committee to exercise

²²⁴ New Misconduct Rule 11(g)(2) (“If the chief judge disposes of the complaint . . . , the chief judge must prepare a supporting memorandum that set forth the reasons for the disposition.”).

²²⁵ See discussion *supra*, text accompanying notes 142 to 145.

²²⁶ Also already noted, the anonymous complaint option may not help even the complainant if the circumstances of the complaint point too obviously to the probable complainant. See Section IV. B. 3.a., *supra*. But as discussed in that Section, it is not a reason to reject the possibility of anonymous complaints.

tremendous flexibility in how the investigation is conducted,²²⁷ and it is by no means necessary that the reluctant witnesses be called, in the first instance, to give that testimony before a panel of investigating judges and the judge who is the subject of the complaint.²²⁸ Barr and Willging note, for example, that an attorney witness who was unwilling to give testimony in the presence of the judge accused of misconduct, could have, and probably should have, been permitted to do so.²²⁹ Some circuits have made a practice of “engag[ing] an outside attorney-investigator to investigate the allegation of the complaint on the committee’s behalf.”²³⁰ It is worth noting that one of the most exhaustive investigations ever done under the 1980 Act, that of Alcee Hastings in the Eleventh Circuit, was done mostly by attorney/investigators retained for the purpose.²³¹

²²⁷ See New Misconduct Rule 13(a), *supra* note 13 (“Each special committee must determine the appropriate extent and methods of the investigation in light of the allegations of the complaint.”); see also Barr & Willging, *supra* note 88 at 121 (“The field study revealed . . . what general procedures special committees had followed [and] showed that there has been considerable experimentation within the basic limits establish by the Act.”)

²²⁸ New Misconduct Rule 13(c), *supra* note 13, provides that “[t]he committee may arrange for staff assistance to conduct the investigation,” including the hiring of special staff for this purpose.

²²⁹ Barr & Willging, *supra* note 88 at 61-62 (the case was referred to in the text *supra* at note 198). Barr and Willging criticize the special committee for not allowing the witness to testify in closed session:

- . . . The chief judge, without any inquiry into the complaint, appointed a special committee, which sent a letter to the complainant asking for clarification and additional information about this and other charges. The complainant responded that she was unwilling to reveal her sources of information about this charge unless she could do it in closed session before the special committee without the judge present. The special committee did not accept the complainant’s offer, nor did it hold further proceedings. Following receipt of the special committee report, the judicial council dismissed the complaint in a conclusory, three-paragraph form order as “not cognizable under the Act.”

The rationale for the council’s order is not clear. If the judge had a right to be present at any committee proceeding, then the committee could not have agreed to complainant’s offered procedure without violating the judge’s rights. The stronger position, however, is that *the judge had no right to be present at purely investigative interviews conducted by the committee* . . . Thus, the committee may have erred in not agreeing to hear whatever evidence the complainant could marshal in a closed session without the judge present.

Id. (emphasis added), *citing* Illustrative Rule 12 Commentary, *supra* note 30 (stating that the requirement that the judge be permitted to attend certain proceedings did not apply to “meetings at which the committee is engaged in investigative activity.”).

²³⁰ Barr & Willging, *supra* note 88 at 121.

²³¹ Volcansek, *supra* note 32, at 84-85 (The special investigative committee “engaged the services of John Doar, who had gained a national reputation for his investigation of the Watergates scandal, and his associate Stewart Webb to conduct the investigation.”)

An attorney retained to conduct an investigation for the special committee can collect a lot of information from attorneys without compromising them with the bench. As of 1993, this practice had been employed in at least three circuits, in eight separate misconduct matters:

In . . . three circuits, investigators have been hired in most special committee proceedings In some of these . . . , the investigator conducted a preliminary investigation, performing such tasks as interviewing witnesses, developing and reviewing evidence, and presenting a report to the committee In one matter, the special committee delegated to the investigator the responsibility of conducting the entire evidentiary hearing.²³²

Indeed, after the investigator conducts a thorough examination of all potential witnesses, the committee may be able to convene a hearing that calls only a very few—those whose testimony relates most directly and relevantly to the charge.²³³ These few may be “confronted” and cross-examined, while many other attorney witnesses can be spared the trouble, and the attendant negative repercussions, of appearing to testify before the committee, and in the presence of the judge being investigated.²³⁴

Out of deference to the particular interests of practicing lawyers—whose careers can be jeopardized by participating in the judicial misconduct process—special investigative committees should approach their task with care. Reliance on investigators or other retained counsel to collect background facts and evidence, and careful paring of witness lists, may spare many lawyers the unnecessary loss of goodwill that would otherwise inevitably follow their testifying in the presence of the judges. Judicial councils should also consider granting recusal rights to lawyers who participated in the process, as has happened in a couple of highly-publicized

²³² Barr & Willging, *supra* note 88 at 121-22. Prof. Hellman notes that in the handling of the complaint against Judge Jon P. McCalla, in 2001, “the special committee hired an outside counsel, who interviewed numerous witnesses.” Hellman, *supra* note 63 at 238.

