

## SPECIAL REPORT: POLICING THE BENCH

### Federal bench reforms fall short

Proposals move ahead, then retreat.

*The last in a three-part series on judicial misconduct.*

**Pamela A. MacLean / staff reporter**

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Northwestern University  
School of Law's Steven  
Lubet

The Vatican College of Cardinals' papal conclave may be the only earthly body more secretive than the disciplinary system of the federal judiciary.

Complaints against judges are secret, although the subject judge immediately sees who complained. Any subsequent investigation by the circuit is secret. The resulting report is secret. A decision to dismiss the claim or punish the judge rarely discloses the name of the errant judge, and appeals by either side remain secret.



Center for Judicial  
Ethics' Cynthia Gray

Just how cloaked in confidentiality judge discipline has become can be seen in a new batch of reforms under review by the judiciary's policy arm, the Judicial Conference of the United States.

The [29 draft rules](#) went out for public comment last year — but all public responses remain confidential. The Administrative Office of the U.S. Courts even refused to disclose the number of comments submitted. They are up for review by the Judicial Conference on March 11.

The 67-page draft reform proposals curtail the 27-year-old system of decentralized rule-making by the circuits, and create national discipline standards.

Under the draft changes, the Judicial Conference's Conduct Committee, which reviews circuit discipline actions, would expand its oversight authority.

It would be empowered to see every complaint filed, although a last-minute change in the draft plan made on Feb. 24 eliminated the requirement that a copy of each complaint filed must also go to the committee. The new version now says circuits must "provide access" to complaints for committee "auditing purposes."

In addition, the changes would provide limited review power to the Conduct Committee, such as determining whether a chief circuit judge's summary dismissal was made too quickly, which would require a further investigation by a specially appointed investigative committee.

The Conduct Committee cannot make independent findings of misconduct.

### **A few steps back**

But the final version of the proposals also retreats in at least one important area. The original version of the draft rules required chief judges — who are aware of alleged misconduct — to initiate complaints. But the final draft rolled back to the existing standard of allowing chief judges to file complaints only if "clear and convincing" evidence of misconduct is present.

In high-visibility cases, the chief judge would be allowed to confirm the existence of a complaint, but not discuss the merits.

In addition, the Conduct Committee would have no ability to impose punishment on misbehaving judges and would be limited to telling circuits to reconsider such actions as dismissal of a complaint. It would be allowed, in "extraordinary circumstances," to conduct additional investigation under the proposal's Rule 21.

"We're trying to set up procedures to allow real misconduct to be brought to our attention," said Judge Ralph K. Winter of the 2d U.S. Circuit Court of Appeals, who heads the Conduct Committee, the group that produced the discipline reform proposals.

Winter said the elimination of mandatory submission of all complaints to the conduct committee has "not altered the monitoring function of the Judicial Conference's Judicial Conduct and Disability Committee."

He added that the Conduct Committee left the possibility of requiring more public disclosure to potential future reforms.

### **Falling short?**

Some observers — including the American Judicature Society, a national group dedicated to improving the justice system — suggest that the potential reforms do not go far enough and may create legal uncertainty that could lead to litigation in future misconduct cases.

"I remain unconvinced that the major problem is procedural," said Charles Geyh, professor at Indiana University School of Law — Bloomington and expert on judicial ethics. "When the only language you're dealing with is whether misconduct is 'conduct that is prejudicial to the administration of justice,' that is largely an empty phrase. [Judges] don't find a problem unless people say they have a problem."

Geyh added, "[I]f they confront a problem they largely do it privately and no one will hear about it. They only deal with it if the press starts screaming or Congress is screaming."

"I think they are more protective than necessary," said Steven Lubet, co-author of *Judicial Conduct and Ethics*, and professor at Northwestern University School of Law, of the lack of transparency in the proposals. "It goes too far to protect confidentiality. There is a public interest in knowing about these proceedings," he said of judicial discipline.

Lubet said a judge's discipline should be public at the point where probable cause for an investigation is established, as is done in many state judicial discipline programs.

Openness would help public confidence in the judiciary, he said. "People would have a better understanding that complaints are taken seriously, and where they are found without merit it would increase sympathy for the judiciary," said Lubet.

Supporters counter that the proposed changes mark this as the first set of national discipline standards for federal judges, with better guidance for circuits on how to implement the Judicial Conduct and Disability Act of 1980.

"To the extent it brings some predictability and clear process it will be helpful to judges," said 9th Circuit Judge M. Margaret McKeown. "It is a more detailed process that fills in some gaps" in existing rules, she said.

Escalating hostility from some in Congress in recent years over controversial court decisions prompted calls by Senator Charles Grassley, R-Iowa, and Representative James Sensenbrenner, R-Wis., to propose separately the creation of an inspector general as a congressional watchdog over the bench. There were also calls to impeach a half-dozen judges for controversial rulings.

Those moves were widely seen as an effort to intimidate judges and a threat to judicial independence.

But it also prompted the late Chief Justice of the United States William H. Rehnquist in 2004 to appoint the Breyer Commission, headed by Justice Stephen G. Breyer, to investigate enforcement of the Judicial Conduct and Disability Act.

The federal judiciary is on the verge of enacting the first discipline reforms to the 1980 act since minor revisions in 1990 and 2002, based on the 2006 recommendations of the Breyer Commission. The current reforms were widely viewed as an effort to forestall Congress from getting into the judge discipline business.

Congress has backed off the inspector general bills. Currently, a measure to curtail judges from attending all-expenses-paid educational junkets has been added to a judicial pay raise bill by senators Russell Feingold, D-Wis., and Jon Kyl, R.-Ariz.

