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THE RELUCTANT TATTLETALE: CLOSING THE GAP IN FEDERAL JUDICIAL DISCIPLINE

DAVID PIMENTEL*

TABLE OF CONTENTS

INTRODUCTION	910
I. HISTORY OF JUDICIAL DISCIPLINE IN THE FEDERAL COURTS	913
A. <i>The 1980 Act</i>	914
B. <i>Impeachments of the 1980s</i>	916
C. <i>The 1990 Amendments to the Act</i>	916
D. <i>Kastenmeier Commission</i>	918
E. <i>Breyer Committee</i>	919
II. UNREPORTED MISCONDUCT.....	920
A. <i>Three Categories of Judicial Misconduct</i>	921
1. Category 1 Misconduct – Formally-Filed Complaints.....	921
2. Category 2 Misconduct – Issues that Come to the Chief Judge’s Attention Through Other Means	921
3. Category 3 Misconduct – Misconduct Issues that the Chief Judge Never Learns About.....	922
B. <i>Is Category 3 Misconduct a Serious Problem?</i>	922
III. WHY JUDICIAL MISCONDUCT GOES UNREPORTED.....	927
A. <i>The Problem of Attorney Incentives</i>	928
1. The Value of an Attorney’s Goodwill with the Court.....	928
2. The Loss of That Goodwill when a Complaint Is Filed.....	929
3. Incentives to Raise Issues of Judicial Misconduct	931
4. Disincentives to Raise Issues of Judicial Misconduct.....	933
B. <i>Conflicting Ethical Duties</i>	936
1. Duty to Place the Client’s Interests First.....	936
2. Duty Not to Disparage the Court	938

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IV. SOLVING THE PROBLEM OF THE RELUCTANT ATTORNEY

COMPLAINANT.....	941
A. <i>Bar Committees</i>	941
B. <i>Anonymous Complaints</i>	945
1. <i>Anonymous Complaints as a Means of Raising Misconduct Matters from Category 3 to Category 2</i>	946
2. <i>Obscuring the Anonymous Complaint Option</i>	948
3. <i>Problems with Anonymous Complaints</i>	950
a. <i>There Ain't No Such Thing as an Anonymous Complaint</i>	951
b. <i>Problems of the Right to Confront Accusers</i>	951
c. <i>The Influx of Anonymous Complaints May Overwhelm the System</i>	953
d. <i>Attorney Witnesses Will Still Suffer, Even if the Complainant is Protected</i>	954
CONCLUSION	957

INTRODUCTION

It is a rare thing when an attorney files a complaint of judicial misconduct against a federal judge; only 1 out of every 83,000 licensed attorneys in the United States 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.

1. See JUDICIAL CONDUCT & DISABILITY ACT STUDY COMM., IMPLEMENTATION OF THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980: A REPORT TO THE CHIEF JUSTICE (2006) [hereinafter BREYER COMM. REPORT], reprinted in 239 F.R.D. 116, 150, 152 (2006) (noting that of the roughly 700 complaints of misconduct filed each year against federal judges (2,108 complaints were filed in the three year period of 2001–2003), only two percent of them (roughly fourteen per year) are filed by attorneys). With well over one million lawyers in the United States (the American Bar Association estimates the number was 1,162,124 in 2008), this figure suggests that .0012% of the lawyers in America file complaints against federal judges each year, and that assumes that each attorney complaint comes from a different attorney. See A.B.A. MKT. RESEARCH DEP'T, NATIONAL LAWYER POPULATION BY STATE (2008), http://www.abanet.org/marketresearch/2008_NATL_LAWYER_by_State.pdf. Of course, if there are repeat filers in this group, 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) (“[T]he 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.”).

Often, the gripes have nothing to do with ethical lapses. Attorneys will complain about one judge who is a stickler on the rules or is unwilling to make an exception on procedure or another judge who is too quick or too slow to grant continuances. But mixed in, one is likely to hear complaints that may rise to the level of actionable misconduct.

Such 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 making sexual advances on court staff.⁵ More common, however, are the accounts of behavior that only attorneys would be fully aware of: judges' less visible, less public, and perhaps far more common ethical lapses, such as playing favorites, evincing racial or gender insensitivity or bias, or behaving abusively or arbitrarily from the bench. However, as a rule, these attorneys do not take the additional step of filing complaints against the judges,⁶ and whatever misconduct they may recount to each other rarely finds its way into the judicial disciplinary process.

The effectiveness of the judicial disciplinary process has been subjected to criticism and scrutiny from time to time over the years. Most recently in 2004,

3. See, e.g., Scott Glover, *9th Circuit's Chief Judge Posted Sexually Explicit Matter on His Website*, L.A. TIMES, June 11, 2008, <http://articles.latimes.com/2008/jun/11/local/me-kozinski12> ("Alex Kozinski, chief judge of the 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 23, 2008, at 8, <http://www.law.com/jsp/article.jsp?id=1202422429431>; see also Debra Cassens Weiss, *Misconduct Findings Against Federal Judge Forwarded to House*, A.B.A. J., June 20, 2008, http://www.abajournal.com/news/misconduct_findings_against_federal_judge_forwarded_to_house/ ("A[n] [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 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, <http://galvestondailynews.com/story.lasso?ewcd=efc95625a2bf886b&-session=TheDailyNews:4B5C49B0118801B6C9qipOA16A6F> ("[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 four month leave of absence from his duties on the bench. *Id.*

6. See *supra* note 1 and accompanying text.

Chief Justice William H. Rehnquist, prompted by congressional complaints about the judiciary's administration of the federal judicial misconduct regime,⁷ appointed a special committee chaired by Justice Stephen Breyer.⁸ The Breyer Committee, which reported in late 2006, conducted a thorough-going inquiry into the judiciary's handling of the misconduct complaint process and 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; the most serious deficiency in the judicial disciplinary process may lie outside the focus of the Breyer Committee's inquiry, in the judicial misconduct that attorneys are unwilling to report, even informally, and which therefore goes unacknowledged and unaddressed.¹⁰

The problem of unreported 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 to do so and ample reason for them to keep quiet. Indeed, attorneys involved in the judicial misconduct process, even those who are involuntarily involved as subpoenaed witnesses, can suffer severe professional repercussions. The judiciary must confront and address this problem, by finding ways to elicit such complaints and to protect the attorneys involved, before it can defend the present system as sound.

7. 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) ("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 Press Release, U.S. House of Representatives Comm. on the Judiciary, Sensenbrenner Remarks Before the U.S. Judicial Conference Regarding Congressional Oversight Responsibility of the Judiciary (Mar. 16, 2004) [hereinafter Rep. Sensenbrenner Remarks], available at <http://judiciary.house.gov/legacy/news031604.htm>)).

8. BREYER COMM. REPORT, *supra* note 1, at 119 (describing the Committee's charge).

9. *See id.* at 123–26 (listing the findings and recommendations of the Committee).

10. The Breyer Committee devoted considerable attention to misconduct that is never included in a formal misconduct complaint, but nonetheless comes to the attention of the chief circuit judge. *See infra* Part II.2. However, the Committee gave scant consideration to potential misconduct that never comes to the chief judge's attention. *See infra* notes 82–94 and accompanying text.

11. The problem was "largely," 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. *See infra* notes 81–93 and accompanying text.

12. Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375, 429–30 (1993) ("One [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: Informally Addressing Instances of Judicial Misconduct*, JUDGES' J., Winter 2005, at 16, 20 (2005) (noting that chief judges may not "even know the extent of problems unless lawyers and court staff *overcome their fear* and speak up") (emphasis added).

At the very least, the judiciary can do much more within the current structure to encourage and facilitate anonymous complaints. Unfortunately, the Judicial Conference's response to the Breyer Committee report discourages anonymous reporting and obscures its availability more than ever, which is quite inconsistent with the spirit of that report and the substance of other changes prompted by its findings.¹³ Presently, the attorneys who practice before the federal bench, arguably those best suited to recognize judicial misconduct when they see it, 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 the best hope for obtaining attorney input and participation in the misconduct process, and for that reason, the system will be far better served if it welcomes them. The facilitation of anonymous complaints 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 1906 in remarks to the American Bar Association entitled "On Causes of Popular Dissatisfaction with the Administration of Justice."¹⁶ Dissatisfaction with the courts, which persists over one hundred years later, perhaps in even greater measure,¹⁷ has much to do with the public's confidence in the judiciary. That

13. Under the current complaint process, a potential attorney-complainant is asked to provide his or her contact information and sign the complaint. JUDICIAL CONFERENCE OF THE UNITED STATES, RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS R. 6(d) (2008) [hereinafter NEW MISCONDUCT RULES], available at http://www.uscourts.gov/library/judicialmisconduct/jud_conduct_and_disability_308_app_B_rev.pdf. These rules, which replaced the previous "Illustrative Rules," are binding for the federal judiciary nationwide and provide greater detail for the judicial complaint process. See *infra* text accompanying note 61. Rule 6(d) seemingly allows for anonymous complaints to be handled under Rule 5(b). See *infra* Part IV.B

14. *Herman v. Mercantile Bank, N.A.*, 143 F.3d 419, 423 n.4 (8th Cir. 1998) (referencing the "[l]egend related to the 'Three Wise Monkeys' carved over [the] door of Sacred Stable, Nikko, Japan"). With respect to judicial misconduct, attorneys at least "speak no evil" in the formal complaint process.

15. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 40 AM. L. REV. 729, 730 (1906) (remarks to the American Bar Association on August 29, 1906).

16. *Id.*

17. Sandra Day O'Connor, *Fair and Independent Courts: Remarks by Justice O'Connor*, 95 GEO. L.J. 897, 897 (2007) (quoting Roscoe Pound in remarks at a 2007 conference on the state of the judiciary and opining "that Pound's words apply with at least equal force today as they did in 1906").

public confidence, in turn, follows from fundamental principles of judicial accountability.

The years since 1906 have witnessed recurring criticisms of the federal judiciary regarding judicial conduct and accountability.¹⁸ Concerns in the late 1970s led to the adoption of the first legislation designed to heighten judicial accountability.¹⁹ Ten years later, further concerns prompted the appointment of a three-branch commission to examine that legislation's effectiveness.²⁰ Continuing concerns in 2004 prompted this latest inquiry, which culminated with the production of a high profile report that was 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, no means for disciplining federal judges existed short of the extreme constitutional remedy of impeachment.²² As might be expected in the post-Watergate era, calls for accountability of public officials increased in the 1970s, and Congress responded with a variety of proposals for policing misconduct in the Third Branch.²³

After considering and debating the various proposals, Congress ultimately enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 ("1980 Act"),²⁴ adopting, for the first time, a procedure by which

18. See, e.g., Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 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."); Carol T. Rieger, *The Judicial Councils Reform and Judicial Conduct 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'"); 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."); Rep. Sensenbrenner Remarks, *supra* note 7. Earlier history of criticism and congressional initiatives to more vigorously enforce judicial accountability, including Senator Tydings' efforts beginning in the 1960s, is 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 & nn. 24-29 (1982).

19. See *infra* Part I.A.

20. See *infra* Part I.D.

21. See *infra* Part I.E.

22. Hellman, *supra* note 7, at 326.

23. See Burbank, *supra* note 18, at 291-308 (presenting a good overview of the various competing proposals that ultimately led to the adoption of the 1980 Act).

24. Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458, 94 Stat. 2035 [hereinafter 1980 Act] (codified as amended at 28 U.S.C. § 372(c) (1988)), amended by Judicial Discipline and Removal Act of 1990, Pub. L. No. 101-650, § 402(a), 104 Stat. 5122, 5122 (codified as amended at 28 U.S.C. § 372(c)(1) (2000)), superseded by Judicial Improvements Act of 2002, Pub. L. No. 107-273, ch. 16, 116 Stat. 1848, 1855

federal judges may be disciplined short of impeachment.²⁵ In the end, the process was entrusted to the judiciary, based very much on concerns for separation of powers and institutional judicial independence.²⁶ Nonetheless, Congress promised to exercise continuing oversight over the entire judicial discipline regime.²⁷

The details of the 1980 Act are thoroughly summarized elsewhere.²⁸ For the purposes of this article, a few basics will suffice. The process begins when “any person” files a complaint alleging conduct “prejudicial to the effective and expeditious administration of the business of the courts” with the clerk of the United States court of appeals in the circuit where the judge sits.²⁹ 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 conduct fact-finding on the complaint’s allegations.³⁰ The judicial council of the circuit then reviews the findings and recommendations of the special investigative committee to determine whether discipline is warranted.³¹

The details of the 1980 Act’s implementation were the subject of rules drafted by each circuit.³² The Judicial Conference of the United States (“JCUS”) approved “Illustrative Rules” in 1986, amended periodically thereafter, for the handling of misconduct complaints, but these “model” rules were merely offered as a suggestion to the various circuits.³³ While most circuits adopted

(codified at 28 U.S.C. §§ 351–364 (2006)). It is important to note that the statute was recodified by the Judicial Improvements Act of 2002 and moved to its current section in the United States Code.

25. Hellman, *supra* note 7, at 326–27 (setting forth a brief history of the 1980 Act’s enactment).

26. S. REP. NO. 96-362, at 7 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4321.

27. The legislative history suggests that Congress would exercise “vigorous oversight” and would leave open the possibility of further amendments that were 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, *inter alia*, 126 CONG. REC. S13,858, S13,861 (daily ed. Sept. 30, 1980) (statement of Sen. DeConcini); 126 CONG. REC. H8788 (daily ed. Sept. 15, 1980) (statement of Rep. Butler)); *Id.* at 307–08 & nn. 100–06 (discussing Congressional oversight).

28. *See, e.g.*, Hellman, *supra* note 7, at 330–32.

29. 28 U.S.C. § 372(c)(1) (1988). Of course, complaints “directly related to the merits of a decision or procedural ruling” are excluded. 28 U.S.C. § 372(c)(2). The only recourse for a complaint based on the merits of a judge’s ruling in a case is reconsideration or appeal under the regular judicial process.

30. 28 U.S.C. § 372(c)(4).

31. 28 U.S.C. § 372(c)(5)–(6).

32. Hellman, *supra* note 7, at 327.

33. JUDICIAL CONFERENCE OF THE UNITED STATES, ILLUSTRATIVE RULES GOVERNING COMPLAINTS OF JUDICIAL MISCONDUCT AND DISABILITY (2000) (on file at the Administrative Office of the U.S. Courts and with the Tennessee Law Review) [hereinafter ILLUSTRATIVE RULES], *superseded by* the NEW MISCONDUCT RULES (2008); Hellman, *supra* note 7, at 327.

rules that closely tracked the Illustrative Rules, the rulemaking power was vested entirely in the respective circuit councils.³⁴

B. *Impeachments of the 1980s*

After fifty years without a judicial impeachment, the 1980s saw three federal judges impeached and removed from the bench.³⁵ Two of the impeached 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.³⁶ Judge Alcee Hastings of Florida was acquitted in his criminal trial but was removed nonetheless, in part for lying and fabricating evidence during the trial itself.³⁷

The 1980 Act played a role in two of these proceedings, but it certainly did not explain the sudden spate of impeachments: "The act was invoked actively in one case, [Hastings,] passively in another, [Nixon,] and ignored in the third[, Claiborne]."³⁸ Nonetheless, for anyone concerned about judicial conduct, this string of impeachments was troubling and emphasized the need to police judicial conduct more vigilantly in the future.³⁹

C. *The 1990 Amendments to the Act*

One of the most conspicuous embarrassments for the 1980 Act was that misconduct complaints were never filed, and the Act's provisions were never invoked, in certain high-profile cases, including cases involving judges who were convicted of crimes and ultimately impeached.⁴⁰ The Act did not, on its face, provide the chief judge jurisdiction to invoke the provisions of the 1980 Act absent a properly-filed complaint.⁴¹ Accordingly, when serious problems

34. Hellman, *supra* note 7, at 333-34.

35. MARY L. VOLCANSEK, JUDICIAL IMPEACHMENT: NONE CALLED FOR JUSTICE 1 (1993).

36. *Id.* at 48-62, 140-41, 151.

37. *Id.* at 102, 115-16.

38. *Id.* at 14.

39. See NAT'L COMM'N ON JUDICIAL DISCIPLINE & REMOVAL, REPORT OF THE NAT'L COMM'N ON JUDICIAL DISCIPLINE & REMOVAL (1993) [hereinafter KASTENMEIER COMM'N REPORT], reprinted in 152 F.R.D. 265, 273 (1993).

40. Robert W. Kastenmeier & Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 KY. L.J. 763, 781 & n. 83 (1988) ("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 *Conduct of Harry E. Claiborne, U.S. District Judge, District of Nevada: Hearing Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the H. Comm. on the Judiciary*, 99th Cong. 31 (1986) (statement of Hon. Charles E. Wiggins, Circuit Judge, U.S. Court of Appeals for the Ninth Circuit) (stating that "there was general perception that the act was triggered by a citizen complaint"))).

41. 1980 Act, 28 U.S.C. § 372(c) (1988).

with judicial conduct emerged, even when judges were criminally prosecuted, some chief circuit judges found themselves awaiting the filing of a formal complaint and feeling powerless to act until they received one.⁴²

In 1990, Congress amended the 1980 Act to remedy this weakness by specifically granting chief circuit judges the power to “identify” a complaint based on information that comes to his or her attention.⁴³ The 1990 amendment gave chief judges the power to act on those matters they learn of, often the most obvious and notorious cases, without awaiting the filing of a complaint.⁴⁴ However, it did nothing to remedy the deficiencies in reporting actionable misconduct. Those most likely to be aware of judicial misconduct, notably the attorneys practicing before the federal courts and the court staff, simply would not file complaints.⁴⁵

42. See VOLCANSEK, *supra* note 35, at 83 (discussing the situation in which “[l]ess than one month after the trial [acquitting Hastings], Chief Judge John Godbold of the Eleventh Circuit . . . 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. That night over dinner Judge Terrell Hodges of Tampa confided to Anthony Alaimo, his friend and fellow judge on the council, that he would file a grievance 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.

43. Judicial Discipline and Removal Act of 1990, Pub. L. No. 101-650, § 402(a), 104 Stat. 5122, 5122 (codified as amended at 28 U.S.C. § 372(c)(1) (2000) (“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 therefore, identify a complaint for purposes of this subsection and thereby dispense with filing of a written complaint.”)), *superseded by* Judicial Improvements Act of 2002, Pub. L. No. 107-273, ch. 16, 116 Stat. 1848, 1855 (codified at 28 U.S.C. § 351–364 (2006)); see also Geyh, *supra* note 18, at 258–59 (discussing the situations in which a chief circuit judge might file a formal complaint).

44. 28 U.S.C. § 402(a).

45. See BREYER COMM. REPORT, *supra* note 1, at 150, 152. Seventh Circuit Executive Collins Fitzpatrick squarely raised this concern 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, 282 (1988) (footnote omitted). One recent article in the Business Crimes Bulletin discusses the Breyer Committee’s interaction with the attorney’s internal 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 judge’s wrath and perhaps prejudicing your case?” Justin A. Thornton, *Complaints of Judicial Misconduct*, 14 BUS. CRIMES BULL. 3, 3 (2007). Thornton 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.*

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 future judicial impeachments, an assortment of reform proposals emerged in Congress in and just before 1990, mostly constitutional amendments.⁴⁶ While none of these proposals got very far in the legislative process, Congress did agree that the judicial impeachment issue needed a closer look. Accordingly, it included language with its 1990 amendments to the 1980 Act creating a "National Commission on Judicial Discipline and Removal" to examine the issues.⁴⁷ The Commission would include representatives from all three branches of government, law school faculties, and private law practice.⁴⁸ Former Congressman Robert Kastenmeier, who had been involved with the impeachments of the 1980s as a member of the House Judiciary Committee, was tapped to chair the Commission, which became known colloquially as the "Kastenmeier Commission."⁴⁹ Its charge was:

[F]irst . . . to investigate and study problems and issues related to the discipline and removal from office of life-tenured federal judges[, s]econd, . . . to evaluate the advisability of proposing alternatives to current arrangements for responding to judicial discipline problems and issues[, and t]hird, . . . to submit . . . a report on its findings and recommendations.⁵⁰

Among other things, the Kastenmeier Commission closely evaluated the impact of the 1980 Act and how it was 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 of self-regulation.⁵¹ The Commission did express concern regarding attorneys' reluctance to file complaints, however, 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 of adverse consequences to themselves or their clients once their identities are known."⁵²

46. See KASTENMEIER COMM'N REPORT, *supra* note 39, at 274-75.

47. 28 U.S.C. § 372.

48. See KASTENMEIER COMM'N REPORT, *supra* note 39, at 267.

49. *Id.*

50. *Id.* at 275.

51. *Id.* at 362 ("The system of formal and informal approaches to problems of misconduct and disability within the federal judicial branch is working reasonably well."); Hellman, *supra* note 7, at 327.

52. KASTENMEIER COMM'N REPORT, *supra* note 39, at 345.

E. Breyer Committee

Unlike the Kastenmeier Commission, which included representatives of 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.”⁵³ 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.”⁵⁴ Recognizing this as a narrow question, the Breyer Committee did not consider the desirability of statutory amendments or otherwise examine alternative approaches as the Kastenmeier Commission had done.⁵⁵ Rather, the Breyer Committee limited its inquiry to an examination of the actual implementation of the present Act, mostly by reviewing the complaints submitted and critically analyzing the judiciary’s handling of each.⁵⁶

The Breyer Committee concluded that the judiciary had “properly implemented the [1980] Act in respect to the vast majority of the complaints filed,”⁵⁷ but that the “high-visibility cases”—those that attracted the attention of the media or Congress—were mishandled almost thirty percent of the time, an error rate deemed “far too high.”⁵⁸ Accordingly, the Committee made a number of recommendations, including more aggressive and transparent action on publicly known judicial misconduct matters as well as adoption of mandatory and uniform national rules for handling misconduct complaints.⁵⁹

Following Breyer Committee recommendations, the relevant Judicial Conference committee drew up uniform national rules to replace the merely advisory “Illustrative Rules.”⁶⁰ These new rules, which embody many of the Breyer Committee’s other recommendations, were circulated for comment in December 2007 and were formally adopted by the JCUS in March 2008.⁶¹

53. BREYER COMM. REPORT, *supra* note 1, at 119 (explaining that Chief Justice Rehnquist “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”).

54. *Id.*

55. *Id.* at 120 (“The question is a narrow one. It does not ask us to rewrite the Act, . . . consider revision of the ethical rules governing judicial misconduct, [or] 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.”).

56. *Id.* (“It does require us to undertake a practical task, namely to examine the actual implementation of the Act in practice and to provide the Chief Justice with our conclusions and recommendations for improvement.”).

57. *Id.* at 122.

58. *Id.* at 123.

59. *Id.*

60. *Id.* at 125, 150–51.

