

An Examination of the Judicial Conduct and Disability System

Statement of Arthur D. Hellman – Executive Summary

The system of decentralized self-regulation established by Congress in the 1980 Act is sound and does not require fundamental restructuring. At the same time, the experience of the past few years has revealed gaps and deficiencies in the regulatory regime that warrant attention. Some may be appropriately dealt with through revision of the Rules promulgated by the judiciary in 2008, but others should be addressed by Congress through changes to Title 28.

In my statement I suggest statutory amendments dealing with three aspects of the system: transparency and disclosure; disqualification of judges; and review of orders issued by chief judges and judicial councils. In each of these areas, the judiciary has promulgated rules that reflect sound policy but are in conflict or tension with statutory language. Moreover, these elements are more than procedural; they determine who makes the decisions and how much information the public receives.

Disclosure and Transparency

A system of self-regulation can work only if it is transparent to the public. Unfortunately, from the beginning, the administration of the Act has been characterized by a lack of transparency and a bias against disclosure. The 2008 Rules take some small steps in the direction of making the process more visible, but they do not go far enough. Moreover, the statute itself bears some of the blame because of its stringent confidentiality provision. Suggestions:

1. Amend § 360 to authorize limited disclosure of pending misconduct proceedings “[w]hen necessary or appropriate to maintain public confidence in the federal judiciary’s ability to redress misconduct or disability.” This proposal codifies and builds upon a novel provision in the 2008 Rules that furnishes a valuable tool to chief judges, particularly in the “high-visibility cases” that shape public perceptions of the judiciary’s administration of the 1980 Act. Codification is especially desirable because the 2008 Rule is arguably inconsistent with current language in Chapter 16 that imposes a strict requirement of confidentiality.

2. Amend § 360(b) to require that final orders issued by chief judges and judicial councils under the 1980 Act be made available to the public by posting on the circuit’s public website. Currently, only six circuits follow this practice; in other circuits, orders are generally available only through the court of appeals clerk’s office.

Disqualification of Judges

Title 28 currently provides only limited guidance on when judges should recuse themselves from participating in misconduct proceedings. The 2008 Rules fill some of the gaps, but one provision appears to be inconsistent with the statute, and others do not adequately protect against conflicts of interest. Suggestions:

1. Adopt, as the general rule for misconduct proceedings, the objective standard set forth in 28 U.S.C. § 455, which governs disqualification in litigation: “A judge shall disqualify himself or herself in any proceeding under this chapter in which the judge’s impartiality might reasonably be questioned.” This would replace the subjective discretionary standard adopted by the 2008 Rules.

2. Amend § 359 to clarify that a judge who is the subject of an investigation by a special committee may participate in judicial council and Judicial Conference activities that do not involve misconduct proceedings. This would codify a provision of the 2008 Rules that embodies sound policy but appears to be inconsistent with the 1980 Act.

3. Amend § 359 to disqualify the circuit chief judge from considering complaints under the Act while he or she is the subject of an investigation by a special committee. As the commentary to the 2008 Rules states in a related context, “participation in proceedings arising under the Act ... by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings.”

Review of Chief Judge and Judicial Council Orders

Chapter 16 contains two – and only two – provisions authorizing review of orders issued by chief judges and judicial councils in misconduct proceedings. The chapter also includes two provisions *precluding* review. Experience has revealed several flaws in the system of review created by these provisions and their interpretation by the judiciary. The suggested amendments to § 357 would (among other things):

1. Codify the judiciary’s pre-2008 rule stating that when the judicial council of the circuit reviews a final order of the chief judge, the chief judge who entered the order shall not participate in the council’s consideration of the petition for review. This rule assures that the one level of review that is available as of right to all dissatisfied complainants and judges is truly independent both in reality and in appearance. It also serves to encourage the chief judge to make sure that all relevant information is included in the formal written record. The 2008 Rules, contrary to the Illustrative Rules, allow the chief judge to participate in judicial council review of his or her final orders.

2. Authorize limited review by the Judicial Conference Committee on Judicial Conduct and Disability (Conduct Committee) of judicial council orders affirming final orders of the chief judge. This would codify and build upon two novel provisions in the 2008 Rules that appear to be in conflict with the current statutory language.

3. Create a channel of review for complaints that have been “identified” by the chief judge. This provision fills a serious gap in the current statutory arrangements: when a misconduct proceeding is initiated by action of the chief judge rather than by the filing of a complaint, there is no provision for review of final orders of the chief judge or the judicial council (unless the person aggrieved by the order is the judge who is the subject of the proceeding). The gap is especially troubling because “identified” complaints often involve “high-visibility cases” like those discussed by the Breyer Committee.