-End-

-CITE-
28 USC CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-MISC1-
Sec.

351. Complaints; judge defined.
352. Review of complaint by chief judge.
353. Special committees.
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355. Action by Judicial Conference.
356. Subpoena power.
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358. Rules.
359. Restrictions.
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363. Court of Federal Claims, Court of International Trade, Court of Appeals for the Federal Circuit.
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-SECREF-

CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 331, 332, 375, 604 of this title; title 38 section 7253.

-End-

-CITE-

28 USC Sec. 351 01/19/04

-EXPCITE-

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE

PART I - ORGANIZATION OF COURTS

CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-

Sec. 351. Complaints; judge defined

-STATUTE-

(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.

(b) Identifying Complaint by Chief Judge. - In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this chapter and thereby dispense with filing of a written complaint.

(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, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this chapter only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the complaint to the judge whose conduct is the subject of the complaint. The clerk shall also transmit a copy of any complaint identified under subsection (b) to the judge whose conduct is the subject of the complaint.

(d) Definitions. - In this chapter -

(1) the term "judge" means a circuit judge, district judge, bankruptcy judge, or magistrate judge; and

(2) the term "complainant" means the person filing a complaint under subsection (a) of this section.

-SOURCE-

(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1848.)

-MISC1-

SEVERABILITY

Pub. L. 107-273, div. C, title I, Sec. 11044, Nov. 2, 2002, 116 Stat. 1856, provided that: "If any provision of this subtitle [subtitle C (Secs. 11041-11044) of title I of div. C of Pub. L. 107-273, enacting this chapter, amending sections 331, 332, 372, 375, and 604 of this title, and section 7253 of Title 38, Veterans' Benefits, and enacting provisions set out as a note under section 1 of this title], an amendment made by this subtitle, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this subtitle, the amendments made by this subtitle, and the application of the provisions of such to any person or circumstance shall not be affected thereby."

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 352, 354 of this title.

-End-

-CITE-
28 USC Sec. 352 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
Sec. 352. Review of complaint by chief judge

-STATUTE-
(a) Expeditious Review; Limited Inquiry. - The chief judge shall expeditiously review any complaint received under section 351(a) or identified under section 351(b). 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 are incapable of being established through investigation.

For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. Such response shall not be made available to the complainant unless authorized by the judge filing the response. The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and any other person who may have knowledge of the

matter, and may review any transcripts or other relevant documents. The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.

(b) Action by Chief Judge Following Review. - After expeditiously reviewing a complaint under subsection (a), the chief judge, by written order stating his or her reasons, may -

(1) dismiss the complaint -

(A) if the chief judge finds the complaint to be -

(i) not in conformity with section 351(a);

(ii) directly related to the merits of a decision or procedural ruling; or

(iii) frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation; or

(B) when a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence; or

(2) conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of the written order to the complainant and to the judge whose conduct is the subject of the complaint.

(c) Review of Orders of Chief Judge. - A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof. The denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(d) Referral of Petitions for Review to Panels of the Judicial Council. - Each judicial council may, pursuant to rules prescribed

under section 358, refer a petition for review filed under subsection (c) to a panel of no fewer than 5 members of the council, at least 2 of whom shall be district judges.

-SOURCE-
(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1849.)

-SECREF-
SECTION REFERRED TO IN OTHER SECTIONS
This section is referred to in sections 353, 357 of this title.

-End-

-CITE-
28 USC Sec. 353 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
Sec. 353. Special committees

-STATUTE-
(a) Appointment. - If the chief judge does not enter an order under section 352(b), the chief judge shall promptly -
(1) appoint himself or herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;
(2) certify the complaint and any other documents pertaining thereto to each member of such committee; and
(3) provide written notice to the complainant and the judge

whose conduct is the subject of the complaint of the action taken under this subsection.

(b) Change in Status or Death of Judges. - A judge appointed to a special committee under subsection (a) may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45. If a judge appointed to a committee under subsection (a) dies, or retires from office under section 371(a), while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(c) Investigation by Special Committee. - Each committee appointed under subsection (a) shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

-SOURCE-

(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1850.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in sections 332, 354, 356, 359, 360 of this title.

-End-

-CITE-

28 USC Sec. 354 01/19/04

-EXPCITE-

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
Sec. 354. Action by judicial council

-STATUTE-
(a) Actions Upon Receipt of Report. -
(1) Actions. - The judicial council of a circuit, upon receipt of a report filed under section 353(c) -
(A) may conduct any additional investigation which it considers to be necessary;
(B) may dismiss the complaint; and
(C) if the complaint is not dismissed, shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.

(2) Description of possible actions if complaint not dismissed. -
(A) In general. - Action by the judicial council under paragraph (1)(C) may include -
(i) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint;
(ii) censuring or reprimanding such judge by means of private communication; and
(iii) censuring or reprimanding such judge by means of public announcement.

(B) For article iii judges. - If the conduct of a judge appointed to hold office during good behavior is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include -
(i) certifying disability of the judge pursuant to the

procedures and standards provided under section 372(b); and
(ii) requesting that the judge voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply.

(C) For magistrate judges. - If the conduct of a magistrate judge is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include directing the chief judge of the district of the magistrate judge to take such action as the judicial council considers appropriate.

(3) Limitations on judicial council regarding removals. -
(A) Article iii judges. - Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.
(B) Magistrate and bankruptcy judges. - Any removal of a magistrate judge under this subsection shall be in accordance with section 631 and any removal of a bankruptcy judge shall be in accordance with section 152.

(4) Notice of action to judge. - The judicial council shall immediately provide written notice to the complainant and to the judge whose conduct is the subject of the complaint of the action taken under this subsection.

(b) Referral to Judicial Conference. -
(1) In general. - In addition to the authority granted under subsection (a), the judicial council may, in its discretion, refer any complaint under section 351, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.
(2) Special circumstances. - In any case in which the judicial council determines, on the basis of a complaint and an investigation under this chapter, or on the basis of information otherwise available to the judicial council, that a judge appointed to hold office during good behavior may have engaged in

conduct -
(A) which might constitute one or more grounds for impeachment under article II of the Constitution, or
(B) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.
(3) Notice to complainant and judge. - A judicial council acting under authority of this subsection shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge whose conduct is the subject of the action taken under this subsection.

-SOURCE-
(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1850.)

-SECREF-
SECTION REFERRED TO IN OTHER SECTIONS
This section is referred to in sections 355, 357, 360, 361 of this title; title 38 section 7253.

-End-

-CITE-
28 USC Sec. 355 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-

Sec. 355. Action by Judicial Conference

-STATUTE-

(a) In General. - Upon referral or certification of any matter under section 354(b), the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in section 354(a)(1)(C) and (2), as it considers appropriate.

(b) If Impeachment Warranted. -

(1) In general. - If the Judicial Conference concurs in the determination of the judicial council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(2) In case of felony conviction. - If a judge has been convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under section 354(b), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

-SOURCE-

(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1852.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 360 of this title; title 38 section 7253.

-End-

-CITE-

28 USC Sec. 356 01/19/04

-EXPCITE-

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE

PART I - ORGANIZATION OF COURTS

CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-

Sec. 356. Subpoena power

-STATUTE-

(a) Judicial Councils and Special Committees. - In conducting any investigation under this chapter, the judicial council, or a special committee appointed under section 353, shall have full subpoena powers as provided in section 332(d).

(b) Judicial Conference and Standing Committees. - In conducting any investigation under this chapter, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331, shall have full subpoena powers as provided in that section.

-SOURCE-

(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1852.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 38 section 7253.

-End-

-CITE-
28 USC Sec. 357 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
Sec. 357. Review of orders and actions

-STATUTE-
(a) Review of Action of Judicial Council. - A complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof.

(b) Action of Judicial Conference. - The Judicial Conference, or the standing committee established under section 331, may grant a petition filed by a complainant or judge under subsection (a).

(c) No Judicial Review. - Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

-SOURCE-
(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1853.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 38 section 7253.

-End-

-CITE-

28 USC Sec. 358 01/19/04

-EXPCITE-

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE

PART I - ORGANIZATION OF COURTS

CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-

Sec. 358. Rules

-STATUTE-

(a) In General. - Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this chapter, including the processing of petitions for review, as each considers to be appropriate.

(b) Required Provisions. - Rules prescribed under subsection (a) shall contain provisions requiring that -

(1) adequate prior notice of any investigation be given in writing to the judge whose conduct is the subject of a complaint under this chapter;

(2) the judge whose conduct is the subject of a complaint under this chapter be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(3) the complainant be afforded an opportunity to appear at

proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

(c) Procedures. - Any rule prescribed under this section shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such rule shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this section may limit the period of time within which a person may file a complaint under this chapter.

-SOURCE-
(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1853.)

-SECREF-
SECTION REFERRED TO IN OTHER SECTIONS
This section is referred to in sections 352, 604 of this title; title 38 section 7253.

-End-

-CITE-
28 USC Sec. 359 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
Sec. 359. Restrictions

-STATUTE-

(a) Restriction on Individuals Who Are Subject of Investigation. - No judge whose conduct is the subject of an investigation under this chapter shall serve upon a special committee appointed under section 353, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331, until all proceedings under this chapter relating to such investigation have been finally terminated.

(b) Amicus Curiae. - No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this chapter.

-SOURCE-

(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1853.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 38 section 7253.

-End-

-CITE-

28 USC Sec. 360 01/19/04

-EXPCITE-

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE

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-HEAD-

Sec. 360. Disclosure of information

-STATUTE-

(a) Confidentiality of Proceedings. - Except as provided in section 355, all papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that -

(1) the judicial council of the circuit in its discretion releases a copy of a report of a special committee under section 353(c) to the complainant whose complaint initiated the investigation by that special committee and to the judge whose conduct is the subject of the complaint;

(2) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(3) such disclosure is authorized in writing by the judge who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331.

(b) Public Availability of Written Orders. - Each written order to implement any action under section 354(a)(1)(C), which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order shall be accompanied by written reasons therefor.

-SOURCE-

(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1854.)

-SECREF-

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in section 604 of this title; title 38 section 7253.

-End-

-CITE-
28 USC Sec. 361 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
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-HEAD-
Sec. 361. Reimbursement of expenses

-STATUTE-
Upon the request of a judge whose conduct is the subject of a complaint under this chapter, the judicial council may, if the complaint has been finally dismissed under section 354(a)(1)(B), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation which would not have been incurred but for the requirements of this chapter.

-SOURCE-
(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1854.)

-SECREF-
SECTION REFERRED TO IN OTHER SECTIONS
This section is referred to in title 38 section 7253.

-End-

-CITE-
28 USC Sec. 362 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
Sec. 362. Other provisions and rules not affected

-STATUTE-
Except as expressly provided in this chapter, nothing in this chapter shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

-SOURCE-
(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1854.)

-REFTEXT-
REFERENCES IN TEXT
The Federal Rules of Civil Procedure, the Federal Rules of Appellate Procedure, and the Federal Rules of Evidence, referred to in text, are set out in the Appendix to this title.
The Federal Rules of Criminal Procedure, referred to in text, are set out in the Appendix to Title 18, Crimes and Criminal Procedure.

-End-

-CITE-
28 USC Sec. 363 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
Sec. 363. Court of Federal Claims, Court of International Trade, Court of Appeals for the Federal Circuit

-STATUTE-
The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the provisions of this chapter, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this chapter.

-SOURCE-
(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1854.)

-SECREF-
SECTION REFERRED TO IN OTHER SECTIONS
This section is referred to in section 364 of this title.

-End-

-CITE-
28 USC Sec. 364 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
PART I - ORGANIZATION OF COURTS
CHAPTER 16 - COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

-HEAD-
Sec. 364. Effect of felony conviction

-STATUTE-
In the case of any judge or judge of a court referred to in section 363 who is convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the following shall apply:

(1) The judge shall not hear or decide cases unless the judicial council of the circuit (or, in the case of a judge of a court referred to in section 363, that court) determines otherwise.

(2) Any service as such judge or judge of a court referred to in section 363, after the conviction is final and all time for filing appeals thereof has expired, shall not be included for purposes of determining years of service under section 371(c), 377, or 178 of this title or creditable service under subchapter III of chapter 83, or chapter 84, of title 5.

-SOURCE-
(Added Pub. L. 107-273, div. C, title I, Sec. 11042(a), Nov. 2, 2002, 116 Stat. 1855.)

-End-

-CITE-
28 USC CHAPTER 17 - RESIGNATION AND RETIREMENT OF JUSTICES AND JUDGES 01/19/04

-EXPCITE-
TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE
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-HEAD-
CHAPTER 17 - RESIGNATION AND RETIREMENT OF JUSTICES AND JUDGES

-MISC1-
Sec.
371. Retirement on salary; retirement in senior status.
372. Retirement for disability; substitute judge on failure to retire.
373. Judges in Territories and Possessions.(!1)
374. Residence of retired judges; official station.
375. Recall of certain judges and magistrate judges.
376. Annuities for survivors of certain judicial officials of the United States.
377. Retirement of bankruptcy judges and magistrate judges.

AMENDMENTS

2002 - Pub. L. 107-273, div. C, title I, Sec. 11043(a)(2), Nov. 2, 2002, 116 Stat. 1855, struck out "; judicial discipline" after "failure to retire" in item 372.

1988 - Pub. L. 100-702, title X, Sec. 1020(a)(9), Nov. 19, 1988, 102 Stat. 4672, substituted "Annuities for survivors of certain judicial officials of the United States" for "Annuities to widows and surviving dependent children of justices and judges of the United States" in item 376.