61. Hellman, *supra* note 7, at 329–30 (outlining the proposals from the Judicial Conference’s Committee on Judicial Conduct and Disability and discussing the adoption of the

However, because of the limited scope of the Breyer Committee's inquiry, its report focused chiefly upon formally-filed complaints and notorious cases. The Committee paid little attention to the problem of reluctant complainants or to potential misconduct that goes unreported, either formally or informally.

II. UNREPORTED MISCONDUCT

The reluctance of attorneys to complain about judicial misconduct appears throughout the history of judicial ethics. John T. Noonan, Jr., a judge on the U.S. Court of Appeals for the Ninth Circuit, described one such example in his book on bribery:

Albert W. Johnson . . . had his own career of unrequited crime. . . . [His] selection [as a federal district 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. . . . In 1933 Attorney General Homer Cummings announced a federal inquiry . . . 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.⁶²

Judge Noonan has expressed his own surprise that so much time passed before an attorney came forward to complain about Johnson's outrageous conduct or to demand accountability,⁶³ but, then again, attorney reluctance has very deep roots.⁶⁴

Indeed, the introduction of a formal complaint process in the 1980 Act did little to overcome that reluctance. As early as 1990, Congress felt the need to address the conspicuous underreporting of judicial misconduct;⁶⁵ even the most notorious conduct—offenses that were grounds for impeachment—had gone unreported through the newly-established judicial misconduct complaint process.⁶⁶ The 1990 amendments did not address the problem of reluctant complainants directly, as already discussed, but instead created a shortcut by

new rules).

62. JOHN T. NOONAN, JR., *BRIBES* 572–73 (1984) (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.

63. Telephone Interview with John T. Noonan, Jr., Circuit Judge, U.S. Court of Appeals for the Ninth Circuit (July 28, 2008) (on file with the Tennessee Law Review). Of course, 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.

64. *See infra* Part III.

65. *See supra* Part I.C.

66. *See supra* notes 40–45 and accompanying text. However, the lack of formal complaints is not particularly surprising. Potential complainants who read in the newspaper that a federal judge has been charged with a felony are unlikely to feel that it would be necessary or even helpful to file a complaint alleging that the felony may constitute judicial misconduct.

which a chief judge, *if already aware of the misconduct*, could act on his or her own initiative and “identify” a complaint.⁶⁷

A. Three Categories of Judicial Misconduct

The 1990 innovation effectively distinguished three separate categories for judicial misconduct matters that are relevant for considering issues of judicial discipline.

1. Category 1 Misconduct – Formally-Filed Complaints

First are those misconduct incidents that are the subject of formally-filed complaints. Such incidents are easily documented, and the Breyer Committee devoted the bulk of its attention to evaluating how these were handled and whether they were handled properly.⁶⁸ We can call this Category 1 misconduct.

2. Category 2 Misconduct – Issues that Come to the Chief Judge’s Attention Through Other Means

Second are misconduct incidents that never generate a formally-filed complaint but are instead brought to, or otherwise come to, the attention of the chief circuit judge through informal means.⁶⁹ For these incidents, the post-1990 statute empowers the chief judge to “identify” a complaint and thereby dispense with the formal filing requirement.⁷⁰

Once a chief circuit judge identifies a complaint, the full mechanisms for investigating and adjudicating the alleged misconduct are triggered.⁷¹ The Breyer Committee examined a few of these instances, particularly the high-publicity cases that garnered significant press attention.⁷² The publicity surrounding these incidents ensured that chief circuit judges were aware of the situations, and the Breyer Committee specifically urged chief judges to quickly identify complaints for these incidents.⁷³

67. Judicial Discipline and Removal Act of 1990, 28 U.S.C. § 372(c)(1) (2000).

68. See BREYER COMM. REPORT, *supra* note 1, at 120–22 (describing the Committee’s method for choosing complaints and evaluating how they were handled).

69. See *supra* Part I.C. See generally Geyh, *supra* note 18 (detailing Category 2 misconduct reporting as an informal method of judicial discipline).

70. 28 U.S.C. § 372(c)(1); NEW MISCONDUCT RULES R.5 (2008).

71. See Arthur D. Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*, 69 U. PITT. L. REV. 189, 2115–16 (2007) [hereinafter Hellman, *A Peek Behind Closed Doors*] (providing an overview of the complaint procedures).

72. BREYER COMM. REPORT, *supra* note 1, at 173–74 (describing how the Committee classified complaints as high-publicity and how these complaints were reviewed).

73. *Id.* at 125 (“Review Committee members 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 . . .”).

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 are the misconduct incidents that never see the light of day. These incidents are never discovered, at least not by the chief circuit judge or anyone else willing or able to address them.⁷⁴ The Kastenmeier Commission gave this category of misconduct only limited attention,⁷⁵ and the Breyer Committee gave it even less.⁷⁶ This third specie of misconduct is the great unknown; we suspect it is there but do not know its magnitude. Misconduct that is never raised with or acknowledged by the judiciary can be referred to as Category 3 misconduct.

B. Is Category 3 Misconduct a Serious Problem?

In a recent conversation with Tom Willging, a key judiciary staff member on conduct and discipline issues at the Federal Judicial Center, 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.”⁷⁷ He was, however, quick to acknowledge that this gap in the system is something we can never be sure that we have addressed adequately.⁷⁸

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 probed.⁷⁹ The first area is conduct which does not rise to the level of judicial misconduct but needs to be corrected

74. Marcus, *supra* note 12, at 429 & n.180 (citing surveys conducted by the Justice Research Institute which show that chief judges believe that there are valid judicial misconduct complaints which go unfiled).

75. See KASTENMEIER COMM’N REPORT, *supra* note 39, at 345–46. Less than two pages of the entire 150 page report were dedicated to the disincentives for filing complaints and the accompanying problem that misconduct will be perceived by a potential complainant but remain entirely unaddressed. See *id.*

76. See BREYER COMM. REPORT, *supra* note 1, at 204–05. 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 from Tom Willging, Fed. Judicial Ctr., to David Pimentel, Assistant Professor, Fla. Coastal Sch. of Law (Aug. 6, 2008) (on file with the Tennessee Law Review).

77. Telephone Interview with Tom Willging, Fed. Judicial Ctr. (June 10, 2008).

78. *Id.*

79. BREYER COMM. REPORT, *supra* note 1, at 204–05.

anyway, such as bad manners or sarcasm.⁸⁰ The second area includes actions which appear to be misconduct but are actually merits-related and, therefore, beyond the scope of the 1980 Act.⁸¹ The third area is 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.⁸²

In this passage, the Breyer Committee acknowledged the problem of Category 3 misconduct but failed to acknowledge its seriousness. While noting that the district judges' colleagues are the last to know and that the responsibility for reporting misconduct falls on attorneys, this chief judge observes that "lawyers will come to me."⁸³ Certainly if and when attorneys *do* come to the chief judge on an informal basis, the problem can be appropriately addressed. Given the strength of attorney reluctance, however, it is hard to imagine that affected attorneys will be quick to approach the chief circuit judge.⁸⁴ Indeed, the Breyer Committee's response to this concern, or lack thereof,⁸⁵ 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.⁸⁶ Rather, the Committee focused

80. *Id.* at 204.

81. *Id.* (providing as a common example "judges' failure, typically inadvertent, to recuse in cases in which they may have even very minor stock ownership in one of the parties").

82. *Id.* at 204–05 (emphasis added). This is not an excerpt; rather, this quoted passage is the entirety of the Breyer Committee's description of the problem of attorney reluctance to file complaints.

83. *Id.* at 205.

84. Judges may perceive themselves to be far more approachable than attorneys perceive them to be. Undoubtedly, some attorneys who know the chief judge 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.

85. See *infra* Part IV.A.

86. It is not clear whether the Breyer Committee saw it as only a minor problem unworthy of serious attention, or whether the Committee saw it as a problem beyond the scope of its charge.

far more attention on the chief judges' response to Category 2 misconduct, giving relatively little attention to the need to uncover Category 3 incidents.⁸⁷

Because Category 3 misconduct is relatively unknown—be it elephant or mouse—and difficult to address,⁸⁸ this area of misconduct is convenient to ignore, and an uncharitable critic might accuse the federal judiciary of doing precisely that. The scant attention given to Category 3 misconduct in the Breyer Committee Report is particularly striking considering how painstakingly the Committee analyzed the handling of Category 1 and Category 2 misconduct, and the strength of its recommendations for addressing the deficiencies in these first two areas.

The Breyer Committee did not ignore Category 3 misconduct completely, however, and seems to concede that the problem is germane to the Committee's inquiry. The Committee's almost dismissive treatment of the problem suggests that the Breyer Committee saw Category 3 misconduct as a minor issue—a mouse⁸⁹—unworthy of the considerable time and resources that would be required to address it.⁹⁰ Accordingly, the Breyer Committee focused its energies elsewhere, on issues more clearly within the scope of its narrow mandate.

In contrast, the Kastenmeier Commission was given a much broader charge than the Breyer Committee: “[T]o 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.”⁹¹ Perhaps due to its broader focus or to its more generous time and resources, the Kastenmeier Commission paid more attention to the problem of Category 3 misconduct, suggesting that it is a serious and genuine concern. In particular, it drew upon studies conducted specifically for the Commission, demonstrating “a widely shared perception that some meritorious complaints are never filed” and

87. It is possible that many of the attorneys' grievances about judicial behavior involve merits-related conduct, which is not cognizable as misconduct under the statute. See BREYER COMM. REPORT, *supra* note 1, at 204. Of course, merits-related conduct cannot be fairly considered Category 3 Misconduct. To the extent that attorneys' reluctance to file complaints comes from their recognition that a 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.

88. See *infra* Part IV.

89. 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 Interview with Tom Willging, *supra* note 77; see also Telephone Interview with Bret Saxe, Office of the Gen. Counsel, Admin. Office of the U.S. Courts (June 24, 2008) (on file with the Tennessee Law Review); Email from Jeffrey Barr, Admin. Office of the U.S. Courts, to David Pimentel, Assistant Professor, Fla. Coastal Sch. of Law (July 30, 2008) (on file with the Tennessee Law Review) (“I believe category 3 misconduct is a mouse in any well-run circuit.”).

90. Willging draws this conclusion. Email from Tom Willging, Fed. Judicial Ctr., to David Pimentel, Assistant Professor, Fla. Coastal Sch. of Law (Aug. 8, 2008) (on file with the Tennessee Law Review).

91. See KASTENMEIER COMM'N REPORT, *supra* note 39 at 275.

“a widespread reluctance among members of the bar to file a complaint,” and made specific recommendations for addressing the problem.⁹² Nonetheless, the Commission devoted less than two pages of its over 400-page Report to the Category 3 misconduct problem and its proposed solution.⁹³ The Breyer Committee, in its passing reference to the problem, noted that the Kastenmeier Commission’s proposed solutions had not borne fruit, and contented itself with an endorsement of those earlier, largely unimplemented ideas.⁹⁴

The fact that we can never be sure of the extent of Category 3 misconduct, however, does not mean that we can or should assume it away. Quite the contrary, there are compelling reasons to believe that Category 3 misconduct exists and is substantial. Chief judges themselves recognize that most genuine judicial misconduct never finds its way into a formal complaint.⁹⁵ 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”⁹⁶ One judge observed, “In my experience here, the most serious allegations of misconduct never hit the complaint process.”⁹⁷ Of course, the judges can only comment on the misconduct that they are aware of (i.e., misconduct in Category 1 or 2). Unfortunately, if the most serious instances of misconduct come to the chief judges’ attention outside of the formal process, then we know we lack an effective mechanism for alerting chief judges to such problems, and we can have little confidence that the chief judges are always getting this information.⁹⁸

92. *Id.* at 345.

93. *See infra* Part IV (discussing proposed solutions to the problem).