²³³ In one of the investigations of Alcee Hastings, the hearings before the Special Committee of judges and with Hastings present was brief, “[o]nly seven witnesses were presented, *although the investigation had cast a much wider net*, and only three of these had a direct impact on the committee’s work.” *Id.* at 94 (emphasis added). Conducting the investigation this way minimized the number of witnesses forced to participate in the formal hearing process.

²³⁴ The unnamed attorney/witness discussed *supra* at notes 142 to 145 specifically recommended this approach, as he believes it might have spared him the professional setbacks he has suffered as a result of his testimony.

misconduct matters.²³⁵ The judiciary must, in any case, demonstrate its sensitivity to attorneys' interest in retaining the goodwill they have established with the court and the bar. Lawyer confidence in that sensitivity is essential if attorney cooperation is to be secured in addressing judicial misconduct concerns in the future.

CONCLUSION

While the various examinations of the federal judicial discipline process have been, for the most part, thorough and well-conceived, the problem of the reluctant attorney complainant has been largely neglected. Neither the Kastenmeier Commission nor the Breyer Committee came up with an effective solution. Attorneys fear any involvement in the judicial disciplinary process, and with good reason. Moreover, any venture to initiate judicial misconduct proceedings is fraught with ethical, professional, and practical peril for an attorney in practice before that court.

Until we acknowledge this problem—that Category 3 misconduct is out there, and that it remains largely unaddressed—we should take little comfort in the reassuring conclusions of the Breyer Committee.²³⁶ Certainly some additional attention can and should be devoted to assessing the extent of Category 3 misconduct; while such data may not be easy to come by, some type of anonymous survey of the bar should be possible. But given the ample evidence that *some* unreported misconduct exists out there, some action should be taken now. We can begin with the proverbial step 1—admitting we have a problem—and consider how best to get the Category 3 misconduct into the system, so it can be addressed effectively and meaningfully. A good start would be to restore language to the New Misconduct Rules explicitly stating that anonymous complaints can and will be considered. The chief judges then need to genuinely consider them and

²³⁵ See, e.g., *McBryde v. Committee to Review Circuit Council Conduct and Disability*, 264 F.3d 52, 54 (D.C. Cir. 2001) (The judicial council ordered, among other things, that Judge McBryde “not be allowed for three years to preside over cases involving any of 23 lawyers who had participated in the investigation.”); see also the judicial misconduct proceedings against Judge Jon P. McCalla in the Western District of Tennessee, who is prohibited from hearing cases involving certain lawyers “because of past conflicts”). Hellman, *supra* note 63 at 239.

²³⁶ See *supra*, note 47 and accompanying text (“Overall, they suggested that the judiciary was doing a good job.”). As noted *supra*, the Breyer Committee essentially concluded that that Category 1 misconduct is being handled very well and that Category 2 misconduct can be handled well with a few adjustments. It did not address, except in a superficial way, the problem of Category 3 misconduct, which is being missed by the system entirely. See *supra*, text accompanying notes 71-77.

respond when the allegations are serious.²³⁷ And finally, the judicial councils and special investigative committees need to respond to such allegations with sensitivity, not only for the integrity of the judiciary and the rights of an accused judge—as they do now—but also for the rights and interests of attorneys, who can be seriously damaged by making complaints or cooperating with such investigations.

The attorney complainant will always be a reluctant tattletale. But a judicial misconduct system that respects and protects the attorney complainant is essential if there is to be reasonable hope of lawyer participation or cooperation. Absent such participation, the federal judicial misconduct system will continue to devote the bulk of its energies to processing frivolous and merits-related complaints from pro se litigants and prisoners, as it does now,²³⁸ in blissful denial of the genuine misconduct that attorneys regularly witness and endure, but are reluctant to report. The third branch of government, and more particularly the society it serves, deserves better than that.

²³⁷ Here, the word “serious” should be interpreted to mean both the gravity of the charges and the credibility of the charges.

²³⁸ Breyer, *supra* note 1 at 22.