Pub. L. 100-659, Sec. 2(b), Nov. 15, 1988, 102 Stat. 3916, added item 377.

RULES OF THE JUDICIAL COUNCIL OF THE SECOND CIRCUIT GOVERNING COMPLAINTS AGAINST JUDICIAL OFFICERS UNDER 28 U.S.C. § 351 et. seq.

Preface to the Rules

Section 351 et. seq. of Title 28 of the United States Code provides a way for any person to complain about a federal judge or magistrate judge who the person believes "has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or "is unable to discharge all the duties of office by reason of mental or physical disability." It also permits the judicial councils of the circuits to adopt rules for the consideration of these complaints. These rules have been adopted under that authority.

Complaints are filed with the clerk of the court of appeals on a form that has been developed for that purpose. Each complaint is referred first to the chief judge of the circuit, who decides whether the complaint raises an issue that should be investigated. (If the complaint is about the chief judge, another judge will make this decision; see Rule 18(e).)

The chief judge will dismiss a complaint if it does not properly raise a problem that is appropriate for consideration under § 351. The chief judge may also conclude the complaint proceeding if the problem has been corrected or if intervening events have made action on the complaint unnecessary. If the complaint is not disposed of in any of these ways, the chief judge will appoint a special committee to investigate the complaint. The special committee makes its report to the judicial council of the circuit, which decides what action, if any, should be taken. The judicial council is a body that consists of the chief judge and six other judges of the court of appeals and the chief judge of each of the district courts within the Second Circuit.

The rules provide, in some circumstances, for review of decisions of the chief judge or the judicial council.

Chapter I: Filing a Complaint

RULE 1. WHEN TO USE THE COMPLAINT PROCEDURE

(a) The Purpose of the Procedure. The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges or magistrate judges have engaged in conduct that does not meet the standards expected of federal judicial officers or are physically or mentally unable to perform their duties.

The law'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.

(b) What May be Complained About. The law authorizes complaints about judges or magistrate judges who have "engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" or who are "unable to discharge all the duties of office by reason of mental or physical disability."

"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 the course of hearings, trials, or appeals. It does not include conduct engaged in by a judicial officer prior to appointment to the bench. The law provides that a complaint may be dismissed if it is "directly related to the merits of a decision or procedural ruling."

"Mental or physical disability" may include temporary conditions as well as permanent disability.

(c) Who May be Complained About. The complaint procedure applies to judges of the United States courts of appeals, judges of the United States district courts, judges of United States bankruptcy courts, and United States magistrate judges. These rules apply, in particular, only to judges of the Court of Appeals for the Second Circuit and to district judges, bankruptcy judges, and magistrate judges of federal courts within the circuit. The circuit includes Connecticut, New York and Vermont.

Complaints about other officials of federal courts should be made to their supervisors in the various courts. If such a complaint cannot be satisfactorily resolved at lower levels, it may be referred to the chief judge of the court in which the official is employed. The circuit executive, whose address is United States Courthouse, Foley Square, New York, New York 10007, is sometimes able to provide assistance in resolving such complaints. All complaints must be submitted in writing.

(d) Time for Filing. Complaints should be filed promptly. A complaint may be dismissed if it is filed so long after the events in question that the delay will make fair consideration of the matter impossible. A complaint may also be dismissed if it does not indicate the existence of a current problem with the administration of the business of the courts.

(e) Limitations on Use of the Procedure. The complaint procedure is not intended to

provide a means of obtaining review of a judge's or magistrate judge's decision or ruling in a case. 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.

The complaint procedure may not be used to have a judge or magistrate judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case.

Also, the complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge or magistrate judge too long. A petition for mandamus can sometimes be used for that purpose.

RULE 2. HOW TO FILE A COMPLAINT

(a) Form. Complaints should be filed on the official form for filing complaints in the Second Circuit, which is reproduced in the appendix to these rules. Forms may be obtained by writing or telephoning the clerk of the Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, New York 10007 (telephone (212) 857-8702). Forms may be picked up in person at the office of the clerk of the court of appeals or any district court or bankruptcy court within the circuit.

(b) Statement of Facts. A statement should be attached to the complaint form, setting forth with particularity the facts upon which the claim of misconduct or disability is based. The statement should not be longer than five pages (five sides), and the paper size should not be larger than the paper the form is printed on. Normally, the statement of facts will include –

(1) A statement of what occurred;
(2) The time and place of the occurrence or occurrences;
(3) Any other information that would assist an investigator in checking the facts, such as the presence of a court reporter or other witness and their names and addresses.

(c) Legibility. Complaints should be typewritten if possible. If not typewritten, they must be legible.

(d) Submission of Documents. Documents such as excerpts from transcripts may be submitted as evidence of the behavior complained about; if they are, the statement of facts should refer to the specific pages in the documents on which relevant material appears.

(e) Number of Copies. If the complaint is about a judge of the court of appeals, an original plus three copies of the complaint form and the statement of facts must be filed; if it is about a district judge or magistrate judge, an original plus four copies must be filed; if it is about a bankruptcy judge, an original plus five copies must be filed. One copy of any supporting transcripts, exhibits, or other documents is sufficient. A separate complaint, with the required number of copies, must be filed with respect to each judge or magistrate judge complained about.

(f) Signature and Oath. The form must be signed by the complainant and the truth of the statements verified in writing under oath. As an alternative to taking an oath, the complainant may declare under penalty of perjury that the statements are true. The complainant's address must also be provided.

(g) Where to File. Complaints should be sent to

Clerk of Court
United States Court of Appeals
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

The envelope should be marked "Complaint of Misconduct" or "Complaint of Disability."

(h) No Fee Required. There is no filing fee for complaints of misconduct or disability.

RULE 3. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A COMPLAINT

(a) Receipt of Complaint in Proper Form.

(1) Upon receipt of a complaint against a judge or magistrate judge

filed in proper form under these rules, the clerk of the court will open a file, assign a docket number, and acknowledge receipt of the complaint. The clerk will promptly send copies of the complaint to the chief judge of the circuit (or the judge authorized to act as chief judge under rule 18(e)) and to the judge or magistrate judge whose conduct is the subject of the complaint. The original of the complaint will be retained by the clerk.

(2) If a district judge or magistrate judge is complained about, the clerk will also send a copy of the complaint to the chief judge of the district court in which the judge or magistrate judge holds appointment. If a bankruptcy judge is complained about, the clerk will send copies to the chief judges of the district court and the bankruptcy court. However, if the chief judge of a district court or bankruptcy court is a subject of the complaint, the chief judge's copy will be sent to the judge eligible to become the next chief judge of such court.

(b) Receipt of Complaint About Official Other Than a Judge or Magistrate Judge of the Second Circuit. If the clerk receives a complaint about an official other than a judge or magistrate judge of the Second Circuit, the clerk will not accept the complaint for filing, and will so advise the complainant.

(c) Receipt of Complaint Not in Proper Form. If the clerk receives a complaint against a judge or magistrate judge of this circuit that uses a complaint form but does not comply with the requirements of Rule 2, the clerk will normally not accept the complaint for filing and will advise the complainant of the appropriate procedures. If a complaint against a judge or magistrate judge is received in letter form, the clerk will normally not accept the letter for filing as a complaint, will advise the writer of the right to file a formal complaint under these rules, and will enclose a copy of these rules and the accompanying forms.

Chapter II: Review of a Complaint By the Chief Judge

RULE 4. REVIEW BY THE CHIEF JUDGE

(a) Purpose of Chief Judge's Review. When a complaint in proper form is sent to the chief judge by the clerk's office, the chief judge will review the complaint to determine whether it should be (1) dismissed, (2) concluded on the ground that corrective action has been taken, (3) concluded because intervening events have made action on the complaint no longer necessary, or (4) referred to a special committee.

(b) Inquiry by Chief Judge. In determining what action to take, the chief judge, with such assistance as may be appropriate, 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 are incapable of being established through investigation. For this purpose, the chief judge may request the judge or magistrate judge whose conduct is complained of to file a written response to the complaint. The chief judge may also communicate orally or in writing with the complainant, the judge or magistrate judge whose conduct is complained of, and other people who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge will not undertake to make findings of fact about any material matter that is reasonably in dispute.

(c) Dismissal. A complaint will be dismissed if the chief judge 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 complaint is frivolous, a term that includes making charges that are wholly unsupported or have been ruled on in previous complaints by the same complainant; or

(4) that, under the statute, the complaint is otherwise not appropriate for consideration.

(d) Corrective Action. The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint or that action on the complaint is no longer necessary because of intervening events.

(e) Appointment of Special Committee. If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee, constituted as provided in Rule 9, to investigate the complaint and make recommendations to the judicial council. However, ordinarily a special committee will not be appointed until the judge or magistrate judge complained about has been invited to respond to the complaint and has been allowed a reasonable time to do so. In the discretion of the chief judge, separate complaints may be joined and assigned to a single special committee.

(f) Notice of Chief Judge's Action.

(1) If the complaint is dismissed or the proceeding concluded on the basis of corrective action taken or because intervening events have made action on the complaint unnecessary, the chief judge will prepare a supporting memorandum that sets forth the allegations of the complaint and the reasons for the disposition. The memorandum will not include the name of the complainant or of the judge or magistrate judge whose conduct was complained of. The order and the supporting memorandum, which may be incorporated in one document, will be filed and provided to the complainant, the judge or magistrate judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). The complainant will be notified of the right to petition the judicial council for review of the decision and of the deadline for filing a petition.

(2) If a special committee is appointed, the chief judge will notify the complainant, the judge or magistrate judge whose conduct is complained of, and any judge entitled to receive a copy of the complaint pursuant to Rule 3(a)(2) that the matter has been referred, and will inform them of the membership of the committee.

(g) Report to Judicial Council. The chief judge will from time to time report to the judicial council of the circuit on actions taken under this rule.

CHAPTER III: Review of Chief Judge's Disposition of a Complaint

RULE 5. PETITION FOR REVIEW OF CHIEF JUDGE'S DISPOSITION

If the chief judge dismisses a complaint or concludes the proceeding on the ground that corrective action has been taken or that intervening events have made action unnecessary, a petition for review may be addressed to the judicial council of the circuit. The judicial council may deny the petition for review, or grant the petition and either return the matter to the chief judge for further action or, in exceptional cases, take other appropriate action.

RULE 6. HOW TO PETITION FOR REVIEW OF A DISPOSITION BY THE CHIEF JUDGE

(a) Time. A petition for review must be received in the office of the clerk of the court of appeals within 30 days of the date of the clerk's letter to the complainant transmitting the chief judge's order.

(b) Form. A petition should be in the form of a letter, addressed to the clerk of the court of appeals, beginning "I hereby petition the judicial council for review of the chief judge's order. . ." There is no need to enclose a copy of the original complaint.

(c) Legibility. Petitions should be typewritten if possible. If not typewritten, they must be legible.

(d) Number of Copies. Only an original is required.

(e) Statement of Grounds for Petition. The letter should set forth a brief statement of the reasons why the petitioner believes that the chief judge should not have dismissed the complaint or concluded the proceeding. It should not repeat the complaint; the complaint will be available to members of the circuit council considering the petition.

(f) Signature. The letter must be signed by the complainant.

(g) Where to File. Petition letters should be sent to

Clerk of Court
United States Court of Appeals
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, NY 10007

The envelope should be marked "Misconduct Petition" or "Disability Petition."

(h) No Fee Required. There is no fee for filing a petition under this procedure.

RULE 7. ACTION BY CLERK OF COURT OF APPEALS UPON RECEIPT OF A PETITION FOR REVIEW

(a) Receipt of Timely Petition in Proper Form. Upon receipt of a petition for review filed within the time allowed and in proper form under these rules, the clerk of the court of appeals will acknowledge receipt of the petition. The clerk will promptly cause to be sent to each member of the judicial council, except for any member disqualified under rule 18, copies of (1) the complaint form and statement of facts, (2) any response filed by the judge or magistrate judge, (3) any record of information received by the chief judge in connection with the chief judge's consideration of the complaint, (4) the chief judge's order disposing of the complaint, (5) any memorandum in support of the chief judge's order, (6) the petition for review, (7) any other documents in the files of the clerk that appear to the circuit executive to be relevant and material to the petition or a list of such documents, (8) a list of any documents in the clerk's files that are not being sent because they are not considered by the circuit executive relevant and material, (9) a ballot that conforms with Rule

8(a). The clerk will also send the same materials, except for the ballot, to the circuit executive and the judge or magistrate judge whose conduct is at issue, except that materials previously sent to a person may be omitted.

(b) Receipt of Untimely Petition. The clerk will not accept for filing a petition that is received after the deadline set forth in Rule 6(a), and will so advise the complainant.

(c) Receipt of Timely Petition Not in Proper Form. Upon receipt of a petition filed within the time allowed but not in proper form under these rules (including a document that is ambiguous about whether a petition for review is intended), the clerk will acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within fifteen days of the date of the clerk's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed in accordance with paragraph (a) of this rule. If the deficiencies are not corrected, the clerk will reject the petition, and will so advise the complainant.

RULE 8. REVIEW BY THE JUDICIAL COUNCIL OF A CHIEF JUDGE'S ORDER

(a) Review Panel. The Chief Judge shall designate six members of the judicial council (other than the chief judge) to serve as a review panel. A review panel shall be composed of three circuit judges and three district judges. Membership on the review panel shall be changed after four months so that all members of the council shall serve on a review panel once each year. A review panel shall act for the judicial council on all petitions for review of a chief judge's dismissal order, except those petitions referred to the full membership of the council pursuant to Rule 8(b).