94. *See* discussion *infra* Part IV.A.

95. Geyh, *supra* note 18, at 256–59.

96. *Id.* at 259.

97. 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); Geyh, *supra* note 18, at 256. Of course, these statements were made in the context of asserting how *informal* methods can be used to address judicial misconduct, and the judges making those comments may believe that they are, in fact, aware of almost all misconduct that happens. Nonetheless, that does not diminish the fact that the formal complaint process misses many instances of misconduct, and that the integrity of the system depends heavily on these informal communications.

98. *See supra* notes 69 and 92. It is clear that some chief judges and court staff work hard at opening the door to this type of informal communication. The Seventh Circuit, through statements of its 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. For example, “Chief Judge Frank Easterbrook, who presides over the 7th U.S. Circuit Court of Appeals, asked lawyers and judges to be on the lookout for aging, cranky, deteriorating judges who might need a call from the top judicial officer in the circuit.” Lynne Marek, *An All-Points-Bulletin: Be on the Lookout for Aging, Cranky Judges*, NAT’L L.J., May 21, 2008, <http://www.law.com/jsp/article.jsp?id=1202421574442>. 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

Chief judges have also recognized that they are not hearing about all misconduct and that they will not get this information unless attorneys can be persuaded to participate in the process. Their frustration is evident in the comments of chief circuit judges: (1) “[T]he bar knows the most about misconduct; there must be some way to tap into that knowledge”;⁹⁹ and (2) “I wish there were a vehicle by which lawyers could better air their grievances, without the concern or fear of retaliation.”¹⁰⁰ Long-time circuit executive Collins Fitzpatrick, who has extensive experience with the 1980 Act, has expressed his concern that chief judges may not “even know the extent of problems unless lawyers and court staff overcome their fear and speak up.”¹⁰¹

There is also reason to believe that sexual misconduct may be more prevalent than is reflected in Category 1 and Category 2 reporting. In a particularly thorough and probing background study for the Kastenmeier Commission, Tom 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.”¹⁰² Obviously, this chief judge was aware of some sexual misconduct, classified as Category 2 misconduct, but this chief judge appears to have the impression that more unreported sexual misconduct is occurring. This concern was confirmed in the Kastenmeier Commission hearings. Barr and Willging point out that “[t]estimony 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.”¹⁰³

While these comments strongly suggest that *some* Category 3 misconduct is taking place, the comments do not quantify the suspicion. Opinions vary widely on the “elephant v. mouse” question. Most judges and judiciary staff appear to adhere to the mouse hypothesis, convinced that word spreads about these types of problems.¹⁰⁴ Whether word *does* get around to the chief circuit judge—and whether we can build a judicial discipline system on the assumption that it

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.

99. Barr & Willging, *supra* note 97, at 134 (quoting an unnamed chief circuit judge).

100. *Id.* at 191.

101. Fitzpatrick, *supra* note 12, at 20.

102. Barr & Willging, *supra* note 97, at 142.

103. *Id.* at 142–43 (citing *Hearings Before the National Comm’n on Judicial Discipline and Removal*, 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)).

104. *See supra* note 89. Judges, often dismayed by the audacity 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 his or her client. The same attorney may well be loath to raise the issue of misconduct to a judge absent a duty of zealous representation. *See* discussion *infra* Part III.

will—is a question that calls for empirical study.¹⁰⁵ It does not appear that anyone has undertaken such a study to date; neither the Kastenmeier Commission nor the Breyer Committee did.

In the meantime, judicial misconduct that escapes the attention of chief judges, large or small, frequent or exceptional, is unaccounted for in the system and for all practical purposes remains unremedied. Moreover, attorneys, those most likely to be aware of judicial misconduct when it occurs, remain reluctant to raise it.

III. WHY JUDICIAL MISCONDUCT GOES UNREPORTED

Misconduct goes unreported when people who are aware of an incident of misconduct choose not to file a complaint under the 1980 Act (which would make it Category 1 misconduct) or otherwise bring the misconduct 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—such circumstances are likely few and far between. In most situations of true judicial misconduct, *someone* is aware of the misconduct and often is aggrieved or at least disillusioned by it.¹⁰⁶ The misconduct remains in Category 3, however, when that person chooses to keep quiet.

Most often, those close to the system, who watch judges in action and hang on to their decisions, will be in the best position to see and recognize judicial misconduct when it happens. Typically, these people will be the attorneys who practice before the court.¹⁰⁷ Chief judges have acknowledged that the few complaints brought by attorneys tend to be the ones that require disciplinary action.¹⁰⁸ One chief judge observed: “It’s very difficult for a practicing lawyer

105. The empirical work could be done by an 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 those challenges are insurmountable. The concern here is not so much that such a survey has not been done, but instead that no one in the judiciary seems to think that one is warranted.

106. 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. This observation is not made lightheartedly as it is usually accompanied by genuine regret, if not bitterness, about this “fact of life.”

107. Court staffs are also extremely well-positioned to see and recognize judicial misconduct when it happens. Much of the discussion of attorney incentives in Part III.A. can be applied to court staff as well. Certainly the potential for anonymous complaints would be as equally applicable to court staff as to practicing attorneys. *See generally* Geyh, *supra* note 18, 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).

108. *Id.* at 258; *see also* Marcus, *supra* note 12, at 375, 390 (discussing a Justice Research Institute survey of federal judges in which a majority of surveyed chief judges agreed that although some valid complaints are filed, “there are valid complaints that are *not* filed as well”).

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."¹⁰⁹

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 for an attorney to establish goodwill with the court. As a practical matter, an attorney's greatest asset, at least for a litigator or criminal law practitioner, includes the credibility and respect he or she enjoys with the judges, particularly considering judges' "human proclivity to be more receptive to argument from a person who is both trusted and liked."¹¹⁰ Attorneys must cultivate that credibility and goodwill by building it over time, indeed, over the course of a career.

Attorneys frequently seek and accept appointments to court committees (usually on issues such as local rules or alternative dispute resolution) in order to provide pro bono assistance to the court and build goodwill with the judges.¹¹¹ This is especially important for young or new lawyers who are still trying to establish relationships and reputations with the court.¹¹²

The eagerness of lawyers to ingratiate themselves with the bench is also apparent 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

It is not clear from Marcus's description whether the judges are referring 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.

109. Geyh, *supra* note 18, at 258.

110. ANTONIN SCALIA & BRYAN A. GARNER, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES, at xxiii (2008) (emphasizing the importance of an attorney's relationship with the judges and the court). Justice Scalia and Bryan A. Garner conclude the introduction to their book by suggesting that some attorneys are inherently likeable and those who are not should "work on it." *Id.* at xxiv. As explained, an attorney who is working to build trust and striving to be liked by the judges should not antagonize them by filing misconduct complaints.

111. *See, e.g.*, Taylor Pendergrass, *Getting Something for Nothing: Pro Bono is an Investment That Pays*, 34 COLO. LAW. 85, 86 (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.'"). Building a positive relationship and reputation with court staff and judges is equally valuable for experienced attorneys.

112. *Id.*

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.¹¹³

There are numerous times when an attorney’s goodwill with the court will be important, such as when the attorney needs an extension of time, an emergency order, or any minor indulgence.¹¹⁴ Judges exercise enormous discretion in how strictly they enforce rules and when they make exceptions.¹¹⁵ An attorney who has abused the court’s goodwill—for example, by bringing frivolous motions or demanding a hearing when in fact the attorney’s evidence proffered at the hearing is inadequate—will have a difficult time getting the court’s indulgence in the future.¹¹⁶ In contrast, an attorney who has built a reputation, usually over a period of many years, as a straight shooter and a good citizen in the court community may get the benefit of the doubt in judicial consideration of his or her special requests.¹¹⁷

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, which is so painstakingly acquired, is lost when the attorney files a misconduct complaint against the judge.¹¹⁸ The Kastenmeier Commission, while discussing

113. David Margolick, *At the Bar*, N.Y. TIMES, Jan. 6, 1989, at B9. 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 judicial misconduct.

114. Neil Dishman, *Deadline Extensions in Federal Court: The Procrastinator’s Guide*, 93 ILL. B.J. 354, 357 (2005) (explaining in his section entitled “Keep your district judge happy” 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). The importance of staying in the good graces of a judge similarly extends to any situation in which the judge is exercising his or her discretion to grant or deny a request from counsel.

115. *Id.*

116. *See, e.g., Jovanovic v. In-Sink-Erator Div. of Emerson Elec. Co.*, 201 F.3d 894, 897 (7th Cir. 2000) (stating that because “counsel 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).

117. *See, e.g., Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354, 362 (7th Cir. 1997) (holding that 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 his or her discretion in granting an extension).

118. *See, e.g., Marcus, supra* note 12, at 429 & n.180 (“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.”) (“Surveys done by the Justice Research Institute for the [Kastenmeier] Commission confirm that lawyers are deterred from filing complaints by fear that

the Department of Justice's role in judicial discipline, noted that DOJ lawyers "will not risk *souring relations* between the Department and a federal judge by making a complaint under the 1980 Act."¹¹⁹ In fact, the attorney who complains may well alienate other judges on the bench who feel a kinship with their colleague or who view the accusation as an attack on the bench as a whole.¹²⁰ Just as likely, other judges may become suspicious of the lawyer who dares to complain about the bench, wondering if they may be next. Either way, it is virtually impossible to imagine a scenario where the attorney who complains about the conduct of judges on the federal bench will remain in the good graces of that bench after doing so.¹²¹

The exceptional attorney who is willing to raise such issues may also alienate fellow members of the bar.¹²² Few attorneys will want to be associated

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 in order to avoid confrontation with their colleagues. *Id.* at 417. He quotes one chief judge who says, "[i]f 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." *Id.* Therefore, even life-tenured federal judges 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.

119. KASTENMEIER COMM'N REPORT, *supra* note 39, at 324 (emphasis added). The Kastenmeier Commission recommended that the DOJ promulgate guidelines for its attorneys but acknowledged that even "an explicit formal policy . . . would not eliminate litigators' understandable reluctance to risk alienating a judge before whom they regularly appear." *Id.* at 326. The Commission Report goes on to observe that "[t]his problem, not unique to government lawyers, is shared by the trial bar generally." *Id.*

120. This is the same "guild favoritism" mentality cited in the Breyer Committee Report. *See supra* note 1, at 119. The Committee was concerned that the judiciary may close ranks on the merits of the complaint itself. The closing of ranks can also play out in more general terms to the detriment of the complaining attorney, as suggested here.

121. There may well be counterexamples. There are certainly scenarios where a judge's misconduct is so egregious that fellow judges will welcome the filing of a misconduct complaint. A miscreant judge tarnishes the image of the bench overall, and judges will likely 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 35, at 83–84 (describing how two judges filed misconduct charges against fellow judge Alcee Hastings after Hastings's acquittal on criminal allegations). 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.

122. *See, e.g.,* John Roemer, *For Kozinski's Tormentor, It's Personal*, DAILY J., June 25, 2008, at 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, the purpose is not to take the side of this particular attorney, who may well have ignoble ulterior motives in raising the complaint. Nor need we pass judgment on the merits of that complaint, which remains pending before the Third Circuit Judicial Council, as far

with the pariah who dares attack or accuse the judges.¹²³ This is another type of “goodwill” that may be lost when an attorney files a misconduct complaint, and the potential for professional isolation will create even stronger incentives for lawyers to hold back.

