

## Complaints of Judicial Misconduct

By Justin A. Thornton

As counsel in a hotly contested case, you suspect that the presiding 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? Is there a formal procedure for filing a complaint of judicial misconduct? Many in-house counsel and practitioners alike are unfamiliar with the provisions of 28 U.S.C. § 351 *et seq.*, and the Rules Governing Complaints of Judicial Misconduct and Disability adopted by each of the federal circuits, which govern the handling of complaints of judicial misconduct or disability.

### APPLICABLE STATUTES AND RULES

Pursuant to the Judicial Improvement Act of 2002 (codified at 28 U.S.C. § 351 *et seq.*), and the *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, published by the Administrative Office of the United States Courts (2000), any person may allege that a judge has engaged in "conduct prejudicial to the effective and expeditious administration of the business of the courts" by filing a written complaint with the clerk of the Court of Appeals for the appropriate circuit, setting forth the relevant facts and circumstances. "The law's purpose is essentially forward-looking and not punitive."

The term "conduct prejudicial to the effective and expeditious administration of the business of the courts" is not precisely defined. But it does include, "... such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office." Importantly, one must distinguish judicial misconduct from legal error.

In the interest of the effective and expeditious administration of the business of the courts, the chief judge may dispense with a formal filing. Anonymous complaints that are not filed by way of formal written complaint are forwarded by the clerk to the chief judge for such action as is deemed appropriate. Thereafter, the chief judge may, by written order, dispense with the filing of a formal written complaint and identify the complaint as being authorized under 28 U.S.C. § 351(b).

The chief judge is required to review any complaint expeditiously. In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining: "1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation; and 2) whether the facts stated in the complaint are either plainly untrue or incapable of being established through investigation." The chief judge cannot make any findings of fact that are reasonably in dispute.

The chief judge by written order may dismiss the complaint if he/she concludes that it is directly related to the merits of a decision or procedural ruling, that it is frivolous, that it does not raise an inference that misconduct has occurred, that it contains allegations which are incapable of being established through investigation, that appropriate corrective action has been taken, or that action on the complaint is no longer necessary because of intervening events. Conduct prejudicial to the effective and expeditious administration of the business of the courts "does not include making wrong decisions — even very wrong decisions — in cases. The law provides that a complaint may be dismissed if it is 'directly related to the merits of a decision or procedural ruling.'"

If the complaint is not dismissed, the chief judge shall appoint a special committee to investigate the facts and allegations, furnish each member of the committee with a copy of the complaint, and provide written notice to the judge complained about (hereinafter "the judge"). The special committee shall then expeditiously conduct its investigation and file with the clerk for transmission to the judicial council a comprehensive report of its investigation, including findings of the investigation and its recommendations for council action. If, during the investigation, the committee has reason to believe that the judge may have engaged in misconduct that is beyond the scope of the complaint, the committee may, with written notice to the judge, expand the scope of the investigation to encompass such misconduct.

The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. The duty of the special committee and its staff "is at all times to be impartial." All persons believed to have substantial information to offer will be called as committee witnesses. The witnesses will be questioned by committee members, staff, or both. The judge will be afforded the opportunity to cross-examine committee witnesses, personally or through counsel. The judge may also call and examine witnesses, and these witnesses may be examined by committee members, staff, or both. Both the committee and the

judge have full subpoena power.

A record and transcript will be made of any hearing, testimony will be taken under oath or affirmation, and the Federal Rules of Evidence will generally apply. All action by the special committee will be by majority vote. All papers, documents, and records of proceedings shall be confidential and shall not be disclosed to anyone except where the judicial council in its discretion releases a copy of a special committee's report to the complainant and the judge, or during impeachment proceedings, or by written authorization by the judge.

Perhaps surprisingly, the applicable statutes and rules are silent with regard to the standard of proof to be applied in the evaluation of complaints of judicial misconduct. Although this issue was addressed by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders during its consideration in 1998 of a complaint filed against District Judge John McBryde of the Northern District of Texas, the committee did not resolve the issue because it was able to make its finding under either standard of "clear and convincing" or "preponderance of" the evidence.