(b) Mail Ballot. Each member of the review panel to whom a ballot was sent will return a signed ballot, or otherwise communicate the member's vote, to the chief judge by the return date listed on the ballot. The ballot form will provide opportunities to vote to (1) deny the petition for review, or (2) refer the petition to the full membership of the judicial council. The form will also provide an opportunity for members to indicate that they have disqualified themselves from participating in consideration of the petition.

Any member of the review panel voting to refer the petition to the full membership of the judicial council, or after such referral, any council member voting to place the petition on the agenda of a meeting of the judicial council shall send a brief statement of reasons to all members of the council.

The petition for review shall be referred to the full membership of the judicial council upon the vote of any member of the review panel and shall be placed on the agenda of a council meeting upon the votes of at least two members of the council; otherwise, the petition for review will be denied.

Upon referral of a petition to the full membership of the judicial council, the clerk shall send to each member of the council not then serving on the review panel the materials specified in Rule 7(a).

(c) Availability of Documents. Upon request, the clerk will make available to any member of the judicial council or to the judge or magistrate judge complained about any document from the files that was not sent to the council members pursuant to Rule 7(a).

(d) Quorum and Voting. If a petition is placed on the agenda of a meeting of the judicial council, a majority of council members eligible to participate (see Rule 18(b)) shall constitute a quorum and is required for any effective council action.

(e) Rights of Judge or Magistrate Judge Complained About.

(1) At any time after the filing of a petition for review by a complainant, the judge or magistrate judge complained about may file, and before the judicial council makes any decision unfavorable to the judge or magistrate judge will be invited to file, a written response with the clerk of the court of appeals. The clerk will promptly distribute copies of the response to each member of the judicial council who is not disqualified and to the complainant. The judge or magistrate judge may not communicate with council members individually about the matter, either orally or in writing.

(2) The judge or magistrate judge complained about will be provided with copies of any communications that may be addressed to the members of the judicial council by the complainant.

(f) Notice of Council Decision.

(1) The order of the judicial council, together with any accompanying memorandum in support of the order, will be filed and provided to the complainant, the judge or magistrate judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2).

(2) If the decision is unfavorable to the complainant, the complainant will be notified that the law provides for no further review of the decision.

(3) A memorandum supporting a council order will not include the name of the complainant or the judge or magistrate judge whose conduct was complained of. If the order of the council denies a petition for review of the chief judge's disposition, a supporting memorandum will be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation.

Chapter IV: Investigation and Recommendation By Special Committee

RULE 9. APPOINTMENT OF SPECIAL COMMITTEE

(a) Membership. A special committee appointed pursuant to rule 4(e) will consist of the chief judge of the circuit and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee will be from districts other than the district of the judge or magistrate judge complained about.

(b) Presiding officer. At the time of appointing the committee, the chief judge will designate one of its members (who may be the chief judge) as the presiding officer. When designating another member of the committee as the presiding officer, the chief judge may also delegate to such member the authority to direct the clerk of the court of appeals to issue subpoenas related to proceedings of the committee.

(c) Bankruptcy Judge or Magistrate Judge as Adviser. If the judicial officer complained about is a bankruptcy judge or magistrate judge, the chief judge may designate a bankruptcy judge or magistrate judge, as the case may be, to serve as an adviser to the committee. The chief judge will designate such an adviser if, within ten days of notification of the appointment of the committee, the bankruptcy judge or magistrate judge complained about requests that an adviser be designated. The adviser will be from a district other than the district of the judge or magistrate judge complained about. The adviser will not vote but will have the other privileges of a member of the committee.

(d) Provision of Documents. The chief judge will send to each other member of the committee and to the adviser, if any, copies of (1) the complaint form and statement of facts, and (2) any other documents on file pertaining to the complaint (or to that portion of the complaint referred to the special committee).

(e) Continuing Qualification of Committee Members. A member of a special committee who was qualified at the time of appointment may continue to serve on the committee even though the member relinquishes the position of chief judge, circuit judge, or district judge, as the case may be, but only if the member continues to hold office under article III, section 1, of the Constitution of the United States.

(f) Inability of Committee Member to Complete Service. If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge of the circuit will determine whether to appoint a replacement member, either a circuit or district judge as the case may be. However, no special committee appointed under these rules will function with only a single member, and the quorum and voting requirements for a two-member committee will be applied as if the committee had three members.

RULE 10. CONDUCT OF AN INVESTIGATION

(a) Extent and Methods to be Determined by Committee. Each special committee will determine the extent of the investigation and the methods of conducting it that are appropriate in the light of the allegations of the complaint. If, in the course of the investigation, the committee develops reason to believe that the judge or magistrate judge may be engaged in misconduct that is beyond the scope of the complaint, the committee may, with written notice to the judge or magistrate judge, expand the scope of the investigation to encompass such misconduct.

(b) Criminal Matters. If the complaint alleges criminal conduct on the part of a judge or magistrate judge, or in the event that the committee becomes aware of possible criminal conduct, the committee will consult with the appropriate prosecuting authorities to the extent permitted by 28 U.S.C. § 351 et. seq. in an effort to avoid compromising any criminal investigation. However, the committee will make its own determination about the timing of its activities, having in mind the importance of ensuring the proper administration of the business of the courts.

(c) Staff. The committee may arrange for staff assistance in the conduct of the investigation. It may use existing staff of the judicial branch or may arrange, through the Administrative Office of the United States Courts, for the hiring of special staff to assist in the investigation.

(d) Delegation. The committee may delegate duties in its discretion to subcommittees, to staff members, to individual committee members, or to an adviser designated under Rule 9(c). The authority to exercise the committee's subpoena powers may be delegated only to the presiding officer. In the case of failure to comply with such subpoena, the judicial council or special committee may institute a contempt proceeding consistent with 28 U.S.C. § 332(d).

(e) Report. The committee will file with the judicial council a comprehensive report of its investigation, including findings of the investigation and the committee's recommendations for council action. Any findings adverse to the judge or magistrate judge will be based on evidence in the record. The report will be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held pursuant to rule 11.

(f) Voting. All actions of the committee will be by vote of a majority of all of the members of the committee.

RULE 11. CONDUCT OF HEARINGS BY SPECIAL COMMITTEE

(a) Purpose of Hearings. The committee may hold hearings to take testimony and receive other evidence, to hear arguments, or both. If the committee is investigating allegations against more than one judge or magistrate judge it may, in its discretion, hold joint hearings or separate hearings.

(b) Notice to Judge or Magistrate Judge Complained About. The judge or magistrate judge complained about will be given adequate notice in writing of any hearing held, its purposes, the names of any witnesses whom the committee intends to call, and the text of any statements that have been taken from such witnesses. The judge or magistrate judge may at any time suggest additional witnesses to the committee.

(c) Committee Witnesses. All persons who are believed to have substantial information to offer will be called as committee witnesses. Such witnesses may include the complainant and the judge or magistrate judge complained about. The witnesses will be questioned by committee members, staff, or both. The judge or magistrate judge will be afforded the opportunity to cross-examine committee witnesses, personally or through counsel.

(d) Witnesses Called by the Judge or Magistrate Judge. The judge or magistrate judge complained about may also call witnesses and may examine them personally or through counsel. Such witnesses may also be examined by committee members, staff, or both.

(e) Witness Fees. Witness fees will be paid as provided in 28 U.S.C. § 1821.

(f) Rules of Evidence; Oath. The Federal Rules of Evidence will apply to any evidentiary hearing except to the extent that departures from the adversarial format of a trial make them inappropriate. All testimony taken at such a hearing will be given under oath or affirmation.

(g) Record and Transcript. A record and transcript will be made of any hearing held.

RULE 12. RIGHTS OF JUDGE OR MAGISTRATE JUDGE IN INVESTIGATION

(a) Notice. The judge or magistrate judge complained about is entitled to written notice of the investigation (rule 4(f)(2)), to written notice of expansion of the scope of an investigation (rule 10(a)), and to thirty days written notice of any hearing (rule 11(b)).

(b) Presentation of Evidence. The judge or magistrate judge is entitled to a hearing, and has the right to present evidence and to compel the attendance of witnesses and the production of documents at the hearing. Upon request of the judge or magistrate judge, the chief judge or a designee will direct the clerk of the court of appeals to issue a subpoena in accordance with 28 U.S.C. § 332(d)(1).

(c) Presentation of Argument. The judge or magistrate judge may submit written argument to the special committee at any time, and will be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(d) Attendance at Hearings. The judge or magistrate judge will have the right to attend any hearing held by the special committee and to receive copies of the transcript and any documents introduced, as well as to receive copies of any written arguments submitted by the complainant to the committee.

(e) Receipt of Committee's Report. The judge or magistrate judge will have the right to receive the report of the special committee at the time it is filed with the judicial council.

(f) Representation by Counsel. The judge or magistrate judge may be represented by counsel in the exercise of any of the rights enumerated in this rule. The costs of such representation may be borne by the United States as provided in rule 14(h).

RULE 13. RIGHTS OF COMPLAINANT IN INVESTIGATION

(a) Notice. The complainant is entitled to written notice of the investigation as provided in rule 4(f)(2). Upon the filing of the special committee's report to the judicial council, the complainant will be notified that the report has been

filed and is before the council for decision. The Judicial Council may, in its discretion release the special committee's report to the complainant.

(b) Opportunity to Provide Evidence. The complainant is entitled to be interviewed by a representative of the committee. If it is believed that the complainant has substantial information to offer, the complainant will be called as a witness at a hearing.

(c) Presentation of Argument. The complainant may submit written argument to the special committee. In the discretion of the special committee, the complainant may be permitted to offer oral argument.

(d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

Chapter V: Judicial Council Consideration of Recommendations of Special Committee

RULE 14. ACTION BY JUDICIAL COUNCIL

(a) Purpose of Judicial Council Consideration. After receipt of a report of a special committee, the judicial council will determine whether to dismiss the complaint, conclude the proceeding on the ground that corrective action has been taken or that intervening events make action unnecessary, refer the complaint to the Judicial Conference of the United States, or order corrective action.

(b) Basis of Council Action. Subject to the rights of the judge or magistrate judge to submit argument to the council as provided in rule 15(a), the council may take action on the basis of the report of the special committee and the record of any hearings held. If the council finds that the report and record provide an inadequate basis for decision, it may (1) order further investigation and a further report by the special committee or (2) conduct such additional investigation as it deems appropriate.

(c) Dismissal. The council will dismiss a 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.

(d) Conclusion of the Proceeding on the Basis of Corrective Action Taken. The 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 such action unnecessary.

(e) Referral to Judicial Conference of the United States. The judicial council may, in its discretion, refer a complaint to the Judicial Conference of the United States with the council's recommendations for action. It is required to refer such a complaint to the Judicial Conference of the United States if the council determines that a circuit judge or district judge may have engaged in conduct –

(1) that might constitute grounds for impeachment; or

(2) that, in the interest of justice, is not amenable to resolution by the judicial council.

(f) Order of Corrective Action. If the complaint is not disposed of under paragraphs (c) through (e) of this rule, the judicial council will take such other action as is authorized by law to assure the effective and expeditious administration of the business of the courts.

(g) Combination of Actions. Referral of a complaint to the Judicial Conference of the United States under paragraph (e) or to a district court under paragraph (f) of this rule will not preclude the council from simultaneously taking such other action under paragraph (f) as is within its power.

(h) Recommendation About Fees. If the complaint has been finally dismissed, the judicial council, upon request of the judicial officer, shall consider whether to recommend that the Director of the Administrative Office reimburse the judicial officer for attorney's fees and expenses.

(i) Notice of Action of Judicial Council. Council action will be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order will be accompanied by a memorandum, which may be incorporated into one document, setting forth the factual determinations on which it is based and the reasons for the council action. The memorandum will not include the name of the complainant or of the judge or magistrate judge whose conduct was complained about. The order and the supporting memorandum will be filed and provided to the complainant, the judge or magistrate judge, and any judge entitled to receive a copy of the complaint pursuant to rule 3(a)(2). However, if the complaint has been referred to the Judicial Conference of the United States pursuant to paragraph (e) of this rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge or magistrate judge will be notified of any right to seek review of the judicial council's decision by the Judicial Conference of the United States and of the procedure for filing a petition for review.

(j) Public Availability of Council Action. Materials related to the council's action will be made public at the time and in the manner set forth in rule 17.

RULE 15. PROCEDURES FOR JUDICIAL COUNCIL CONSIDERATION OF A SPECIAL COMMITTEE'S REPORT

(a) Rights of Judge or Magistrate Judge Complained About. Within ten days after the filing of the report of a special committee, the judge or magistrate judge complained about may address a written response to all of the members of the judicial council. The judge or magistrate judge will also be given an opportunity to present oral argument to the council, personally or through counsel. The judge or magistrate judge may not communicate with council

members individually about the matter, either orally or in writing, except as the judicial council has authorized one or more of its members to engage in such communications on its behalf.

(b) Conduct of Additional Investigation by the Council. If the judicial council decides to conduct additional investigation, the judge or magistrate judge complained about will be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in rules 10 through 13 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony to avoid unnecessary repetition of testimony presented before the special committee.

(c) Quorum and Voting. A majority of council members eligible to participate (see Rule 18(b)) shall constitute a quorum and is required for any effective council action, except that, in accordance with 28 U.S.C. § 152(e), a decision to remove a bankruptcy judge from office requires a majority of all the members of the council.

Chapter VI: Miscellaneous Rules

RULE 16. CONFIDENTIALITY

(a) General Rule. Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration will not be disclosed by any judge, magistrate judge, or employee of the judicial branch or any person who records or transcribes testimony except in accordance with these rules.