There are undoubtedly examples of attorneys who have been victimized by 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.¹²⁴ In the case of Judge John McBryde of 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.¹²⁵ The U.S. Attorneys of the two affected districts therefore cooperated with each other by jointly filing a complaint of judicial misconduct.¹²⁶ This, however, appears to be an exceptional circumstance.¹²⁷

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.¹²⁸ The benefit to litigants, in particular, “does not seem to justify the burden the Act imposes on the courts.”¹²⁹ 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 of the circuit.”¹³⁰ For a litigant, this kind of attention may have value.¹³¹ For an attorney, however, the attention of the chief judge is more likely to be the type of attention the attorney must studiously avoid.¹³²

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.

123. *Id.*

124. *See* NEW MISCONDUCT RULES R.23 (“Confidentiality”).

125. Christine Biederman, *Temper, Temper: Judge John Henry McBryde Ruled His Court Like a Minor Despot, Angering Lawyers and Fellow Judges*, DALLAS OBSERVER, Oct. 2, 1997, <http://www.dallasobserver.com/1997-10-02/news/temper-temper/>.

126. *Id.*

127. For a counterexample, *see infra* note 200 and accompanying text.

128. *See* Barr & Willging, *supra* note 97, at 150–53.

129. *Id.* at 151.

130. *Id.*

131. *See* Marcus, *supra* note 12, at 429 (“[I]t is clear that some complainants have no desire to maintain confidentiality. Organizational complainants may go so far as to call press conferences to trumpet their accusations.”).

132. *See* 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

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.¹³³ Every attorney who is a part of this system—who spends his or her working life pursuing justice on behalf of clients—benefits if corruption and misconduct are eradicated from the courts. 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.¹³⁴

Moreover, Model Rule of Professional Responsibility 8.3 places an ethical duty on attorneys to report unethical behavior.¹³⁵ The jurisprudence on this issue has developed mostly in the context of the parallel duty to report the misconduct or ethical lapses of other attorneys.¹³⁶ 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."¹³⁷

Model Rule 8.3(b) extends the reporting duty beyond fellow attorneys and also imposes a duty to report the misconduct of judges.¹³⁸ Presumably, this duty is even more difficult to enforce. In fact, the author has been unable to find any instance where an attorney was disciplined for violating this or a similar provision.¹³⁹ It is not surprising that bar authorities are slow to take up such

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.”).

133. 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.”).

134. *See supra* note 106.

135. MODEL RULES OF PROF'L CONDUCT R. 8.3 (2009):

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question 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.

136. *See* MODEL RULES OF PROF'L CONDUCT R. 8.3(a). *See generally* Ott & Newton, *supra* note 133 (describing recent developments in how courts treat instances where an attorney has failed to report unethical conduct).

137. Ott & Newton, *supra* note 133, at 747.

138. MODEL RULES OF PROF'L CONDUCT R. 8.3(b).

139. Ott & Newton, *supra* note 133, 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.”).

cases; sanctioning an attorney who has been subjected to the misconduct of a judge could easily be characterized as punishing the victim.¹⁴⁰

On the other hand, the duty to report judicial misconduct applies equally to the attorney who may benefit from the judge's actions, where, for example, the judge shows partiality on the bench. Here, of course, the attorney is not the victim, but rather the beneficiary, of the misconduct.¹⁴¹ Certainly, disciplining attorneys for their silence would not be "punishing the victim" in those circumstances, and 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 Model Rule 8.3 may not only coerce reluctant attorneys to report misconduct but also mitigate the negative perception of an attorney who complains of judicial misconduct.¹⁴² Whereas currently the attorney who complains of judicial misconduct may be perceived as a whiner or a troublemaker, particularly by the bench, active enforcement of a "duty to report" rule would make the attorney look like someone who is simply trying to comply with ethical obligations.¹⁴³ Nonetheless, for whatever reasons, the various state bars are not pursuing these cases.

4. Disincentives to Raise Issues of Judicial Misconduct

The most obvious disincentive to complaining of judicial misconduct, as already discussed above, is the loss of goodwill with the bench.¹⁴⁴ However, this characterization may understate the extent and intensity of those disincentives, which relate to the attorney's standing and reputation in the bar.¹⁴⁵ The experience of the "snitch rule" for fellow attorneys is instructive, if not entirely analogous, in terms of both the difficulty of enforcement and the

These few cases arise out of the failure to report the misconduct of fellow attorneys, not the failure to report misconduct of judges that is the subject of Model Rule 8.3(b).

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

141. 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.,* Schladen, *supra* note 5 (discussing the misconduct proceedings against Judge Samuel Kent).

142. Vivian E. Berg, *The Snitch Rule: Does it Work?*, 67 N.D. L. REV. 381, 383 (1991) (commenting on how Model Rule 8.3 can "offer some comfort to the lawyer who decides to report misconduct").

143. *Id.*

144. *See* discussion *supra* Part III.2.

145. *See supra* note 122 and accompanying text; *see also infra* Part III.B (discussion of ethical duties and ethical pitfalls).

arguable unfairness and unreasonableness of expecting full compliance.¹⁴⁶ Indeed, whatever incentives may exist for attorneys to participate in the judicial misconduct process, the incentives to keep quiet are far more compelling.¹⁴⁷

The problems and dynamics associated with reporting the misconduct of fellow attorneys are quite different than those associated with complaining about the misconduct of 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 or her classmates risks social ostracism.¹⁴⁸ There is little wonder that attorneys are reluctant to snitch on their colleagues. However, reporting a judge’s misconduct is like going straight to the principal to tattle on the teacher. Who has the guts to do that?¹⁴⁹ “Suicidal” is the adjective that comes to mind when thinking about an attorney’s report of judicial misconduct. While that term is certainly hyperbolic, as no one’s life is actually threatened, the consequences of filing complaints against judges could well threaten an attorney’s career.¹⁵⁰

The potential impact that filing a complaint of judicial misconduct could have on an attorney’s career cannot be overestimated. Consider, for example, a judicial misconduct proceeding that took place in the Ninth Circuit during the 1990s.¹⁵¹ A judge was being investigated for alleged misconduct, and the special investigative committee had come to town to take evidence, having issued subpoenas to a number of witnesses, primarily practitioners in that court.

146. See generally Ott & Newton, *supra* note 133, at 749–54 (discussing the negative ramifications that ensue for reporting colleagues’ unethical conduct).

147. See generally *supra* note 45 and accompanying text (listing rationales to account for the dearth of attorney reporting).

148. Ott & Newton, *supra* note 133, at 753 (“Lawyers, who in many respects depend 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.”).

149. Indeed, even the chief judge—the principal in the school—may fear a hostile reaction or retaliation and be dissuaded 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 . . .” Geyh, *supra* note 18, at 268 (quoting an unpublished interview with a federal judge) (on file with Barr and Willging). Collins 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, concern about retaliation from the next chief judge can color the process.” Fitzpatrick, *supra* note 12, at 19–20.

150. 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.” Berg, *supra* note 142, at 383.

151. The author was 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.

One of the attorneys who was subpoenaed to testify seemed most reluctant, as his testimony was not entirely favorable to the judge in question. He nonetheless appeared and testified. After testifying, the attorney observed in comments made off the record directly to the author that he would need to relocate because he did not feel he could be effective practicing law in this district any longer. While this might appear to be an overreaction, the problem is certain to be more acute in smaller cities where there are few federal judges; alienate one and it may be difficult to carry on a 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—as did another attorney witness in that proceeding.¹⁵²

It would be nice if we could conclude that the repercussions for the attorney witness ended there. Almost a decade 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.¹⁵³ In the first question of his interview for the judgeship, he was asked about his involvement in the misconduct proceeding in his former district.¹⁵⁴ The attorney has credible reasons to believe that his candidacy for the judgeship was harmed, at least with regard to one influential member of the selection panel, as a result of this “taint by association” with the earlier proceeding.¹⁵⁵ This was an attorney who testified *involuntarily* under subpoena. It naturally follows that whatever

152. Telephone Interview with Unnamed Witness (July 3, 2008). Because the judicial misconduct proceedings were never made public, the proceedings and identity of the witness must remain confidential. The comments discussed were made directly to the author, informally, outside the hearing. These facts were confirmed in a follow-up telephone interview with the witness on July 3, 2008. *Id.* The witness confirmed that the primary reason for his relocation was the damage that he had sustained with the bench as a result of his testimony. *Id.* The witness also confirmed that the other attorney witness had relocated shortly after the incident as well. *Id.*

153. *Id.*

154. *Id.* It appears that the subpoena this 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 his candidacy for a judgeship, that conduct could be argued to be “prejudicial to the effective and expeditious administration of the business of the courts” under the 1980 Act, 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. The attorney believes he would only damage himself and his career further, and probably irreparably, were he to file any type of complaint. *Id.*

155. *Id.* The sensitivity of this 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 selected for the judgeship absent the “taint.” Undoubtedly, there were other highly qualified candidates. However, the fact that the testimony was raised in the screening interview, apparently causing one member of the committee to lose interest in his candidacy as a result of his involvement in the earlier misconduct investigation, suggests that the attorney did indeed suffer some damage as a result of his cooperation in the proceeding. Specifically, he may have lost the opportunity to be fairly considered for the post.

damage he suffered professionally as a result of his testimony 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 by keeping the system highly confidential.¹⁵⁶ There is virtually no corresponding sensitivity for the harm that attorneys may suffer as a result of their involvement in the reporting process. With the near certainty that an 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. 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.¹⁵⁷

B. *Conflicting Ethical Duties*

The pragmatic realities of legal practice are not the only factors at play here; attorneys also have ethical obligations that must be respected, even when it is inconvenient to do so.¹⁵⁸ But in this particular situation, there is no way to err on the side of caution—in favor of ethical behavior—because complaining about judicial misbehavior is every bit as dangerous ethically as keeping quiet.

1. Duty to Place the Client's Interests First

Of all the ethical duties that lawyers have, first and foremost is their duty to the client, to represent the interests of that client, and to avoid conflicts with those interests.¹⁵⁹ It should be noted up front that raising an issue of judicial

156. See ILLUSTRATIVE RULES R. 17 cmt. (2000) (justifying the strict confidentiality provisions in Rule 17 by explaining that “[t]he statute and its legislative history exhibit a strong policy goal of protecting judges and magistrates from the damage that could be done by publicizing unfounded allegations of misconduct”).

157. See, e.g., Roemer, *supra* note 122, at 120 (discussing the criticism Judge Kozinski’s accuser received from within the bar).

158. See *supra* text accompanying note 135–42 (discussing Model Rule 8.3(b)).

159. See MODEL RULES OF PROF’L CONDUCT pmb1. (2009):

[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 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 Fitzpatrick, *supra* note 45, at 282; Thornton, *supra* note 45, at 3–4 (discussing attorneys’ fears about harming current and future clients by a judge’s retaliatory prejudice in response to

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 be used to correct judicial errors in a case or to reverse a judge's determination.¹⁶⁰ If a judge's prejudice, bias, or neglect results in an adverse ruling for an attorney's client, the attorney's only recourse—for the benefit of the client—is the judicial process, e.g., an appeal.¹⁶¹ Filing a misconduct complaint may prompt some kind of remedial action to avoid such problems in future cases or produce an apology, but it cannot go back to redress the harms caused by the misconduct in terms of adverse rulings.¹⁶²

With this in mind, the attorneys who zealously represent their clients may actually face an ethical problem by filing a judicial misconduct complaint.¹⁶³ If attorneys damage their clients' prospects in ongoing litigation by alienating the judges of the relevant bench via a misconduct complaint,¹⁶⁴ they may well run afoul of the ethical obligations owed to the client.¹⁶⁵ The attorney who places the integrity of the system over the interests of the client by choosing to file a complaint of judicial misconduct does so not only at the client's peril, but also at his or her own.