### **Sharp disagreements**

Whether the proposals do more than nibble at the edges of reform remains to be seen.

Mark I. Harrison, an attorney at Osborn Maledon in Phoenix who chaired the American Bar Association commission evaluating the Model Code of Judicial Conduct, noted that "every time the process is opened up, it functions with more efficacy. And the concerns about secrecy go down the drain.

"Years ago, lawyer discipline was terribly secret. It was feared the media would flock to cases like lemmings if it was opened up. But it turns out the only time the media comes is when a case has widespread public interest," Harrison said.

"Virtually all state discipline systems are far more open and transparent than the federal system," Harrison said.

North Carolina U.S. Senior District Judge W. Earl Britt, who served as president of the Federal Judges Association from 1995 to 1997, declined to comment on the discipline reforms.

Not everyone believes there is a need for new rules.

Dick DeGuerin of Houston's DeGuerin Dickson & Hennessy represents Texas U.S. District Judge Samuel B. Kent, who endured a four-month suspension and now faces criminal investigation as a result of the sexual harassment complaint.

"What is now in place is a very powerful and serious investigative process that took place in Judge Kent's case. It was thorough. [The circuit court investigators] had outside counsel and took outside depositions from outside witnesses. I don't know that they need any reform of that process," DeGuerin said.

Others see a need.

"The federal judiciary has a code of conduct, just no mechanism for enforcing it," said Douglas Kendall, executive director of Community Rights Counsel, a public interest environmental law firm that won financial reporting reforms when judges attend expense-paid seminars.

Kendall said the discipline rules have long required more than a violation of the conduct code to be interpreted as punishable misconduct.

Not only has the degree of misconduct that is punishable been an issue, but also the role of the Conduct Committee.

### **Committee power contested**

The extent of the Conduct Committee's power became an issue in the 2006 investigation of U.S. District Judge Manuel Real in Los Angeles over allegations that he interfered in a bankruptcy case to aid a woman under his supervision on probation.

In the committee's 2006 ruling, a 3-2 majority held it had no jurisdiction to overrule the 9th Circuit's decision to dismiss the complaint against Real. *In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders*, 449 F.3d 106 (2006).

The language of the statute, 28 U.S.C. 352(c) states that any circuit council's dismissal of a complaint "shall be final and conclusive and not judicially reviewable on appeal."

But under the current reform proposal, the Conduct Committee has reversed its position on jurisdiction over cases such as Real's.

The committee, with new membership, now says it would have authority to overturn a circuit's summary dismissal of a complaint, and order the circuit to impanel a special investigative panel to reconsider the complaint.

That appears to fly in the face of the statute, according to Arthur Hellman, a professor at the University of Pittsburgh School of Law who filed a critique of some rule changes.

The proposed rule appears to conflict with the precedent set in the 2006 Real decision, and Hellman worries that it will spawn legal challenges in future cases.

The prospect of "reopening otherwise closed proceedings does have the potential for these ugly disputes," he said. "If the committee thinks that authority is needed, they should ask Congress," he said. But that may be a can of worms they'd rather leave closed, he suggested.

Winter of the 2d Circuit said that the committee changed its mind and found that there has to be power to at least order circuits to appoint special investigative panels.

"It was a glitch that was never an intent to limit review," he said. "You would never write a statute that way, to allow a subordinate body to cut off review even when making an erroneous ruling," he said.

As for opening a door to challenges, "There can always be litigation," Winter said.

On Jan. 18, in an appeal of a previously undisclosed 2004 misconduct case involving Real, the Conduct Committee issued a precedent-setting decision. Real had been accused of abuse of power by refusing to follow appellate orders and failing to state reasons for decisions, with at least 23 cases identified as remanded multiple times or reassigned to a new judge on remand.

The 9th Circuit issued a private reprimand, which was appealed by an unidentified complainant as too lax, sending it up to the Conduct Committee separately from the earlier bankruptcy case.

The Conduct Committee decision establishes for the first time that judges may be disciplined if they "willfully" ignore legal standards or the directions of appeals courts.

But, in an effort to avoid treading on judicial independence, the committee instructed that judges who push the edge of existing precedent must be given "breathing room" to protect their independence. It returned the case to the 9th Circuit to determine if Real's misconduct was willful.

The American Judicature Society (AJS) weighed in on the reform proposals, applauding the committee's "impressive work," but warned that several rules may not go far enough.

Automatic dismissal of misconduct complaints asserting a judge delayed ruling in a case could discourage filing of claims because individual litigants are unlikely to know if a judge has a pattern of delay, which is punishable. Outside a U.S. attorney's or public defender's office, few lawyers would know if a judge had a pattern of delay, the AJS argued.

Automatic dismissal would "prevent a chief judge from identifying a pattern that could indicate serious administrative failures or a possible disability, preventing the chief judge from taking informal action," warned Cynthia Gray, director of the Center for Judicial Ethics at the AJS.

"We do say if there is a pattern of delay it is misconduct," Winter said. "Most chief judges are well aware of which judges delay things and which don't. Realistically speaking, a chief circuit judge has that information at their disposal," he said.

The proposed rule changes would authorize circuits to disclose the existence of a complaint and investigation only if news has leaked out in press reports, but that would be as far as the circuits would be able to go.

Since 2002, Congress has encouraged the courts to post final discipline orders online, but so far only the 7th and 9th circuits have begun posting routine orders. The 7th Circuit has posted 68 orders and the 9th Circuit posted 10 in 2008.

Discipline orders, which rarely identify the subject judge, are retained for the public in paper form by the Federal Judicial Center in Washington or in local clerk's offices, leaving them all but inaccessible.