(b) Files. All files related to complaints of misconduct or disability, whether maintained by the clerk, the chief judge, members of a special committee, members of the judicial council, or staff, and whether or not the complaint was accepted for filing, will be maintained separate and apart from all other files and records, with appropriate security precautions to ensure confidentiality.

(c) Disclosure of Memoranda of Reasons. Memoranda supporting orders of the chief judge or the judicial council, and dissenting opinions or separate

statements of members of the council, may contain such information and exhibits as the authors deem appropriate.

(d) Availability to Judicial Conference. If a complaint is referred under rule 14(e) to the Judicial Conference of the United States, the clerk will provide the Judicial Conference with copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the Judicial Conference or its Committee to Review Circuit Council Conduct and Disability Orders, in connection with their consideration of a referred complaint or a petition under 28 U.S.C. § 355 for review of a council order, the clerk will furnish any other records related to the investigation.

(e) Availability to District Court. If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 14(f)(3), the clerk will provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. Upon request of the chief judge of the district court, the judicial council may authorize release of any other records relating to the investigation.

(f) Impeachment Proceedings. The judicial council may release to the legislative branch any materials that are believed necessary to an impeachment investigation of a judge or a trial on articles of impeachment.

(g) Consent of Judge or Magistrate Judge Complained About. Any materials from the files may be disclosed to any person upon the written consent of both the judge or magistrate judge complained about and the chief judge of the circuit. The chief judge may require that the identity of the complainant be shielded in any materials disclosed.

(h) Disclosure by Judicial Council in Special Circumstances. The judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that the council concludes that such disclosure is justified by special circumstances and is not prohibited by 28 U.S.C. § 355.

(i) Disclosure of Identity by Judge or Magistrate Judge Complained About. Nothing in this rule will preclude the judge or magistrate judge complained about from acknowledging that such judge is the judge or magistrate judge

referred to in documents made public pursuant to rule 17.

RULE 17. PUBLIC AVAILABILITY OF DECISIONS

(a) General Rule. A docket-sheet record of orders of the chief judge and the judicial council and the texts of any memoranda supporting such orders and any dissenting opinions or separate statements by members of the judicial council will be made public when final action on the complaint has been taken and is no longer subject to review.

(1) If the complaint is finally disposed of without appointment of a special committee or of it is disposed of by council order dismissing the complaint for reasons other than mootness, or because intervening events have made action on the complaint unnecessary, the publicly available materials will not disclose the name of the judge or magistrate judge complained about without such judge's consent.

(2) If the complaint is finally disposed of by censure or reprimand by means of private communication, the publicly available materials will not disclose either the name of the judge or magistrate judge complained about or the text of the reprimand.

(3) If the complaint is finally disposed of by any other action taken pursuant to rule 14(d) or (f) except dismissal because intervening events have made action on the complaint unnecessary, the text of the dispositive order will be included in the materials made public, and the name of the judge or magistrate judge will be disclosed.

(4) If the complaint is dismissed as moot at any time after the appointment of a special committee, the judicial council will determine whether the name of the judge or magistrate judge is to be disclosed.

(5) The name of the complainant will not be disclosed in materials made public under this rule unless the chief judge orders such disclosure.

(b) Manner of Making Public. The records referred to in paragraph (a) will be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals at the United States Courthouse, Foley Square, New York, New York 10007. The clerk will send copies of the publicly available materials to the Administrative Office of the United States Courts, Office of the General Counsel, Thurgood Marshall Federal Judiciary Building, One Columbus Circle, N.E., Washington, DC 20544, where such materials will also be available for public inspection. In cases in which memoranda appear to have precedential value, the chief judge may cause them to be published.

(c) Decisions of Judicial Conference Standing Committee. To the extent consistent with the policy of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, opinions of that committee about complaints arising from this circuit will also be made available to the public in the office of the clerk of the court of appeals.

(d) Special Rule for Decisions of Judicial Council. When the judicial council has taken final action on the basis of a report of a special committee, and no petition for review has been filed with the Judicial Conference within thirty days of the council's action, the materials referred to in paragraph (a) will be made public in accordance with this rule as if there were no further right of review.

(e) Complaints Referred to the Judicial Conference of the United States. If a complaint is referred to the Judicial Conference of the United States pursuant to rule 14(e), materials relating to the complaint will be made public only as may be ordered by the Judicial Conference.

RULE 18. DISQUALIFICATION

(a) Complainant. If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. If the complaint is filed by a judge, or identified by the chief judge pursuant to 28 U.S.C. § 351(a), that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant.

(b) Judge Complained About. A judge whose conduct is the subject of a complaint will be disqualified from participating in any consideration of the complaint except to the extent that these rules provide for participation by a judge or magistrate judge who is complained about. This subsection shall not apply where a complainant files complaints against a majority of the members of the judicial council, in which event, the council members, including those complained against, may refer the complaints, with or without a recommendation for appropriate action, to the Judicial Conference of the United States or to the judicial council of another circuit, or may take other appropriate action, including disposition of the complaints on their merits.

(c) Member of Special Committee Not Disqualified. A member of the judicial council who is appointed to a special committee will not be disqualified from participating in council consideration of the committee's report.

(d) Judge or Magistrate Judge Under Investigation. Upon appointment of a special committee, the judge or magistrate judge complained about will automatically be disqualified from serving on (1) any special committee appointed under Rule 4(e), (2) the judicial council of the circuit, (3) the Judicial Conference of the United States, and (4) the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States. The disqualification will continue until all proceedings regarding the complaint are finally terminated, with no further right of review. The proceedings will be deemed terminated thirty days after the final action of the judicial council if no petition for review has at that time been filed with the Judicial Conference.

(e) Substitute for Chief Judge. If the chief judge of the circuit is disqualified or otherwise unable to participate in consideration of the complaint, the duties and responsibilities of the chief judge under these rules will be assigned to the circuit judge eligible to become the next chief judge of the circuit.

RULE 19. WITHDRAWAL OF COMPLAINTS AND PETITIONS FOR REVIEW

(a) Complaint Pending Before Chief Judge. A complaint that is before the chief judge for a decision under rule 4 may be withdrawn by the complainant with the consent of the chief judge.

(b) Complaint Pending Before Special Committee or Judicial Council. After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both (1) the judge or magistrate judge complained about and (2) the special committee (before its report has been filed) or the judicial council.

(c) Petition for Review of Chief Judge's Disposition. A petition to the judicial council for review of the chief judge's disposition of a complaint may be withdrawn by the petitioner at any time before the judicial council acts on the petition.

RULE 19A. ABUSE OF THE COMPLAINT PROCEDURE

If a complainant files vexatious, harassing, or scurrilous complaints, or otherwise abuses the complaint procedure, the council, after affording the complainant an opportunity to respond in writing, may restrict or impose conditions upon the complainant's use of the complaint procedure. Any restrictions or conditions imposed upon a complainant shall be reconsidered by the council periodically.

RULE 20. AVAILABILITY OF OTHER PROCEDURES

The availability of the complaint procedure under these rules and 28 U.S.C. § 351 et. seq. will not preclude the chief judge of the circuit or the judicial council of the circuit from considering any information that may come to their attention suggesting that a judge or magistrate judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge all the duties of office by reason of disability.

RULE 21. AVAILABILITY OF RULES AND FORMS

These rules and copies of the complaint form prescribed by rule 2 will be available without charge in the office of the clerk of the court of appeals, United States Courthouse, Foley Square, New York, New York 10007, and in each office of the clerk of a district court or bankruptcy court within this circuit.

RULE 21A. NO IMPLICATION OF CONSTITUTIONALITY

The adoption of these rules shall not be construed as indicating any views with respect to the constitutionality of 28 U.S.C. § 351 et. seq. or any action taken hereunder.

RULE 22. EFFECTIVE DATE

These rules apply to complaints filed on or after November 2, 2002. The handling of complaint filed before that date will be governed by the rules previously in effect.

RULE 23. ADVISORY COMMITTEE

The advisory committee appointed by the Court of Appeals for the Second Circuit for the study of rules of practice and internal operating procedures shall also constitute the advisory committee for the study of these rules, as provided by 28 U.S.C. § 2077(b), and shall make any appropriate recommendations to the circuit judicial council concerning these rules.

COMPLAINT FORM

JUDICIAL COUNCIL OF THE SECOND CIRCUIT

COMPLAINT AGAINST JUDICIAL OFFICER
UNDER 28 U.S.C. § 351 et. seq.

INSTRUCTIONS:

(a) All questions on this form must be answered.

(b) A separate complaint form must be filled out for each judicial officer complained against.

(c) Submit the correct number of copies of this form and the statement of facts. For a complaint against:

a court of appeals judge -- original and 3 copies
a district court judge or magistrate judge -- original and 4 copies
a bankruptcy judge -- original and 5 copies

(For further information see Rule 2(e)).

(d) Service on the judicial officer will be made by the Clerk's Office. (For further information See Rule 3(a)(1)).

(e) Mail this form, the statement of facts and the appropriate number of copies to the Clerk, United States Court of Appeals, Thurgood Marshall U.S. Courthouse, 40 Foley Square, New York, NY 10007.

1. Complainant's Name: _____

Address: _____

_____

Daytime Telephone No. (include area code): _____

2. Judge or magistrate judge complained about:

Name: _____

Court: _____

3. Does this complaint concern the behavior of the judge or magistrate judge in a particular lawsuit or lawsuits?

[ ] Yes [ ] No

If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court: _____

Docket number: _____

Docket numbers of any appeals to the Second Circuit:

_____

Did a lawyer represent you?

[ ] Yes [ ] No

If "yes" give the name, address, and telephone number of your lawyer:

4. Have you previously filed any complaints of judicial misconduct or disability against <u>any</u> judge or magistrate judge?

[ ] Yes [ ] No

If "Yes," give the docket number of each complaint.

5. You should attach a statement of facts on which your complaint is based, see rule 2(b), and

EITHER

(1) check the box and sign the form. You do not need a notary public if you check this box.

[ ] I declare under penalty of perjury that:

(i) I have read rules 1 and 2 of the Rules of the Judicial Council of the Second Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint and attached statement of facts are true and correct to the best of my knowledge.

_____
(signature)

Executed on _____
(date)

OR

(2) check the box below and sign this form in the presence of a notary public;

[ ] I swear (affirm) that--

(i) I have read rules 1 and 2 of the Rules of the Judicial Council of the Second Circuit Governing Complaints of Judicial Misconduct or Disability, and

(3) The statements made in this complaint and attached statement of facts are true and correct to the best of my knowledge.

_____
(signature)

Executed on _____
(date)

Sworn and subscribed to before me
this ____ day of _____200_.

_____
(Notary Public)

My commission expires: _____

EXHIBIT B-2

RULES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES FOR THE PROCESSING OF PETITIONS FOR REVIEW OF CIRCUIT COUNCIL ORDERS UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT

[As revised by the Judicial Conference of the United States, September 20, 1989]

The Judicial Conference of the United States prescribes these rules under the authority of section 372(c)(11) of title 28, United States Code, with respect to the processing of petitions for review submitted to the Conference under 28 U.S.C. § 372(c)(10), seeking review of circuit council actions taken under 28 U.S.C. § 372(c)(6) upon complaints of judicial conduct or disability:

1. Petition for review may be made by the filing of a written submission to the Judicial Conference addressed as follows:

Leonidas Ralph Mecham
Secretary, Judicial Conference
of the United States
Administrative Office of the
United States Courts
Washington, D.C. 20544
Attention: Office of the General Counsel

2. No form is prescribed for the filing of a petition for review.

3. Such petition shall consist of a written submission in typewriting on plain paper of 8-1/2 by 11 inch dimensions.

4. No formal limitation is imposed upon the length of the petition, but it is suggested that such petition should not normally exceed 20 pages in addition to the attachments required by Rule 8.

5. The petition shall contain a short and plain statement of the basic facts underlying the complaint, the history of its consideration before the appropriate circuit judicial council, and the premises upon which the petitioner asserts entitlement to relief from the action taken by the council.

6. No absolute time limitation exists upon the filing of a petition for review. Nevertheless the petition should be submitted seasonably following final action by the circuit judicial council and issuance of its implementing order under 28 U.S.C. § 372(c)(15).

7. Five copies of the petition for review shall be submitted, at least one of which shall bear the original ink signature of the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office shall then accept the original petition alone and shall undertake necessary reproduction of copies at its expense.

8. The petition for review shall have attached thereto a copy of each of the following documents:

- the order of the circuit judicial council issued under 28 U.S.C. § 372(c)(15), of which review is sought;
- the original complaint of judicial misconduct or disability that commenced the proceeding;
- any other documents or correspondence arising in the course of the proceeding before the judicial council or its special committee which the petitioner deems essential or useful to the prompt disposition of the review petition.

9. Upon receipt of a petition for review that appears on its face to be coherent, in compliance with these rules, and appropriate for present disposition, the Administrative Office shall promptly acknowledge receipt of the petition and advise the chairman of the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, a committee appointed by the Chief Justice of the United States as authorized by 28 U.S.C. § 331.

10. Unless otherwise directed by the Executive Committee of the Judicial Conference, the Committee to Review Circuit Council Conduct and Disability Orders shall assume the consideration and disposition of all petitions for review, in conformity with the Judicial Conference statement of the Committee's jurisdiction.

11. The Administrative Office shall then distribute the petition and its attachment to the members of the Committee to Review Circuit Council Conduct and Disability Orders for their deliberation. The petition shall receive an eight-digit identifying number of which the initial two digits shall refer to the year of filing, the next three digits shall be "372," and the final three shall identify each individual petition. Unless otherwise directed by the chairman, the Administrative Office shall contact the circuit executive or clerk of the United States court of appeals for the appropriate circuit to obtain the record of circuit council consideration of the complaint for distribution to the Committee.