A cautionary tale comes from the example of Douglas Schafer, an attorney who was disciplined himself after filing a complaint concerning a state court judge's acceptance of bribes.¹⁶⁶ Schafer's client had been involved in the

the filing of a judicial misconduct complaint).

160. See, e.g., ILLUSTRATIVE RULES R. 1(e) ("The judicial council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that."); see also *In re Charge of Judicial Misconduct or Disability*, 137 F.3d 650, 651 (D.C. 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) (2006)] (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.").

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

162. ILLUSTRATIVE RULES R. 1(a) ("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 *supra* note 160.

163. See *supra* note 159.

164. See discussion *supra* Part III.2.

165. See Thornton, *supra* note 45, at 3 (stating than an attorney risks "incurring the judges' wrath and perhaps *prejudicing [the] case*" if the attorney files a misconduct complaint) (emphasis added).

166. 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, 405–08, 411–26 (2003) (detailing the ordeal Schafer went through to have his

bribery scheme, which is how Schafer learned of the judge's involvement.¹⁶⁷ Instead of supporting the attorney who was attempting to expose judicial corruption, the bar's response was to investigate the attorney.¹⁶⁸ In the end, the bar disciplined Schafer for using privileged client information in his misconduct complaint, information that he should have kept confidential.¹⁶⁹ The misuse of privileged information is a serious offense, and any good intentions that he may have had in exposing judicial corruption cannot justify his ethical lapse. However, 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. Although this example comes from the Washington state judiciary—not the federal system—it illustrates one bar's response when an attorney attacks a judge.¹⁷⁰ There is no reason to believe that the outcome would have been different had Schafer pursued a similar complaint against a federal judge who was taking bribes.

2. Duty Not to Disparage the Court

Additionally, attorneys have an ethical duty not to make allegations with "reckless disregard for the truth," as reflected in Model Rule of Professional Conduct 8.2(a).¹⁷¹ Thus, attorneys who make charges of judicial misconduct need to be certain of the facts behind their complaint. How much additional investigation to confirm suspicions and verify facts must an attorney do to ensure that his or her 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 as well the case of Stephen Yagman, an attorney who accused a federal judge in the Central District of California of anti-Semitism and made

judicial misconduct complaint heard and the consequences he suffered as a result of his efforts to report the judge's wrongdoing).

167. *Id.* at 405–06.

168. *Id.* at 406.

169. *Id.* It is worth noting that Shafer'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 Shafer himself became the focus of ethical inquiry. *Id.* at 411–23.

170. *See also In re Complaint of Judicial Misconduct*, 2 Cl. Ct. 255, 262 (Cl. Ct. 1983) (Judge Kozinski, then presiding over the Federal Claims Court, publicly reprimanded and sanctioned two lawyers for bringing a judicial misconduct complaint under the 1980 Act that the court deemed frivolous.); *infra* notes 172–78 (discussing the case of Stephen Yagman who was disciplined for complaining about the federal court).

171. MODEL RULES OF PROF'L CONDUCT R. 8.2(a) (2009):

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.

other disparaging comments about the judge in a letter to a legal publisher.¹⁷² Yagman came under attack for “impugning the integrity of the court”¹⁷³ and for attempting to create a basis for disqualifying this judge in the future.¹⁷⁴ After a two-day hearing, the judges of the Central District of California attempted to make an example out of Yagman by suspending his license to practice law in that district.¹⁷⁵ After a protracted legal battle, Yagman was vindicated by the Ninth Circuit, which (1) acknowledged that his allegations were protected by the First Amendment¹⁷⁶ and (2) reversed the disciplinary sanction.¹⁷⁷

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. Still, Yagman’s case and all the publicity it garnered sent a strong message to the rest of the bar: attorneys who dare to file an accusation against a judge or a court will certainly draw unfavorable attention to themselves, including the possibility of disciplinary action.¹⁷⁸

More specifically, those who disapprove of the decision to complain of judicial misconduct, including people empowered to enforce attorney

172. 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.” Standing Comm. on Discipline v. Yagman, 55 F.3d 1430, 1434 (9th Cir. 1995) (quoting Susan Seager, *Judge Sanctions Yagman, Refers Case to State Bar*, L.A. Daily J., June 6, 1991, at 1). 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,” “buffoon,” and “sub-standard human.” *Id.* at 1434 n.4.

173. *Id.* at 1436–37.

174. *Id.* at 1434 n.6, 1442.

175. *Id.* at 1435 (stating that “the district court held that Yagman had committed sanctionable misconduct and suspended him from practice in the Central District for two years”) (citations omitted).

176. *Id.* at 1438–42.

177. *Id.* at 1445. Yagman has a more storied history in one of the more recent high-publicity misconduct matters as the accuser of Judge Manuel Real. See Henry Weinstein, *Judge Real’s Sanctions Against Lawyer Killed but Feud Goes On*, L.A. TIMES, Nov. 29, 1991, at B1. He is the exceptional attorney who is willing to bring complaints 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. WKLY, June 27, 2007, <http://www.laweekly.com/2007-06-28/news/hoisted-by-his-own-petard/>.

178. Perhaps it was too easy to find fault with Yagman. Yagman was known for filing, and winning, civil suits against the Los Angeles Police Department. See McDonald, *supra* note 177. Certainly his self-styled “whistle-blowing” activity should not have insulated him from prosecution for crimes and other ethical breaches that 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, which 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.

discipline, may be quick to find fault with the accuser. Therefore, when an attorney learns of judicial corruption, the attorney cannot raise the issue or file the complaint unless the attorney is sure that his or her own house is in order.¹⁷⁹ At the very least, accusers must conduct a thorough investigation to confirm the accuracy of their suspicions.¹⁸⁰ Otherwise, if the sources ultimately prove unreliable, the accuser may well be found to have committed an ethical breach for levying unsubstantiated accusations.¹⁸¹

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 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”¹⁸² The ethical attorney may, therefore, be stuck in a “damned if you do, damned if you don’t” scenario, one in which additional inquiry and confirmation of facts surrounding the misconduct will only make the attorney’s position *more* difficult. Making the extra effort to confirm facts will do two things. First, it will create the impression that the attorney is pursuing a personal agenda to bring down the judge, thereby exacerbating the damage the attorney will suffer with the bench. Second, it will potentially remove any doubt that could justify inaction (failure to file). Confirmation of the attorney’s suspicions will paint the attorney into a corner by invoking Rule 8.3(b)’s requirement that the attorney file a complaint and accordingly suffer all the negative consequences of doing so.¹⁸³

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 attorneys will almost always follow the more conservative course—the path of least resistance—by turning a blind eye to perceived misconduct and keeping quiet.

179. See *John* 8:7 (King James) (“He that is without sin among you, let him first cast a stone at her.”).

180. Compliance with MODEL RULES OF PROF’L CONDUCT R. 8.2(a) will require this at a minimum.

181. 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 Institute for the Commission confirm that lawyers are deterred from filing complaints by fear that their careers will be harmed. As a consequence, 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.

182. MODEL RULES OF PROF’L CONDUCT R. 8.2(a) (2009).

183. See MODEL RULES OF PROF’L CONDUCT R. 8.3(b).

IV. SOLVING THE PROBLEM OF THE RELUCTANT ATTORNEY COMPLAINANT

The problem of reluctant complainants has no easy answers. Otherwise, the problem 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 mitigate the problem of unreported misconduct by creating Category 2, which furnished a means for addressing misconduct absent a formally filed complaint.¹⁸⁴ But the remaining problem of the Category 3 misconduct still begs for attention.

A. Bar Committees

To address the disincentives for attorneys 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 to the chief judge of serious complaints against federal judges.”¹⁸⁵ The 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.”¹⁸⁶

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.¹⁸⁷ The JCUS’s hopeful reference to “other structures or approaches” seemed to acknowledge that the “bar

184. 28 U.S.C. § 351(b) (2006).

185. KASTENMEIER COMM’N REPORT, *supra* note 39, 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.” *Id.* This idea for bar committees is much older. It 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. One proposal suggested:

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 bench and bar and to receive occasional, specific support from the chief judge.

STEVEN FLANDERS & JOHN T. McDERMOTT, OPERATION OF THE FEDERAL JUDICIAL COUNCILS 34 (1978).

186. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 29 (Mar. 15, 1994).

187. *Id.*

committee” approach was not a complete or ideal solution to the problem, simultaneously emphasizing 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.¹⁸⁸ As of 2005, eleven years after the JCUS issued its endorsement of the concept, Fitzpatrick canvassed all the chief judges of the federal circuits and observed that “no circuit has created such a committee as of yet.”¹⁸⁹ The Breyer Committee offered little more. The Committee only noted that one chief judge had proposed the creation of such a committee to the judicial council in that circuit, suggesting “‘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.’”¹⁹⁰ Notwithstanding the chief judge’s support for the idea, that circuit’s judicial council rejected the proposal.¹⁹¹

The Breyer Committee acknowledged that this problem of attorney reluctance persists, and made specific note of the Kastenmeier Commission’s proposed “bar committee” solution. It is worth noting that the Breyer Committee was aware that the solution had been generally ineffective to date, but the Committee had nothing better to offer. Instead, it simply re-endorsed the bar committee approach in language that is again notable for its weakness: “The councils should *ask* courts in the circuit to *encourage* the creation of

188. The Breyer Committee made the following observation: “[A]s far as we can determine, the suggestion has been implemented in any form in only one circuit.” BREYER COMM. REPORT, *supra* note 1, at 217. 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 from Jeffrey Barr, *supra* note 89; Email from Tom Willging, Fed. Judicial Ctr., to David Pimentel, Assistant Professor, Fla. Coastal Sch. of Law (Aug. 1, 2008) (on file with the Tennessee Law Review). The Breyer Committee also pointed out 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 be kept confidential. BREYER COMM. REPORT, *supra* note 1, at 205 (presumably quoting the district court’s documentation of its ombudsman office). Again, consultation with the Breyer Committee staff identified that particular district, but the district court’s newly revised website no longer contains a reference to the ombudsman and emails to the district court 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 its presence. One might also argue that the ombudsman’s jurisdiction would *not* include judicial misconduct concerns, as the 1980 Act and its accompanying rules contain “an institutional mechanism or forum for redress[ing]” judicial misconduct. Email from Jeffrey Barr, Admin. Office of the U.S. Courts, to David Pimentel, Assistant Professor, Fla. Coastal Sch. of Law (July 31, 2008) (on file with the Tennessee Law Review).

189. Fitzpatrick, *supra* note 12, at 20.

190. BREYER COMM. REPORT, *supra* note 1, at 205.

191. *Id.*

committees of local lawyers whose senior members can serve as intermediaries between individual lawyers and the formal complaint process.”¹⁹² While the Breyer Committee’s approach constitutes a token acknowledgement of the problem of Category 3 misconduct, it fails to bring meaningful emphasis or attention to the issue. Moreover, there does not appear to be any reason to believe that the suggestion will have any more impact now than it did fifteen years ago when the Kastenmeier Commission and the JCUS initially proposed and endorsed the idea.

One might well argue that the bar committee idea is not so much an idea that failed as an idea that was never tried. It is certainly unpopular with the judges.¹⁹³ Otherwise, it could have and would have been attempted in a number of courts already.¹⁹⁴

It is not at all clear that attorneys are any more enthusiastic about this proposal than are judges, or that bar associations will be willing to play this role. The chairpersons of these committees, whoever they may be, would have to associate their names with the complaints against the judges, and senior or

192. *Id.* at 217 (emphasis added).