Any findings adverse to the judge will be based on evidence in the record. The judge has the right to receive a copy of the report at the time it is filed with the judicial council. After the filing of a report of a special committee, the judge may file a written response with the clerk of the Court of Appeals, who will forward it to all members of the judicial council and to the circuit executive. Upon receipt of the special committee's report, the judicial council may undertake any additional investigation it considers necessary or dismiss the complaint. Upon request of the judge, the judicial council may, if the complaint has been

finally dismissed, recommend that the Administrative Office of the United States Courts award reimbursement of expenses and attorneys' fees. The judicial council will dismiss the complaint if it concludes:

- (1) that the claimed conduct, even if the claim is true, is not "conduct prejudicial to the effective and expeditious administration of the business of the courts" and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;
- (2) that the complaint is directly related to the merits of a decision or procedural ruling;
- (3) that the facts on which the complaint is based have not been demonstrated; or
- (4) that, under the statute, the complaint is otherwise not appropriate for consideration.

Furthermore, the judicial council will conclude the complaint proceeding if it determines that appropriate action has already been taken to remedy the problem identified in the complaint or that intervening events make any action unnecessary.

If additional investigation is not undertaken and the complaint is not dismissed, the judicial council shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit. Such action may include ordering, for a fixed temporary period, that no new cases be assigned to the judge, censuring or reprimanding the judge by means of private communication or public announcement, or requesting the judge to retire voluntarily with the provision, if necessary, that ordinary length-of-service requirements be waived.

The judicial council cannot order removal of a judge appointed to hold office during good behavior. However, when appropriate, the judicial council may, in addition to other corrective action, refer the complaint to the judicial conference of the United States for further action. In that regard, perhaps the most significant such action led to the impeachment of then-judge Alcee Hastings of the U.S. District Court for the Southern District of Florida.

A complainant or judge who is dis-

satisfied with the action of the judicial council may petition the Judicial Conference for review, and the judicial conference may either grant or deny the petition. The determination of the judicial conference on appeal is final and is not judicially reviewable.

## **RECENT REPORT BY THE BREYER COMMITTEE**

An average of about 700 complaints are filed annually against federal judges, mostly (92%) by litigants and prisoners. During 2001-2005, only 81 attorneys were identified as complainants. The majority of complaints allege prejudice/bias or abuse of judicial power. Most complaints are dismissed as being frivolous and/or because the allegations are directly related to the merits of a judicial decision. Nine special committees were appointed to investigate 15 complaints filed against nine judges during 2001-2005. In those cases, judicial councils dismissed six complaints against five judges, and imposed public censure on two judges, private censure on one judge, and "other discipline" on another judge whose case remains under seal. In no instances during 2001-2005 did judicial councils exercise their authority to direct the chief judge to take action against a magistrate judge, certify a judge as disabled, or request voluntary retirement.

Following a two-year study in which it examined more than 2000 complaints, a committee led by Justice Breyer concluded in its report of September 2006 that there is "no serious problem with the Judiciary's handling of the vast bulk of complaints" filed under the Judicial Conduct and Disability Act. Failing to process such complaints properly occurred in 2%-3% of the cases. The committee also identified 17 high-profile cases (*i.e.*, those receiving significant news coverage or which came to the attention of, or were filed by, members of Congress) during 2001-2005, and concluded that five of those 17 cases were mishandled. Noting that such mishandling of well-publicized cases "may discourage those with legitimate complaints from using the Act," the committee concluded that an error rate of nearly 30% in high-visibility cases was "far too high." See Implementation of the Judicial Conduct

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and Disability Act of 1980: A Report to the Chief Justice, The Judicial Conduct and Disability Act Study Committee, chaired by Justice Stephen Breyer (September 2006).

### **CONCLUSION**

As the National Commission on Judicial Discipline & Removal observed in its Report of August 1993:

Public accountability is not the only value at stake. Unjustified suspicion of the ethics and conduct of federal judges or of the

federal judiciary's commitment to effective self-regulation is harmful to the rule of law and a threat to judicial independence. The judiciary thus has a direct institutional interest in a system of self-regulation that is not only effective but perceived to be effective.

In conclusion, counsel should familiarize themselves with the formal procedure provided for by applicable statutes and rules in the event they are faced with the prospect of misconduct

by a federal judge. Filing a complaint of judicial misconduct is a serious matter and may, or may not, be the right thing to do.



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