12. In recognition of the review nature of petition proceedings under 28 U.S.C. § 372(c)(10), no additional investigation shall ordinarily be undertaken by the Judicial Conference or the Committee. If such investigation is deemed necessary, the Conference or Committee may remand the matter to the circuit judicial council that considered the complaint, or may undertake any investigation found to be required. If such investigation is undertaken by the Conference or Committee, (a) adequate prior notice shall be given in writing to the judge or magistrate whose conduct is the subject of the complaint, (b) such judge or magistrate shall be afforded an opportunity to appear at any investigative proceedings which might be conducted and to present argument orally or in writing, and (c) the complainant shall be afforded an opportunity to appear at any proceedings conducted if it is considered that the complainant could offer substantial new and relevant information.

13. Except where additional investigation is undertaken as provided in Rule 12, there shall be no arguments or personal appearances before the Committee. Unless the petition for review is

amenable to disposition on the face thereof, the Committee may determine to receive written argument from the petitioner and from the other party to the complaint proceeding (the complainant or judge/magistrate complained against).

14. The decision on the petition shall be made by written order as provided by 28 U.S.C. § 372(c)(15). Such order shall be forwarded by the Committee chairman to the Administrative Office, which shall distribute it as directed by the chairman. In accordance with section 372(c)(15), orders of the Committee shall be maintained as public documents by the Administrative Office and by the clerk of the United States court of appeals for the circuit in which the complaint arose.

15. In conformity with 28 U.S.C. § 372(c)(10), all orders and determinations of the Judicial Conference or of the Committee on its behalf, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

Implementation of the Judicial Conduct and Disability Act of 1980

A Report to the Chief Justice

The Judicial Conduct and Disability Act Study Committee

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Associate Justice, Supreme Court of the United States

Sarah Evans Barker
U.S. District Judge, Southern District of Indiana

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Foreword and Executive Summary

The Committee's charge

The Judicial Conduct and Disability Act authorizes any person to file a complaint alleging that a federal judge has engaged in conduct "prejudicial to the effective and expeditious administration of the business of the courts." The Act also permits any person to allege conduct reflecting a judge's inability to perform his or her duties because of "mental or physical disability."

In 2004, Chief Justice William H. Rehnquist pointed out that there "has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented." The Chief Justice consequently created this Committee to look into the matter. He appointed to the Committee three judges who as former circuit chief judges had had considerable experience administering the Act, two district court judges who have served as chief judges and as members of their circuits' judicial councils, and his administrative assistant, with experience in judicial branch administration. He 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. Chief Justice John G. Roberts, Jr., asked the Committee to continue its work.

The federal judiciary, like all institutions, will sometimes suffer instances of misconduct. But the design of any system for discovering (and assessing discipline for) the misconduct of federal judges must take account of a special problem. On the one hand, a system that relies for investigation upon persons or bodies other than judges risks undue interference with the Constitution's insistence upon judicial independence, threatening directly or indirectly distortion of the unbiased handling of individual cases that Article III seeks to guarantee. On the other hand, a system that relies for investigation solely upon judges themselves risks a kind of undue "guild favoritism" through inappropriate sympathy with the judge's point of view or de-emphasis of the misconduct problem.

In 1980, Congress, in the Judicial Conduct and Disability Act, sought to create a discipline system that would prove effective while taking proper account of these competing risks. The Act creates a complex system that, in essence, requires the chief judge of a circuit to consider each complaint and, where appropriate, to appoint a special committee of judges to investigate further and to recommend that the circuit judicial council assess discipline where warranted. In a word, the Act relies upon internal judicial branch investigation of other judges, but it simultaneously insists upon consideration by the chief circuit judge and members of the circuit judicial council, using careful procedures and applying strict statutory standards.

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The basic question presented is whether the judiciary, in implementing the Act, has failed to apply the Act strictly as Congress intended, thereby engaging in institutional favoritism. This question is important not only to Congress and the public, but to the judiciary itself.

The Committee soon realized that the only way it could answer this question was to review the complaints themselves, bringing its own judgment to bear upon other judges' handling of those complaints. The Committee sought, through statistical sampling, the use of strict objective standards, and the use of experienced staff, to make its own assessment as objectively as possible.

The question is a narrow one. It does not ask us to rewrite the Act, and none of our recommendations requires statutory amendment. It does not ask us to consider revisions of the ethical rules governing judicial conduct, or to study other similar proposals for change. It does not seek comparisons with state, foreign, or other disciplinary systems. It does not demand the assistance of academic experts. 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.

We are aware of news reports alleging various ethical improprieties, such as judges' failures to report reimbursement for attending privately sponsored seminars and judges' failures to recuse in cases where they own stock. These issues are important ones. They may well merit inquiry. And we recognize that the Judicial Conference of the United States has asked other committees to make recommendations about these matters. They do not fall within the mandate of this Committee. Complaints, though, are nevertheless filed under the Act alleging that judges failed to recuse themselves when their financial holdings created conflicts of interest. Thus, after we present our recommendations, we endorse consideration of requiring judges to use conflict-avoidance software to reduce the number of recusal complaints filed under the Act.

Resources

The Committee received no special funding. The Committee was assisted by experienced staff from the Federal Judicial Center and the Administrative Office of the United States Courts. We thank them for their work.

The Committee's method

The Committee initially examined individual instances in which members of Congress had complained (to the Judicial Conference and the public) about the handling of allegations of judicial misconduct. This initial informal examination suggested that, in some of those instances, the judiciary's own handling of the complaint may

have been problematic. This indicated a need to determine how serious any such implementation problems were and how frequently they occurred. In particular, did the problems that had come to public attention so far amount only to the "tip of the iceberg"? In other words, were problems occurring frequently when the judiciary processed complaints brought under the Act?

The Committee determined that it must first evaluate that "iceberg," i.e., how the judiciary handled the vast number of complaints filed, few of which would ever come to public notice. The total number of complaints filed each year, however, averages over 700. That number is not large compared to the total number of cases handled in the federal system annually (over 2 million in 2005—appeals, civil, criminal, and bankruptcy); but the number is large when considered in light of the Committee's own ability to determine whether the courts have properly handled the complaint—an exercise that typically requires careful examination of the individual complaint and its disposition. Many complaints are handwritten, lengthy, and difficult to decipher. The Committee could not itself review the complaints filed over, say, three years—more than 2,000. Nor could it completely delegate to its staff the work of reexamining and evaluating the decisions of chief judges and the members of circuit councils—both because the staff was small and because the very point of the Committee was to obtain a judicial evaluation of those judge-made decisions.

Ultimately the Committee asked its staff of experienced researchers to design, and the Committee then approved, a research plan that would enable it to examine both (1) the vast bulk of complaints that receive little or no public notice, and (2) the very few "high-visibility" complaints. We began by examining the complaints resolved in the three years immediately prior to our appointment—a period during which more than 2,000 complaints were resolved. From this group of 2,000 cases, we created two samples. The first (the "stratified sample") consisted of 593 cases drawn from the 2,000 that included *all* of those complaints most likely to have merit (those filed by attorneys, for example) and a random sample of other complaints. The second sample consisted of 100 cases drawn completely at random from the 2,000. As our research progressed, we decided to look at a third, far-smaller group of "high-visibility" complaints, i.e., those complaints that had received some public attention. For that third group, we looked at five years (not three years): cases from 2001 through 2005. We identified 17 cases—16 in which complaints had been filed or initiated by the chief judge and one case in which a complaint had not been filed but arguably should have been initiated and considered by the chief judge.

In order to evaluate the cases, we developed a set of "Standards for Assessing Compliance with the Act." We based those Standards on the Act itself and upon orders of chief circuit judges and judicial councils implementing the Act. Staff researchers and the members of the Committee used those Standards to assess whether each complaint had, or had not, been properly handled. As the Committee's work continued, the Committee revised the Standards slightly in light of experience to make clear that to be "inherently incredible" an allegation need not be literally impossible,

to clarify the standards for examining the merits of a judge's written opinion, and to add a Standard concerning chief judges' initiation of complaints (what the Act calls "identifying" a complaint).

In order to ensure that the researchers were applying the Committee Standards in the way that the Committee's judicial members would apply them, after the Committee staff examined 300 of the 593 cases in the stratified sample, the Committee reviewed 53 of them—40 drawn at random and all 13 that the researchers had identified up to that time as problematic. ("Problematic" means not that the complaint was meritorious, but that the handling of the complaint deviated from the Act's requirements; "problematic" includes, for example, dismissals without adequate investigation or for the wrong reasons.) We agreed unanimously with the researchers where they determined that handling was "nonproblematic"; we also agreed with the researchers unanimously or by a majority in respect to the 13 instances they had labeled problematic.

When the researchers concluded their review of all 593 cases, they had identified 25 as problematic. The Committee reviewed all 25. It agreed with the researchers in respect to 20 of the 25. The Committee also examined without comment from staff the 100 complaints drawn at random. The Committee identified two of those instances as involving problematic handling.

The Committee then conducted a separate assessment of the judiciary's handling of the "iceberg's tip," namely cases that had received some public notoriety. We looked for such cases by examining national and regional news sources over a five-year period. We found 17, including five that had been included in the three-year 593-case stratified sample. We had already found that two of those five cases involved problematic handling.

We then considered (or reconsidered) each of the 17 cases individually, first through examination by staff applying the same Committee Standards previously applied and then by the entire Committee proceeding case by case. The Committee ultimately determined that five of the 17 cases involved problematic handling.

In addition to the research already described, the judges on the Committee interviewed all current chief judges and one judge who had just stepped down as chief judge. Committee staff interviewed current and former chief circuit judges and circuit staff at length, and the Committee reviewed detailed reports of those interviews. And staff reviewed other relevant materials, such as information about the Act available on circuit and district court websites, and allegations of judicial misconduct sent to Congress and contained in the files of the House Committee on the Judiciary.

Major conclusions

The Committee has reached two major conclusions. First, the chief circuit judges and judicial councils have properly implemented the Act in respect to the vast majority of the complaints filed, what we have referred to as the bulk of "the iceberg." The Committee sought to determine whether each complaint in the samples was properly reviewed and resolved in accordance with the Act's criteria. The Committee found that the relevant error rate, i.e., that of failing properly to process such complaints, is about 2% to 3%. While a perfectly operating system remains the goal, the Committee recognizes that no human system operates perfectly; some error is inevitable. And the Committee is unanimous in its view that a processing error rate of 2% to 3% does not demonstrate a serious flaw in the operation of the system—given the number of complaints filed, their occasional lack of clarity, and the judgmental nature of the decision as to whether further inquiry is required. Further, the Committee Standards are strict and we applied them strictly. For example, some complaints make far-fetched, but not totally implausible, allegations of fact, such as a complaint that alleged that an intern had impersonated a judge on the bench. Because the complaint pointed out that the hearing had been tape-recorded and listed specific witnesses, we concluded in that case that the chief judge could have checked, or directed circuit staff to check, the factual basis for the complaint and should have done so.

In sum, we find no serious problem with the judiciary's handling of the vast bulk of complaints under the Act. The federal judiciary handles more than 2 million cases annually; 700 users of the system file complaints; the handling of 2% to 3% of those is problematic. We find this last number reflective of the difficulties of creating an error-free system. We nonetheless make suggestions that we believe will reduce this last-mentioned number further. But we conclude that there is no problem-riddled "iceberg" lurking below the "high-visibility" surface.

Second, we have separately assessed high-visibility cases—those that have received national or regional press coverage, including matters that have come to the attention of (or been filed by) members of Congress. Such cases were few—we identified 17 over a five-year period. But we found the handling of five of them problematic. The proper handling of high-visibility complaints has particular importance. Because the matters at issue have received publicity, the public is particularly likely to form a view of the judiciary's handling of all cases upon the basis of these few. And the mishandling of these cases may discourage those with legitimate complaints from using the Act. We consequently consider the mishandling of five such cases out of 17—an error rate of close to 30%—far too high.

Findings

Chapters 2 through 5 of this report each contain a set of findings. Those findings include:

Chapter 2: Complaints Terminated; Source, Nature, and Object; Types of Dispositions, 2001–2005

1. The number of terminated complaints peaked in 1998 and has hovered between 600 and 800 per year since then.
2. Almost all complaints are filed by prisoners or litigants.
3. Almost all complaints allege misconduct rather than disability.
4. Almost all complaints are dismissed by the chief judge; 88% of the reasons given for dismissal are that the complaint relates to the merits of a proceeding or is unsubstantiated.
5. The circuits vary considerably in the time they take to terminate complaints.
6. There are mistakes in the data that circuits submit to the Administrative Office of the U.S. Courts for national statistical reports on the Act's administration; perhaps most serious, for the period we examined, the circuit data underreported the number of special committees that chief judges appointed.

Chapter 3: How the Judicial Branch Administers the Act—Process

1. Many courts do not use their websites to provide the public with information about the Act and about how to file a complaint.
2. In most circuits, staff in the clerk's office or in the circuit executive's office analyze complaints and present them to the chief circuit judge, often with a draft order.
3. Chief judges report that, consistent with the Act, they reserve for themselves decisions whether to undertake further inquiries about complaint allegations, e.g., seeking a response from the judge, speaking to witnesses, or other inquiries that go beyond simple inspection of routine documents.
4. In the 593-case sample (i.e., the sample that overrepresents complaints most likely to allege conduct that the Act covers):
    - chief judge orders were ordinarily consistent with the statutory requirement that they state reasons and with Judicial Conference policy that they restate the complaint's allegations; and
    - in about half the instances chief judges undertook limited inquiries—the most common limited inquiry took the form of an examination of the record in the underlying court case.