193. 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 Jeffrey Barr, *supra* note 89; Email from Jeffrey Barr, Admin. Office of the U.S. Courts, to David Pimentel, Assistant Professor, Fla. Coastal Sch. of Law (Aug. 15, 2008) (on file with the Tennessee Law Review). In another circuit, the idea generated a very strongly-worded objection from authorities in the circuit responsible 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 notions of stirring up discontent or encouraging attorneys to find fault with judicial behavior. Another possibility is that judges simply distrust attorneys and fear 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, judges’ fears would likely prove to be unfounded if a bar committee were ever formed.

194. At least one alternative proposal for eliciting the comments of attorneys on the conduct of federal judges 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, among other things, addressing the problem of attorney reluctance. Telephone Interview with John T. Noonan, Jr., *supra* note 63. 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 about the performance of the judges in that area. *Id.* The hope was that the seniority of the members of the bar and the informality of the “discussion” format might persuade the attorneys to be more candid about these topics than they otherwise would. *Id.* 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. *Id.*

not, precious few lawyers would want to assume that responsibility and the negative ramifications it would entail.¹⁹⁵

In at least the publicized examples, the bar association's track record of supporting attorney victims/complainants does not bode well.¹⁹⁶ In addition to the case of Schafer, discussed above, a particularly glaring example occurred twenty years ago in the Western District of Pennsylvania. A federal judge told plaintiff's attorney Barbara Wolvovitz in the middle of a jury trial that she could not use her birth name in his court; as a married woman, she would only be referred to by her husband's name.¹⁹⁷ Her co-counsel was charged with contempt when he protested, and Ms. Wolvovitz was threatened with jail time if she continued to use her birth name.¹⁹⁸ The incident prompted outrage throughout the country, and many people filed letters of complaint. The National Organization for Women organized a protest in front of the courthouse, calling for the judge's resignation.¹⁹⁹ While one would expect a bar association to weigh in on behalf of its member, particularly in circumstances as compelling as these, the Allegheny County Bar President was interviewed on television about the incident and declined to support the attorney or lend any of the bar association's legitimacy to her cause.²⁰⁰ This is a prime example of when a bar association could have, and arguably should have, rallied around the

195. See discussion *supra* Parts III.2, 4.

196. See, e.g., *supra* note 166 and accompanying text (discussing the case of Douglas Schafer, an attorney whose bar association chose to investigate and discipline him after he brought a meritorious complaint against a judge for bribery).

197. Associated Press, *U.S. Judge Won't Allow Lawyer "to Use that Ms."*, N.Y. TIMES, July 14, 1988, at A23.

198. *Id.*

199. Telephone Interview with Barbara Wolvovitz (Aug. 11, 2008) (on file with the Tennessee Law Review).

200. *Id.* Two weeks after the trial, the television program *Pittsburgh 2Day* had Ms. Wolvovitz and a representative from the National Organization for Women, who was calling for the judge's resignation, as guests on the show. The program invited the judge to appear, but he declined. However, Thomas Hollander, President of the Allegheny County Bar appeared and defended the judge, stating:

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.

Pittsburgh 2Day (KDKA-TV2 television broadcast July 1988) (on file with the Tennessee Law Review). Although 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 in calling for disciplinary action, even in this obvious and notorious case of judicial misbehavior.

attorney to condemn a federal judge's behavior. However, it did not find the will, political or otherwise, to do so.

One can only speculate what may have happened within the court during this period as a result of all the letters and unflattering press coverage, but something prompted the judge to completely reverse his stances and apologize.²⁰¹ This is a good example of an appropriate outcome that was likely spurred by the event's widespread publicity. Unfortunately, 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 in a jurisdiction 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."²⁰² 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 use of anonymous complaints as a proper means of raising issues of judicial misconduct.²⁰³ The Illustrative Rules adopted by the judiciary in 1986 clearly stated that "[a]nonymous complaints are not handled under these rules."²⁰⁴ These rules also provided that the complaint "*must* be signed" and that "[t]he complainant's address *must* also be provided."²⁰⁵

201. Associated Press, *Federal Judge Apologizes in Fight over Use of "Ms."*, N.Y. TIMES, July 15, 1988, at A10. The judge also announced his retirement less than four months later. Associated Press, *Judge in Sexist Dispute Retires*, N.Y. TIMES, Nov. 12, 1988, at 7. 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 RULES R. 4(d) (2000) ("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 . . .").

202. KASTENMEIER COMM'N REPORT, *supra* note 39, at 345.

203. See *id.* at 345–46 (discussing the judiciary's concerns about an anonymous complaint procedure).

204. ILLUSTRATIVE RULES R. 2(g).

205. ILLUSTRATIVE RULES R. 2(f) (emphasis added).

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

There appears to be something slightly disingenuous about the Illustrative Rules' prohibition on unsigned complaints. Because there was no statutory basis for refusing unsigned complaints, the rules necessarily prescribed how such complaints should be handled.²⁰⁶ Immediately after stating 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."²⁰⁷ Notwithstanding this provision, the Illustrative Rules plainly discouraged anonymous complaints and obscured the availability of this option to a complainant.

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

206. Indeed, the statute has always provided and continues to provide 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. sections 351(a) & (c) state:

(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

Judicial Improvements Act of 2002, 28 U.S.C. §§ 351(a), 351(c) (2006). Arguably, therefore, the Illustrative Rules would have conflicted with the statute had they directed the Clerk to reject anonymous complaints.

207. ILLUSTRATIVE RULES R. 2(g). Although the reference to Rule 20 appeared in the original Illustrative Rules, the reference to Rule 2(j) did not. See ILLUSTRATIVE RULES R. 2(g) (1986). Rule 2(j) established how a chief judge can identify a complaint absent formal filing. It 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.

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. 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).²⁰⁸

This commentary clearly acknowledges a role for anonymous complaints and sets forth the rationale for allowing them in this limited manner. 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 . . . lawyers.”²⁰⁹ The Kastenmeier Commission essentially agreed, and it commended 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.²¹⁰ The Commission stated that it “believes this procedure has promise in addressing the bar’s unfortunate but understandable reluctance to incur a judge’s hostility by filing a complaint.”²¹¹

Although it is difficult to find concrete examples, Barr and Willging cite two circumstances where attorneys’ inability to remain anonymous frustrated inquiries or actions on allegations of serious misconduct.²¹² In one case, “the source 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.’”²¹³ In the other, the complainant was “unwilling to reveal her sources . . . unless she could do it in closed session . . . without the judge present.”²¹⁴ 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

208. ILLUSTRATIVE RULES R. 2 cmt. (2000) (footnote omitted).

209. *Id.*

210. KASTENMEIER COMM’N REPORT, *supra* note 39, at 346.

211. *Id.*

212. Barr & Willging, *supra* note 97, at 61–62.

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

214. *Id.* at 62; *see infra* note 248 (describing this scenario more extensively).

complaints were not confidential; the response probably discouraged him from filing."²¹⁵

It appears that the misconduct allegations were not considered on their merits in any of these cases. 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 home with his family. They agreed he had been harsh, as he had also been harsh with them.²¹⁶

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

In addition, a chief judge who merely suspects that there is a problem with one of the judges in the circuit may have those suspicions confirmed by an anonymous complaint, or by a pattern of them. The anonymous filing(s) may provide the impetus, or the excuse, the chief judge needs to identify a complaint and commence the process. Anonymous complaints, therefore, may be important in emboldening chief judges to take appropriate action, precisely the type of action that they have been too slow to take in the past.²¹⁷

2. Obscuring the Anonymous Complaint Option

Notwithstanding Illustrative Rule 2(g) and its commentary on the handling of anonymous complaints, the system clearly discouraged this form of filing. Rule 2(f) required the complainant to provide their signature and address.²¹⁸ All of the misconduct complaint forms contain blanks for the complainant to enter his or her name and address.²¹⁹ Even the rule that directed the clerk of court to

215. Marcus, *supra* note 12, at 429 (quoting an unnamed circuit executive whom he refers to in the third person). This is offered as an example of attorneys' reluctance to complain if they cannot file the complaint anonymously. It is also a compelling example of how judiciary staff has apparently interpreted Rule 2(g) 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.

216. Fitzpatrick, *supra* note 45, at 283 (footnote omitted).

217. BREYER COMM. REPORT, *supra* note 1, at 123.

218. ILLUSTRATIVE RULES R. 2(f) (2000).

219. ILLUSTRATIVE RULES app. 1.

accept anonymous complaints and forward them to the chief judge began by stating that anonymous complaints are “not handled under these rules.”²²⁰ In these circumstances, an unsophisticated complainant would likely conclude that he was not permitted to file an anonymous complaint.

The Breyer Committee did not explicitly comment on the desirability of maintaining—much less enhancing—this mechanism for anonymous complaints. The JCUS apparently interpreted this omission as a license to further obscure the anonymous complaint option.²²¹

The newly adopted, and now binding, national rules for filing 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 titled “Complainant’s Address and Signature; Verification.”²²² It provides:

The complainant must provide a contact address and sign the complaint. The truth of the statements 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).²²³

The rule no longer requires the clerk of court to accept the anonymous complaint and forward it to the chief judge.²²⁴ However, Rule 5 provides that anonymous complaints—now identified solely as “complaints that do not comply with Rule 6(d)” —“must be considered under this Rule,” suggesting that the chief judge has an obligation to look at the allegations and decide whether to conduct an inquiry and, possibly, “identify” a complaint absent formal filing.²²⁵ Accordingly, one could argue that there has been no substantive change to the rules in terms of the handling of anonymous complaints. While the clerk no longer has an explicit obligation to forward anonymous complaints to the chief judge, the chief judge does have an obligation to consider them, which may amount to the same thing.

On the other hand, the message that anonymous complaints are unwelcome is stronger than ever. The Illustrative Rules featured the words “anonymous complaints” in boldface as both a rule title and commentary heading.²²⁶ Now, a potential complainant examining the rules and looking for an “anonymous complaint” option, will no longer find that term in a heading or even in the text

220. ILLUSTRATIVE RULES R. 2(g).

221. Alternatively, perhaps the judges on the JCUS Committee on Conduct and Disability, which drafted the new rules, simply viewed anonymous complaints as unimportant and excised any references to them from the rules.

222. NEW MISCONDUCT RULES R. 6(d) (2008).

223. *Id.*

224. NEW MISCONDUCT RULES R. 8(a).

225. NEW MISCONDUCT RULES R. 5(a) & (b).

226. ILLUSTRATIVE RULES R. 2(g) & cmt. (2008).

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 . . ."²²⁷ The New Misconduct Rules struck the provision in the Illustrative Rules commentary that explained why anonymous complaints may be desirable.²²⁸ The complaint form attached to the new rules calls for the name, address, and daytime phone number of the complainant.²²⁹ Even a sophisticated complainant, reading these rules, would doubt the appropriateness of submitting a complaint anonymously.

The irony here is striking. The Breyer Committee strongly urged chief judges to be more pro-active in identifying complaints,²³⁰ and the rules now obligate, rather than merely permit, the chief judge to identify a complaint "[i]f the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible."²³¹ These and other recommendations of the Breyer Committee emphasized more active, robust, and responsive administration of the 1980 Act.²³² Thus, it is quite inconsistent with the thrust of the Breyer Committee's recommendations 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 incentives for attorneys to refrain from filing complaints.

3. Problems with Anonymous Complaints

Encouraging and welcoming anonymous complaints is not a panacea for the problems of Category 3 misconduct and attorneys' reluctance to come forward and file complaints. The concept has weaknesses that deserve attention.