Chapter 4: How the Judicial Branch Administers the Act—Results

1. Overall, terminations that are not consistent with our understanding of the Act's requirements are rare, amounting to about 2% to 3% of all terminations.
2. Chief circuit judges' rate of problematic dispositions is consistent with the rate reported in 1993 (for the period 1980–1991) by the National Commission on Judicial Discipline and Removal, despite the substantial increase since 1991 in the per-judge caseload of circuit judges (including chief judges) as well as in the number of complaints with which chief circuit judges must deal.
3. The rate of problematic dispositions is significantly higher, about 29%, for complaints that have come to public attention. The higher rate may reflect the greater complexity of such cases and less familiarity with their proper handling as a result of their infrequent occurrence. The high rate in such cases is of particular concern because it could lead the public to question the Act's effectiveness, and it may discourage the filing of legitimate complaints.
4. Most of the dispositions labeled "problematic" were problematic for procedural reasons, in particular the chief judge's failure to undertake an adequate inquiry into the complaint before dismissing it. We did not attempt to determine whether appropriate handling would have changed the substantive outcome.

Chapter 5: Activity Outside the Formal Complaint Process

1. Based primarily upon our interviews, we conclude that informal efforts to resolve problems remain (as the Act's sponsors intended) the principal means by which the judicial branch deals with difficult problems of judicial misconduct and disability.
2. The main problems that the informal efforts seek to address are decisional delay, mental and physical disability, and complaints about the judge's temperament.
3. The 1993 *Report of the National Commission on Judicial Discipline and Removal* recommended that committees of local lawyers serve as conduits between lawyers and judges to communicate problems of judicial behavior. The Judicial Conference endorsed the proposal but few committees have been created.
4. The Ninth Circuit has created a program to make counseling available at all times both to judges who may benefit from it and to other judges who may seek guidance as to how to deal with colleagues. Ninth Circuit judges report that the program has proved successful.

Recommendations

1. The Judicial Conference should authorize the chair of its Review Committee, or a designee, to provide advice and counsel regarding the implementation of the Act to chief circuit judges and judicial councils. The role of the Committee, while advisory, should be sufficiently vigorous to address and ameliorate the kinds of problematic terminations, especially in high-visibility cases, that we describe in our report.

2. In dealing with chief judges and judicial councils in this more aggressive advisory role, Review Committee members should stress the desirability, in appropriate cases, of (1) chief judges' identifying complaints, (2) transferring complaints for handling in other circuits, and (3) appointing special investigative committees.

3. The Review Committee (aided by the Federal Judicial Center) should help chief circuit judges, judicial council members, and circuit staff—especially those new to their positions—to understand and administer the Act. This assistance should consist, at least, of (1) an individual in-court orientation program for new chief judges and (2) the development and maintenance of materials, including a compendium, based on chief judges' and councils' interpretations of the Act, designed to facilitate learning from past experience.

   The orientation program and materials should emphasize, among other things, (1) the role of special committees, including their powers and limitations; (2) the meaning of statutory terms; (3) the chief judge's authority in an appropriate instance to identify a complaint, particularly where alleged misconduct has come to the public's attention through press coverage or other means; and (4) the desirability in an appropriate instance to transfer a complaint for handling outside the circuit and the mechanisms for doing so.

4. The Judicial Conference should ask its Review Committee to make available (on www.uscourts.gov) illustrative past and future chief judge dismissal orders and judicial council orders, appropriately redacted, in order to inform chief judges, judicial council members, and interested members of the media and the public how chief judges and councils have terminated complaints and why. Circuit staff should be encouraged to send orders promptly to be considered for public availability.

5. Circuit councils should ask all courts in the circuit to encourage the formation of committees of local lawyers whose senior members can serve as intermediaries between individual lawyers and the formal complaint process.

6. Circuit councils should require all courts covered by the Act to provide information about filing a complaint on the homepage of the court website, as well as to take other steps to publicize the Act's availability.

7. Circuit councils, through their circuit executives or the clerks of court, should take steps to ensure the submission of timely and accurate information about complaint filings and terminations.
8. The Administrative Office should refine two aspects of its annual report on the Act's administration. Table 11 should tally the number of special committees appointed each year. Table S-22 should report council actions in the same way that Table 11 does.
9. The Judicial Conference Review Committee should consider periodic monitoring of the Act's administration.
10. The Federal Judicial Center should seek to ensure that all judges understand the Act and how it operates.
11. The Judicial Conference should make clear that it possesses the authority to review its Review Committee decisions on appeal by complainants and judges from judicial council orders.
12. The councils and Judicial Conference should consider giving support to programs that provide telephonic or similar assistance for chief judges and others where judicial disability or lack of judicial temperament is at issue.

As noted earlier, committees of the Judicial Conference are examining other matters that fall under the rubric of "judicial ethics" but that do not directly involve the administration of the Judicial Conduct and Disability Act. One matter is compliance with statutory standards mandating a judge's recusal from a case when he or she has any financial holding in the parties in litigation. Although recusal decisions are almost always merits-related and thus not covered by the Act, litigants (and sometimes others) nevertheless file complaints alleging improper failure to recuse, and chief judges must act on the complaints even if only to dismiss them. To reduce this unnecessary burden, we encourage the Judicial Conference to consider mandating use of conflict-avoidance software and other steps to reduce potential conflicts of interest and complaints over failure to recuse. Our report notes other steps courts have taken to try to reduce other judicial behavior that produces either complaints under the Act or is presented to chief circuit judges informally, such as local rules designed to avoid circuit judges' delay in producing opinions assigned to them.

The body of this report and its appendices describe in detail our examination of the Act's implementation and set forth the bases for these findings and recommendations.

Chapter 1

Committee Creation and Activities; Previous Studies; Act Provisions

Congress enacted the Judicial Conduct and Disability Act in 1980.[1] The Act permits any person to file a complaint alleging misconduct by a federal judge or a federal judge's inability to discharge the duties of office because of a mental or physical disability and describes how such complaints are to be treated.

The Committee

***Committee creation*—**On May 25, 2004, Chief Justice Rehnquist appointed this six-member Committee to assess how the judicial branch has administered the Act. The Chief Justice said "[t]here has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented, and I decided that the best way to see if there are any real problems is to have a committee look into it." (See Appendix A.) Chief Justice Roberts asked the Committee to continue its work.

***Members*—**Chief Justice Rehnquist appointed Associate Supreme Court Justice Stephen Breyer (chair), District Judge Sarah Evans Barker of the Southern District of Indiana, Senior U.S. Circuit Judge Pasco M. Bowman of the Eighth Circuit, U.S. District Judge D. Brock Hornby of the District of Maine, U.S. Circuit Judge J. Harvie Wilkinson III of the Fourth Circuit, and Sally M. Rider, administrative assistant to the Chief Justice. All appellate judges on the Committee had served as chief judges of their courts of appeals, and thus as chairs of their circuit judicial councils and members of the Judicial Conference of the United States. Both district judges on the Committee had served as members of the Judicial Conference and of its Executive Committee, and as members of their circuits' judicial councils. Ms. Rider was a litigator in the District of Columbia for 13 years, then served as Chief Justice Rehnquist's administrative assistant from August 2000 until September 2005, and she currently serves Chief Justice Roberts in the same capacity. Appendix B has biographical summaries for the Committee members.

***Staff and budget*—**Chief Justice Rehnquist requested the directors of the Administrative Office of U.S. Courts and the Federal Judicial Center to assign members of the agencies' staffs to assist us. Four Center employees and one Administrative Office employee provided principal support, and other staff of both agencies provided ad-

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ditional assistance, including Federal Judicial Center editorial assistance. Appendix C has biographical information about key staff.

We did our work with no special appropriation or grant of funds. The Federal Judicial Center and Administrative Office absorbed the salary and travel costs of their employees' work for the Committee; the Center funded several small contract research projects. Committee members' travel for meetings came from funds appropriated for the operation of the courts. Our individual interviews with chief circuit judges took place when members and chief judges were both in Washington for other business, or by telephone.

The Committee's assignment—Chief Justice Rehnquist asked us to examine, in his words, "the way in which the Judicial Conduct and Disability Act of 1980 is being implemented."

Because the great majority of complaints are resolved by dismissal by chief circuit judges, the central task was to assess the degree to which the actions of chief judges (and on rare occasion, judicial councils) complied with the Act.

We undertook both quantitative and qualitative research to inform our assessment of the Act's implementation by

- assessing the number and types of complaints filed and the types of dispositions provided by chief judges and judicial councils for statistical reporting years 2001 through 2005, based primarily on data supplied by the Administrative Office of the U.S. Courts (see Chapter 2);
- documenting the processes and procedures that chief judges, judicial councils, and their staffs use to process complaints filed under the Act, based largely on our interviews and our staff's interviews of current and former chief circuit judges, and circuit staff, and also surveying court websites to learn how, if at all, the websites provide information about the Act (see Chapter 3);
- analyzing three different sets of complaint dispositions for compliance with the Act and measuring the actions of chief judges and judicial councils against standards we developed for assessing compliance with the Act (see Chapter 4); and
- seeking to learn, through our interviews, about informal efforts to identify and resolve allegations of misconduct and disability (see Chapter 5).

We present recommendations in Chapter 6.

The Committee met five times, each time in Washington, D.C., starting with an organizational meeting on June 10, 2004. The last meeting was on June 28, 2006, to review findings and recommendations for this final report.

As of August 14, 2006, we received 105 unsolicited submissions from 48 individuals (for example, one individual sent us six separate packets over several months objecting to a chief judge's dismissal of his complaint, which we later realized was

case C-9, discussed in Chapter 4). Of the 48 individuals who communicated by letter or fax, as best we can determine:

- 22 protested a judicial decision or sent copies of filings in litigation;
- nine protested the disposition of a misconduct complaint under the Act;
- five alleged federal judicial misconduct (e.g., bias or conspiracy);
- 11 alleged misconduct by state judges or non-judicial officials (e.g., a U.S. attorney); and
- five asked to meet with the Committee.

We sent a postcard acknowledging receipt of each submission and giving the citation of the Act as the proper vehicle for filing misconduct and disability complaints; because we had no authority to act on individual complaints, we took no other action.

Previous studies of the Act and its administration

The Act's administration has been the object of one major inquiry: that of the National Commission on Judicial Discipline and Removal, which Congress created in 1990[2] and which filed its report in 1993.[3] The Commission's statutory charge, size, and funding, and thus its report and numerous supporting studies, went well beyond our narrower mandate: The report and studies covered the varied means available and potentially available to Congress and the executive branch in dealing with judicial misconduct and disability, as well as the administration of the 1980 Act and related actions within the judicial branch. The Commission made various recommendations, principally to the judicial branch, concerning the Act, its administration, and related matters, most of which have been implemented.

As to the Act's administration, the Commission observed:[4]

> It would be surprising if a rigorous evaluation of experience under the 1980 Act had unearthed no instances where those charged with its implementation failed to treat complaints with the seriousness they deserved. The Commission identified such instances, but not many.

The Commission based this conclusion on its own analysis, informed by several research inquiries undertaken for the Commission, including Jeffrey Barr's and Thomas Willging's Federal Judicial Center study of chief judges' disposition of complaints and their informal resolution of allegations,[5] Charles Geyh's analysis of methods of judicial discipline other than those provided in the Act,[6] and Richard Marcus's review of public orders relating to complaints and the products of the Barr/Willging interviews.[7]

In 2002, the chair and ranking member of the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property asked the Federal Judicial Center for some follow-up research on chief circuit judge orders dismissing complaints, which

the study found were generally in compliance with a specific statutory requirement and another Judicial Conference recommendation.[8]

Beyond the National Commission report, supporting research, and the 2002 FJC follow-up study of the Act's administration, there have been several case studies on the disposition of highly publicized complaints filed under the Act in the 1980s,[9] and at least two articles describing how real or asserted misconduct or disability problems were handled informally in the shadow of the Act.[10]

The Act's major provisions

Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 to make circuit judicial councils more effective governance agencies by broadening their membership and enhancing their authority, including providing a formal means by which individuals could seek review of judicial behavior apart from decisions in cases. The sections that constitute the Judicial Conduct and Disability Act came after more than ten years of debate about the most appropriate federal judicial administrative structure to receive and process complaints of judicial misconduct and disability and the constitutional permissibility of various types of sanctions that could be statutorily authorized.[11] The Act has been amended only twice. Congress enacted minor revisions in 1990,[12] and in 2002 recodified the Act as a separate chapter in title 28.[13] Appendix D reproduces the Act in its codified form.