227. NEW MISCONDUCT RULES R. 6(d) (emphasis added).

228. See *supra* text accompanying note 208 (quoting the commentary's explanation in full). Rule 6 no longer contains commentary beyond the simple statement that "[t]he Rule is adapted from the Illustrative Rules and is self-explanatory." NEW MISCONDUCT RULES R. 6 cmt. 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 RULES R. 5 cmt. Although this commentary makes clear that chief judges must act upon information that comes to them anonymously, it never uses the term "anonymous" and is not associated explicitly with Rule 6(d). Few complainants are likely to find this commentary and, even if they do, they are unlikely understand it as an invitation to submit their complaint anonymously.

229. NEW MISCONDUCT RULES app.

230. BREYER COMM. REPORT, *supra* note 1, at 209 (recommending that "Review Committee members should stress the desirability . . . of . . . chief judges' using their statutory authority to identify complaints when accusations become public").

231. NEW MISCONDUCT RULES R. 5(a).

232. See generally BREYER COMM. REPORT, *supra* note 1, at 107-26 (stating that the Breyer Committee generally recommended an increased adherence to the 1980 Act).

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

One major concern is that no complaint is truly anonymous.²³³ If a judge makes intemperate remarks in a small hearing, and an anonymous complaint is filed regarding the judge's behavior in that hearing, identifying the likely complainant may be quite easy. After all, few people were present to witness the incident, and even fewer were likely to take offense at the judge's particular remarks.

Although this is undoubtedly true, it is in no way an argument for prohibiting or discouraging anonymous complaints. The complainant runs a certain risk of having his or her identity discovered when filing anonymously, but if the complainant files in a regular fashion, which would require the complainant's name and address, that risk is one hundred percent. 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

Another major objection to anonymous complaints is that they might infringe upon the judge's right to confront accusers,²³⁴ a principle enshrined in the Sixth Amendment.²³⁵ Recognizing and responding to anonymous complaints arguably exposes judges to wiles of mendacious complainants 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 witch trials.²³⁶

Although the Sixth Amendment's Confrontation Clause, by its very terms, is normally applicable only to "criminal prosecutions,"²³⁷ the underlying due process implications deserve deference and attention. Indeed, one district court has found right-to-confront-accusers protections in the terms of the 1980 Act itself:

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,

233. See KASTENMEIER COMM'N REPORT, *supra* note 39, at 346.

234. 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 45, 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.").

235. U.S. CONST. amend. VI.

236. The author once had the temerity to suggest the idea of expanding the concept of anonymous complaints in judicial misconduct proceedings to a federal judge. 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.

237. 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).

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.²³⁸

In another case fifteen years later, the same court again acknowledged judges' due process rights in misconduct proceedings, including the right to confront witnesses, but declined to find a violation of those rights on the facts before it.²³⁹

The Kastenmeier Commission acknowledged Confrontation Clause concerns, but it 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.*"²⁴⁰ Indeed, the judges' right to confront an anonymous complainant is relevant only if the complaint itself is treated as testimony or other evidence. If the special committee and judicial council act after investigating an anonymous complaint, due process 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.²⁴¹ The fact that the original anonymous complaint cannot be treated as competent witness testimony does not in any way undermine the legitimacy of either the inquiry or the decision.²⁴²

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

239. *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 83 F. Supp. 2d 135, 168-69 (D.D.C. 1999) (recognizing due process implications in the judicial 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.

240. KASTENMEIER COMM'N REPORT, *supra* note 39, at 345-46 (emphasis added).

241. 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].").

242. 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.

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 the anonymous allegation and supporting evidence (e.g., courtroom transcripts) sufficiently credible 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 is willing to act on such allegations or, in other words, only if the chief judge is *de facto* complicit in the campaign of harassment.

The confidentiality of the process otherwise offers the judge adequate, if not complete, protection from defamatory attacks from anonymous sources. There is also no reason to believe that anonymous complaints would make a chief judge any more likely to pursue frivolous and harassing investigations against their colleagues. If the anonymous complaint is not well-grounded in fact, the chief judge's preliminary inquiry should reveal its lack of merit quickly enough and result in no action against the wrongfully accused judge.

If, on the other hand, the anonymous complaint is well-grounded, the chief judge will benefit from learning of the existence of a problem, and even if the chief judge is already aware of it, from additional background about its nature and severity. After the chief judge's limited inquiry confirms that a potential problem exists, the chief judge can use the acquired and confirmed information to commence an investigation by appointing a special investigative committee, quite independently 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, is never revealed.

c. The Influx of Anonymous Complaints May Overwhelm the System

Yet 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 accusations. Does the judiciary have the staff and resources to process all of these, or would the system cease to be workable?

One can only speculate on how many more complaints would be raised if the judiciary were more inviting of anonymous complaints. Hopefully, the more inviting approach would bring in any meritorious complaints of Category 3 misconduct, which is actionable but presently slips through the cracks. Those will require serious work and investigation, as they should. However, an influx of frivolous anonymous complaints is unlikely to overwhelm the judiciary's resources because such complaints are so easily dismissed. Unlike a frivolous formal complaint, which requires that a formal, reasoned dismissal order be prepared and sent to the complainant,²⁴³ a frivolous anonymous complaint can

243. NEW MISCONDUCT RULES R. 11(g)(2) (2008) ("If the chief judge disposes of the

simply be set aside—the judiciary wouldn't know who to send a dismissal order to anyway. Accordingly, staff who process anonymous complaints can devote their energies to verifying allegations—a far more meaningful use of their time and energies—rather than drafting formal, reasoned memoranda dismissing frivolous complaints. Likewise, if complainants under the current system opt instead to file anonymously, the judiciary's overall workload could go down, even as the number of complaints goes up.

All told, expanding the anonymous complaint option could impact judicial staff quite positively, as they would spend less time churning out formalistic dismissal orders for meritless complaints and more time verifying allegations of true misconduct. In any case, the ease of handling frivolous anonymous complaints should provide some offset for the increase in volume.

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,²⁴⁴ would have no happier ending if the complainant in that case had been anonymous. An anonymous complaint process will not solve all our problems;²⁴⁵ however, it can remove some of the disincentives to filing the complaint in the first place.

Additionally, steps can and should be taken to protect attorney witnesses who are victimized in the process. Again, the judges administering the 1980 Act must act with sensitivity, not just for the plight of a judge who has been implicated in the judicial misconduct process, but also for the plight of attorneys who testify (perhaps unwillingly) in that process.

The process already allows a special investigative committee to exercise tremendous flexibility in conducting the investigation,²⁴⁶ and it is by no means necessary that a committee call the reluctant witnesses to testify before a panel of investigating judges and the judge who is the subject of the complaint.²⁴⁷

complaint . . . , the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition.”).

244. See *supra* text accompanying notes 151–55.

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

246. See NEW MISCONDUCT RULES R. 13(a) (“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 97, 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 established by the Act.”).

247. See NEW MISCONDUCT RULES R. 13(c) (providing that “[t]he committee may arrange

Barr and Willging note, for example, that an attorney witness who was unwilling to testify in the presence of the judge accused of misconduct, could have, and probably should have, been permitted to do so.²⁴⁸ Some circuits have made a practice of “engag[ing] . . . an outside attorney-investigator to investigate the allegations of the complaint on the committee’s behalf.”²⁴⁹ In fact, one of the most exhaustive investigations ever conducted under the 1980 Act—Alcee Hastings in the Eleventh Circuit—was conducted mostly in this manner.²⁵⁰

An attorney retained to conduct an investigation for the special committee can collect a substantial amount of information from attorneys without compromising their standing with the bench. As of 1993, at least three circuits had employed this practice 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.

for staff assistance to conduct the investigation,” including the hiring of special staff for this purpose).

248. Barr & Willging, *supra* note 97, at 61–62; *see also supra* text accompanying note 213 (referring to the case). Barr and Willging criticize the special committee for not allowing the witness to testify in a 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 a 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. Barr & Willging, *supra* note 97, at 61–62 (emphasis added) (footnotes omitted) (citing ILLUSTRATIVE RULES R. 12 cmt. (2000) (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”)).

249. *Id.* at 121.

250. VOLCANSEK, *supra* note 35, at 84–85 (noting that the special investigative committee “engaged the services of John Doar, who had gained a national reputation for his investigation of the Watergate scandal, and his associate Stewart Webb to conduct the investigation”).

. . . In one matter, the special committee delegated to the investigator the responsibility of conducting the entire evidentiary hearing.²⁵¹

Indeed, after the investigator thoroughly examines all potential witnesses, the committee may be able to convene a hearing that calls only those whose testimony relates most directly and relevantly to the charge.²⁵² These few witnesses may be “confronted” and cross-examined, while many other attorney witnesses can be spared the attendant negative repercussions of testifying before the committee and in the presence of the judge being investigated.²⁵³

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. Both the reliance on investigators or other retained counsel to collect background facts and evidence and the careful paring of witness lists may spare many lawyers the unnecessary loss of goodwill that would otherwise inevitably follow their testimony. Judicial councils should also consider granting recusal rights to participating lawyers, as has happened in a couple of highly publicized misconduct matters.²⁵⁴ 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.

251. Barr & Willging, *supra* note 97, at 121–22. Professor Hellman notes that in the handling of the complaint against Judge Jon P. McCalla in 2001, “[t]he special committee hired an outside counsel, who interviewed numerous witnesses.” Hellman, *A Peek Behind Closed Doors*, *supra* note 71, at 238.

252. See VOLCANSEK, *supra* note 35, at 94. In one of the investigations of Alcee Hastings, the hearings before the special committee of judges, in which Hastings present, were brief. “Only 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.* (emphasis added). Conducting the investigation in this way minimized the number of witnesses forced to participate in the formal hearing process.

253. The unnamed attorney-witness discussed *supra* at notes 151–55 specifically recommended this approach. He believes it might have spared him the professional setbacks caused by his testimony.

254. See *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 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.”); Hellman, *A Peek Behind Closed Doors*, *supra* note 71, at 239 (discussing 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”).

CONCLUSION

While the various examinations of the federal judicial discipline process have been, for the most part, thorough and well-conceived, they have largely neglected the problem of the reluctant attorney complainant. Neither the Kastenmeier Commission nor the Breyer Committee offered an effective solution. Attorneys fear any involvement in the judicial disciplinary process, and with good reason. 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 that Category 3 misconduct exists and remains largely unaddressed, we should take little comfort in the Breyer Committee's reassuring conclusions.²⁵⁵ We certainly can and should devote additional attention to assessing the extent of Category 3 misconduct; while such data may not be easy to obtain, an anonymous survey of the bar should be possible. But given ample evidence that *some* unreported misconduct exists currently, some action should be taken now. We must begin with the proverbial first step—admitting we have a problem—before we can consider how best to address Category 3 misconduct within the system. Amending the New Misconduct Rules to restore language explicitly authorizing consideration of anonymous complaints would be a good start. The chief judges then need to genuinely consider anonymous complaints and respond to them when the allegations are serious.²⁵⁶ 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 risk serious professional damage by raising complaints or cooperating with such investigations.

The attorney-complainant will always be a reluctant tattletale. But the judicial misconduct system must respect and protect the attorney-complainant if there is to be reasonable hope of lawyer participation and 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,²⁵⁷ blissfully denying any genuine misconduct that attorneys may witness and endure, but are reluctant to report. The third branch of government and, more particularly, the society it serves deserve better than that.

255. See Hellman, *supra* note 7, at 327 (“Overall, they suggested that the judiciary was doing a good job . . .”). As noted earlier, the Breyer Committee essentially concluded 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 superficially, the problem of Category 3 misconduct, which the system is missing entirely. See *supra* notes 79–86 and accompanying text.

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

257. BREYER COMM. REPORT, *supra* note 1, at 135–36.