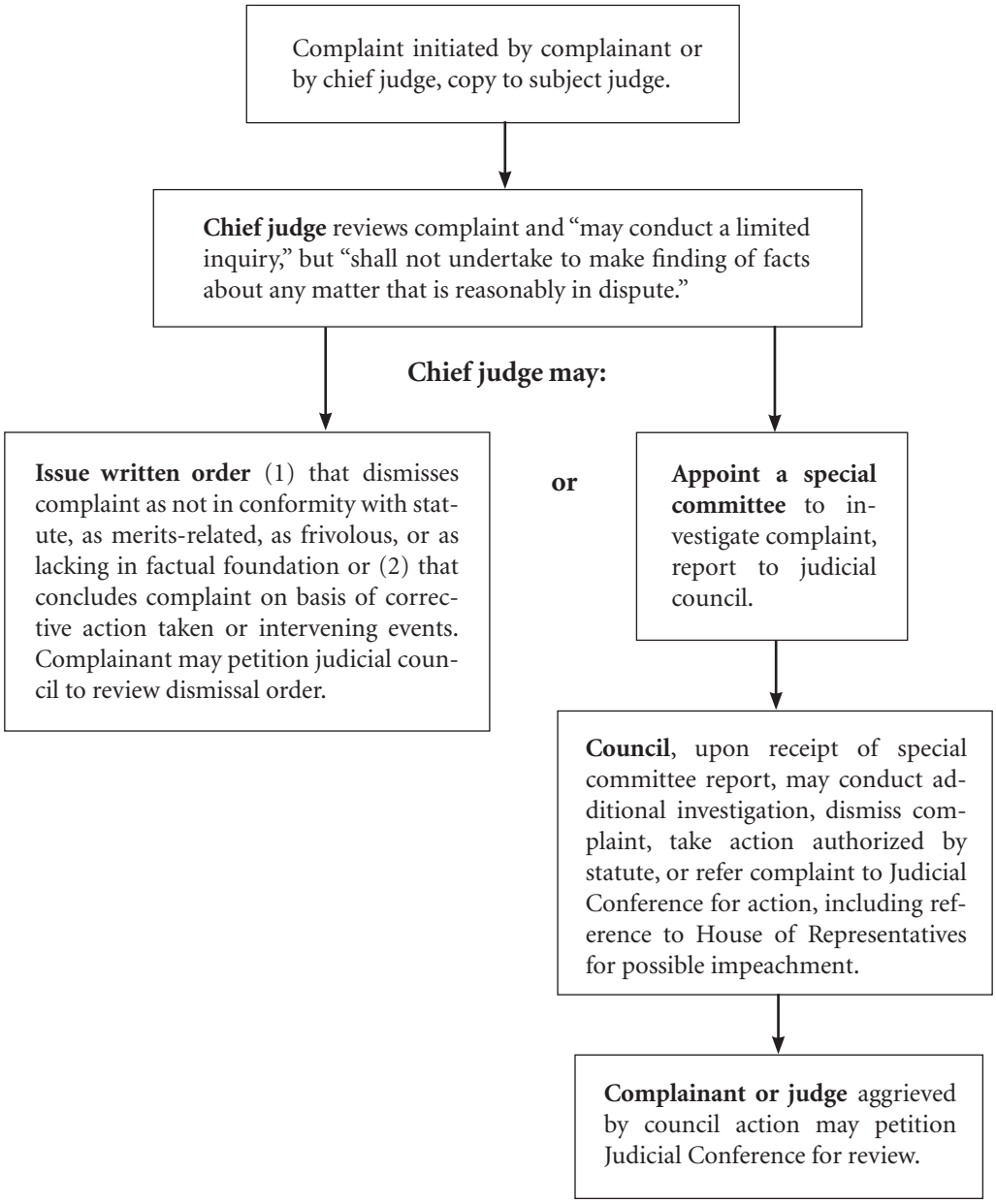
Figure 1 provides an overview of the Act's process for presenting and dealing with complaints of judicial misconduct and disability. The great majority of complaints end with the chief judge dismissal order or council refusal to upset that order.

Because of the complexities of processing a complaint, we describe the statutory steps in some detail.

Initiating the complaint—Section 351(a) authorizes "[a]ny 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" to "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." Section 351(c) directs the clerk to transmit the complaint to the chief circuit judge (or, if the chief judge is the object of the complaint, to the active judge on the court of appeals who is senior in service) and to the judge complained against. (Complaints against International Trade Court or Federal Claims Court judges are handled by those courts' chief judges.)

Section 351(b) authorizes the chief judge, by written order, to "identify" a complaint (begin the process) on the basis of "information available to the chief judge" and "thereby dispense with filing of a written complaint."

Figure 1. Flowchart of Major Steps in Complaint Processing



Chief judge review—Section 352(a) directs the chief judge to "expeditiously review" every complaint. The purpose of the review is "not . . . to make findings of fact about any matter that is reasonably in dispute." The purpose is to determine if the complaint should be dismissed or the proceedings concluded, or, alternatively, if a special committee should investigate disputed facts. Section 352(a) authorizes the chief judge to "conduct a limited inquiry" to determine "whether appropriate corrective action has been or can be taken without the necessity for a formal investigation" or whether the complaint states facts that "are either plainly untrue or incapable of being established through investigation" by a special committee. The Act says a limited inquiry may include the chief judge's seeking a response from the subject judge; oral or written communications by the chief judge or staff with the judge, the complainant, or other witnesses; and examination of relevant documents.

After completing the section 352(a) review, the chief judge, under section 352(b), must either:

- Terminate the complaint by (1) dismissing it as (a) "not in conformity with section 351(a)" (i.e., alleging conduct not covered by the Act); (b) "directly related to the merits of a decision or procedural ruling"; (c) "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation"; or (d) "lack[ing] any factual foundation or . . . conclusively refuted by objective evidence"; or (2) "conclud[ing] the proceeding" because "appropriate corrective action has been taken or . . . action on the complaint is no longer necessary because of intervening events." Section 352 directs the chief judge to dismiss the complaint or conclude the proceeding by "written order, stating his or her reasons" and provide the order to the complainant and subject judge. Either may petition the judicial council to review the order; a council's denial of a petition is, as interpreted to this point, "final and conclusive."

  or

- Appoint "a special committee to investigate the facts and allegations contained in the complaint" and so advise the complainant and subject judge. The chief judge is to serve on the committee and to appoint to the committee "equal numbers of circuit and district judges of the circuit" (section 353(a)).

Special committee investigation and judicial council action—Section 353(c) directs the special committee to "conduct an investigation as extensive as it considers necessary" and expeditiously to "file a comprehensive written report thereon" with the circuit council, presenting the committee's findings and its recommendations for council action.

Section 354 authorizes the council to undertake any additional investigation it finds necessary and to either dismiss the complaint or take any of a range of actions

as to the subject judge, including the following: a temporary halt in case assignments; a private or public censure; certifying a district or circuit judge's disability pursuant to 28 U.S.C. § 372(b); requesting such a judge's voluntary retirement; or ordering the removal from office of term-limited judges (according to statutory procedures). Section 357 authorizes the complainant or subject judge to petition the Judicial Conference to review council actions taken under section 354. The council may also refer judicial misconduct to the Judicial Conference for its action, including advising the House of Representatives that impeachment may be warranted.

Judicial Conference action—Section 354 authorizes the judicial council to refer any action to the Judicial Conference for resolution and to advise the Conference of any judicial conduct that may constitute grounds for impeachment, which the Conference may refer to the House of Representatives. Section 331 of title 28 authorizes the Judicial Conference to establish a "standing committee" to exercise its functions under the Act, and, pursuant to that authority, the Conference established its Committee to Review Circuit Council Conduct and Disability Orders (Review Committee).

Other provisions deal with written notice requirements; subpoena power of special committees, councils, and the Judicial Conference and its Review Committee; confidentiality of proceedings; and the effect of felony convictions on judges' authority to decide cases and creditable service for taking senior status. Section 359(a) bars a judge who is the subject of special committee, judicial council, or Judicial Conference proceedings from serving on the circuit judicial council, the Judicial Conference, or the Conference's Review Committee.

Illustrative Rules and Committee Standards

Section 358 authorizes judicial councils to adopt "rules for the conduct of proceedings" under the Act. In 1986, a special committee of the chief judges of the courts of appeals formulated *Illustrative Rules Governing Complaints of Judicial Conduct and Disability* (AO 2000) for circuit councils to consider adopting; the Review Committee revised them in 2000. Most circuit councils have adopted the Illustrative Rules verbatim or with slight modifications.

For our research, we developed "Standards for Assessing Compliance with the Act," in order to promote uniformity in Committee and staff assessments of complaint dispositions. The Standards (see Appendix E) draw from the Illustrative Rules and observed patterns of chief judge and judicial council actions in applying the Act. Chapter 4's assessments of complaint terminations quote the Standards applicable to the particular aspect of the Act at issue.

Chapter 2

Complaints Terminated; Source, Nature, and Object; Types of Dispositions, 2001–2005

This chapter presents an overall description of all complaints terminated in fiscal years 2001 to 2005 (October 1, 2000, through September 30, 2005).

Key findings:

1. **The number of terminated complaints peaked in 1998 and has hovered between 600 and 800 per year since then.**
2. **Almost all complaints are filed by prisoners or litigants.**
3. **Almost all complaints allege misconduct rather than disability.**
4. **Almost all complaints are dismissed by the chief judge; 88% of the reasons given for dismissal are that the complaint relates to the merits of a proceeding or is unsubstantiated.**
5. **The circuits vary considerably in the time they take to terminate complaints.**
6. **There are mistakes in the data that circuits submit to the Administrative Office of the U.S. Courts for national statistical reports on the Act's administration; perhaps most serious, for the period we examined, the circuit data underreported the number of special committees that chief judges appointed.**

Source of data

Circuit staff submit an "AO Form 372" to the Administrative Office for each terminated complaint (see Appendix F). The form classifies the complaining party or parties, the type (but not the names) of judge(s) complained about, the general nature of the complaint, the disposition of the complaint by the chief judge, and action, if any, by the judicial council. The AO compiles these data annually for Tables 11 and S-22 of *Judicial Business of the United States Courts* (see Appendix G), meeting the Act's reporting mandates.[14]

The AO provided our staff the forms for the 3,670 complaints reported terminated from 2001 through 2005—these forms are the source of most of the information in this chapter. Additional information came from the actual case files for 604 of those complaints. (Our staff went through a sample of 593 case files from 2001–2003, and an additional 11 from dispositions after 2003, as part of the Committee's assessment

of whether chief judges and judicial councils resolve complaints consistently with the Act's requirements. See Chapter 4.)

Complaints terminated

Table 1 shows that during 2001 through 2005, the 12 regional circuits and three national courts terminated at least 3,670 complaints, an average of 734 per year. ("At least" signifies that the drop in terminations in 2005 is almost surely an artifact of some circuits' late reporting of terminations near the end of the year, as explained in Table 1's * note.) The number of terminations varies by size of circuit, but with controls for the number of judges, most circuits fell within a range of plus-or-minus ten of the overall average of 44 complaints per 100 non-senior judges per year. The District of Columbia Circuit is the exception with 83 complaints. (To be clear, the ratio's numerator includes *all* complaints, those against active status judges as well as against senior judges; the denominator, though, excludes senior judges, for two reasons. One is to allow the next paragraph's comparison with termination data in earlier years, assembled for the National Commission on Judicial Discipline and Removal. The second reason is the difficulty of knowing how many senior status judges at any point are in fact doing no judicial work and thus far less likely to attract complaints. Including them in the denominator reduces the ratio of complaints per judge, but, we found, has little effect on the rank order of circuits that can be extracted from Table 1. The Administrative Office data do not distinguish complaints filed against senior judges from those against active judges.)

Figure 1 shows that the number of complaints peaked in 1998 and has stayed high since then. And complaints have increased more than the number of judges. Complaints in 1992 were about 24 per 100 non-senior judges in the eight circuits studied (354 complaints and 1,489 non-senior judges[15]). From 2001–2005, nationally there were an average of 44 complaints per 100 non-senior judges annually, as shown in Table 1.

There is some speculation that the 1996 Prison Litigation Reform Act[16] may help explain this increase in filings over the last eight to ten years by causing an increase in complaints filed by prisoners—41% of all complaints filed in 2001–2005 (see Table 2). That Act requires most prisoners who seek to file litigation in forma pauperis (including challenges to their convictions) to pay at least some portion of the filing fee and costs assessed through charges to their prison accounts.[17] There is no charge, however, for filing a complaint under the Judicial Conduct and Disability Act. This causal relationship is speculation, though, in part because we do not have information on the proportion of complaints filed by prisoners prior to 1996.

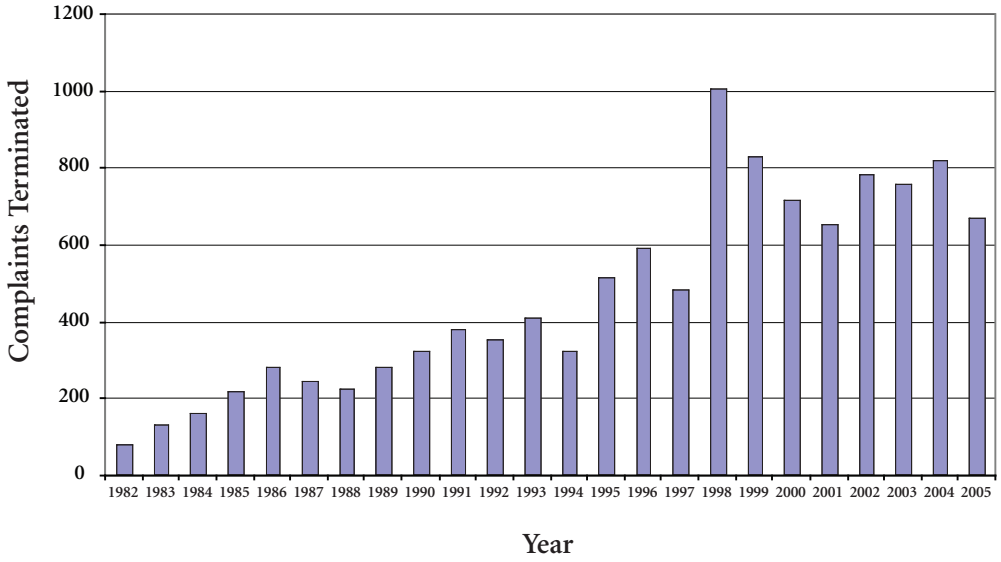
Table 1. Complaints Terminated in 2001–2005*

	Total	2001	2002	2003	2004	2005	Non-senior judges in service on 9/30/03	Annual rate of complaints per 100 non-senior judges†
All circuits	3,670	652	779	754	819	666	1,658	44
1st	121	16	25	17	40	23	64	38
2d	382	75	93	71	52	91	136	56
3d	225	52	48	44	34	47	122	37
4th	316	61	62	72	73	48	127	50
5th	470	90	95	97	98	90	186	51
6th	357	76	98	72	64	47	151	47
7th	152	39	29	33	35	16	113	27
8th	324	41	57	88	93	45	110	59
9th	622	98	125	126	153	120	297	42
10th	196	30	47	42	44	33	113	35
11th	372	57	61	72	102	80	175	43
D.C.	116	17	36	12	29	22	28	83
Fed.	5	—	—	2	2	1	12	8
CIT	2	—	—	2	—	—	9	4
CFC	10	—	3	4	—	3	15	13

* These figures vary slightly from the figures for terminated complaints in Table S-22 of the 2001 through 2005 *Judicial Business of the United States Courts*; those tables do not include the complaints reported very late in the yearly process. The 2005 figures in Table 1 do not include reports submitted after the reporting period and therefore underestimate the number of terminated complaints in that year to an unknown degree. The figures in this table correspond more closely to the figures in Table 11 of *Judicial Business*, which presents summary information about terminations.

† Computed by dividing the total number of complaints by five to determine the average number of complaints per year, dividing this figure by the number of non-senior judges in service on September 30, 2003, and then multiplying by 100.

Figure 2. Complaints Terminated by Year, 1982–2005



Complainants

The numbers in this and the next sections reflect *participations* in the process rather than *individuals*. One complainant may participate more than once (file more than one complaint) or name two or more judges in a complaint, and one judge may receive more than one complaint.

Litigants and prisoners dominate the complaint process. Table 2 indicates that during the five-year period:

- litigants constituted 51% (1,988 of 3,912) of the complainants;
- prisoners account for an additional 41% (1,588) (most prisoners who file complaints are also litigants, but AO Form 372 codes prisoners and litigants separately);
- complaints by court officials were especially rare, averaging only one per year;
- complaints by other public officials were also rare—the figure is somewhat distorted by the single complaint that was submitted by 15 House members (which we discuss in Chapter 4 as case C-17); and
- "other persons," who constituted approximately 6% (229) of the complainants, are usually relatives of litigants or prisoners, or unrelated persons (including nonprofit organizations) with an interest in a particular case.

Table 2. Types of Complainants

	Total*	Litigant	Prisoner†	Attorney	Court official	Public official	Other persons
Total	3,912	1,988	1,588	81	5	21	229
1st	123	69	45	4	1	—	4
2d	403	266	97	5	—	16	19
3d	284	123	92	8	—	1	60
4th	437	262	155	3	—	—	17
5th	476	153	304	9	—	—	10
6th	365	163	163	7	—	2	30
7th	152	76	67	2	—	1	6
8th	324	90	217	9	—	—	8
9th	637	392	191	13	1	—	40
10th	203	100	96	4	—	—	3
11th	373	193	138	13	—	—	29
D.C.	116	88	23	3	—	1	1
Fed.	5	5	—	—	—	—	—
CIT	2	1	—	—	1	—	—
CFC	12	7	—	1	2	—	2

* A complaint may be filed by more than one complainant and by more than one type of complainant.

† Most prisoners' complaints related to their earlier civil or criminal litigation and might have been more accurately classified as a complaint by a former litigant.

Judges complained against

During the five-year period, complaints named judges more than 5,000 times. (This refers not to 5,000 individual judges but to the number of times a judge was named in the complaints.) Considerably fewer individuals served as judges during those five years, which means that some judges were named more than once. District judges were approximately 56% (2,887 of 5,176) of the judges named. Appellate judges were named about 24% (1,262) of the time, with magistrate judges and bankruptcy judges named less often.

The data cannot provide the number of individual judges complained about because the AO records do not identify judges by name. It appears unlikely, however, that each federal judge serving in the period received at least one complaint, or that a few judges received them all. Rarely did two unrelated complaints in our 593-case sample name the same judge.

Table 3. Types of Judges Named in the Complaints

	Total instances of judges being named	Appellate judges	District judges	Magistrate judges	Bankruptcy judges
Total	5,176	1,262	2,887	850	177
1st	187	59	99	16	13
2d	383	76	236	63	8
3d	225	31	136	37	21
4th	494	125	287	73	9
5th	470	101	234	125	10
6th	477	84	318	62	13
7th	195	36	139	13	7
8th	668	133	353	166	16
9th	1,205	379	617	156	53
10th	262	56	151*	45	10
11th	371	65	201	89	16
D.C.	214	104	104	5	1
Fed.	13	13	—	—	—
CIT	2	—	2	—	—
CFC	10	—	10	—	—

* A complaint filed in the Tenth Circuit named a judge serving on the Court of International Trade along with three judges from the Tenth Circuit. That Court of International Trade judge is coded as a Tenth Circuit district court judge since the complaint was considered by the Tenth Circuit.

Naming more than one judge in a complaint occurred in approximately 12% of the terminated complaints. Complaints against multiple appellate judges were most common, occurring in 30% of the complaints that named an appellate judge. Such complaints often named the entire panel in response to an unsuccessful appeal, and on occasion named the trial judge(s) in the case. Table 4 shows that nationally, each appellate judge received annually an average of 1.58 complaints. When we control for number of judges, appellate judges were named at a rate almost twice that of district judges. Approximately 2% of the complaints named more than five judges.

Table 4. Annual Rate of Complaints for Different Types of Judges*

	Appellate judges	District judges	Magistrate judges	Bankruptcy judges
All circuits	1.58	0.86	0.33	0.11
1st	1.97	0.71	0.19	0.20
2d	1.27	0.86	0.28	0.07
3d	0.52	0.49	0.22	0.21
4th	1.92	1.13	0.36	0.08
5th	1.35	0.58	0.39	0.08
6th	1.40	1.04	0.30	0.07
7th	0.65	0.60	0.09	0.05
8th	2.96	1.68	0.81	0.18
9th	2.92	1.15	0.32	0.16
10th	0.93	0.84	0.20	0.10
11th	1.18	0.60	0.29	0.09
D.C.	2.31	1.39	0.33	0.20
Fed.	0.22	—	—	—
CIT	—	0.04	—	—
CFC	—	0.13	—	—

* Computed by dividing by five the total number of times each type of judge was named in a complaint and dividing this figure by the number of non-senior judges of that type in service on September 30, 2003. This table differs from Table 1 in that this table focuses on the number of times judges are named in the complaints, not the number of complaints.

Allegations

Table 5 indicates that misconduct allegations far outweighed disability allegations. Of the 5,227 allegations, only 190 (3.6%) were for conduct related to mental or physical disability. Among all allegations, by far the most common were charges of prejudice or bias (28.4%) and abuse of judicial power (23.4%), together constituting 52% (2,733 of 5,277) of all allegations. The "other" category constitutes 17% (933) of the allegations.

Table 5. Types of Allegations

	Total allegations*	Prejudice/ bias	Abuse of judicial power	Bribery corruption	Undue decisional delay	Incompetence/ neglect	Conflict of interest	Mental disability	Demeanor	Physical disability	Other
Total	5,277	1,497	1,236	364	364	320	244	160	129	30	933
1st	206	81	40	13	17	20	14	7	7	2	5
2d	632	169	123	29	43	32	45	36	29	3	123
3d	431	74	17	22	30	22	36	16	7	2	205
4th	394	93	162	25	18	25	13	15	9	3	31
5th	616	136	96	21	41	13	17	13	9	2	268
6th	363	221	29	26	14	19	12	11	1	—	30
7th	169	48	39	1	23	1	3	3	7	—	44
8th	493	120	170	55	51	47	13	8	12	2	15
9th	1,091	237	283	150	80	82	52	38	34	12	123
10th	260	83	68	4	21	3	18	2	3	—	58
11th	452	126	187	18	22	53	13	8	9	3	13
D.C.	139	96	14	—	3	2	8	1	1	—	14
Fed.	8	5	3	—	—	—	—	—	—	—	—
CIT	3	1	1	—	1	—	—	—	—	—	—
CFC	20	7	4	—	—	1	—	2	1	1	4

* A complaint may allege multiple grounds of misconduct; 33% of the complaints included more than one allegation.

Action taken by the chief judge

Section 352(a) of the Act tells chief judges to review complaints "expeditiously." The commentary to Illustrative Rule 4 says that "it would be a rare case in which more than sixty days is permitted to elapse from the filing of the complaint to the chief judge's action on it." Table 6 shows that, nationwide, 38% of the complaints consumed more than 60 days to disposition. Individual circuits' processing times vary greatly. In the Seventh Circuit, half of the complaints were resolved within eight days, and in the Fifth Circuit, half within 13 days. By contrast, in the Second Circuit, half the complaints were resolved within 150 days, and 2% were resolved within 60 days.

These figures include, as to dismissed complaints, only those in which the complainant did not petition the judicial council to review the chief judge dismissal order under section 352(c). Complainants sought review of 44% of the chief judge orders, and in those cases the AO data do not include the date the complaint was terminated by the chief judge. But there is no reason to believe those dismissals differ from unappealed dismissals as to the time from filing to chief judge order.

Table 6. Time to Disposition by Chief Judge

	Complaints (with no petitions to council)	Days to resolve 50% of complaints	Percent consuming more than 60 days
All circuits	2,034	45	38%
1st	38	74	60%
2d	202	150	98%
3d	96	25	12%
4th	170	24	3%
5th	196	13	2%
6th	181	45	35%
7th	116	8	6%
8th	206	62	54%
9th	390	48	19%
10th	90	29	10%
11th	283	109	78%
D.C.	55	26	9%
Fed.	5	56	60%
CIT	2	164	100%
CFC	6	226	83%

Table 7 shows the reasons chief judges gave in their orders dismissing complaints or concluding proceedings; orders frequently give more than one reason. Reasons included:

- allegations directly related to the merits of a judicial decision (52%, or 2,668 of 5,141 reasons offered);
- "frivolousness," i.e., the complaint lacked adequate factual specification in support of the allegations, or a limited factual inquiry by the chief judge revealed that the allegations could not be proven (36%, or 1,835 of 5,141 reasons offered)—"frivolous" and "merits-related" were often mentioned together in a dismissal;
- complaint not in conformity with the statute (11%, or 564 of 5,141 reasons offered), such as misconduct charges against someone other than a judge; and
- appropriate corrective action had already been taken, or action was no longer necessary because of intervening events (approximately 1%, or 74 of 5,141 reasons offered).

Table 7. Reasons Given in Chief Judge Dismissal Orders

	Total reasons for disposition*	Nonconformity with statute	Directly related to merits	Frivolous	Appropriate corrective action taken	Action no longer necessary due to intervening events
Total	5,141	564	2,668	1,835	32	42
1st	254	53	90	108	1	2
2d	665	152	281	227	3	2
3d	419	20	214	180	3	2
4th	464	60	253	148	—	3
5th	608	9	390	202	3	4
6th	370	61	243	62	3	1
7th	170	17	93	57	2	1
8th	450	87	182	165	8	8
9th	921	40	412	461	7	1
10th	210	9	165	35	1	—
11th	440	8	269	145	1	17
D.C.	152	45	62	44	—	1
Fed.	5	—	5	—	—	—
CIT	1	—	1	—	—	—
CFC	12	3	8	1	—	—

* Chief judges often cite multiple reasons for the disposition. Table S-22 of *Judicial Business of the United States Courts* records only one basis for the disposition by the chief judge.

Judicial council actions; special committee appointments

The complainant petitioned the judicial council to review the chief judge's order in 44% (1,592 of 3,627) of the dismissed or concluded complaints. According to the data submitted to the AO (the data, as we note below, appear mistaken in part), the councils in each instance either denied the petition or, pursuant to a few circuits' practice, granted the petition and then dismissed it on the merits.

Table 8 shows the dispositions of matters in which the chief judge did not dismiss the complaint or conclude the proceeding. The table is based on the AO 372 forms the circuits submitted to the AO for 2001–2005; the 593 actual case files our staff examined for terminations in 2001–2003; and 11 case files they examined for terminations in 2004–2005 (11 high-visibility cases).

According to these data, chief judges appointed nine special committees to investigate 15 complaints filed against nine judges. The judicial councils:

- dismissed six complaints filed against five judges;
- imposed public censure on two judges (involving a total of seven complaints) and private censure on one judge (involving one complaint); and
- imposed "other discipline" on one judge (according to AO data; the case file is sealed).

Table 8. Special Committees and Council Action

	2001–2003			2004–2005	2001–2005
	Circuit data	Files	Total	Circuit data	Total
Special committees					
Appointed	1	5	6	3	9
Complaints investigated			8	7	15
Council actions as to the nine judges complained against					
Complaints dismissed			3	2*	5
Imposed public censure			1†	1*	2
Imposed private censure			1		1
Imposed "other discipline"‡			1‡		1‡

* According to circuit-supplied data, the judicial council dismissed all seven complaints considered by the three special committees appointed in 2004 and 2005. However, our investigation of 11 high-visibility cases after 2003, reported in Chapter 4, included one special committee investigation of five related complaints, in response to which the council issued a public censure (case C-17 in Chapter 4).

† Two related complaints combined in one special committee investigation and council action.

‡ Sealed record.

According to data submitted to the AO, in no instance during this five-year period did the 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.

Errors in the circuit-reported data

Cross-checking 593 of the over 2,000 AO-372 forms for 2001–2003 dispositions against the actual case files revealed some errors in the data the circuits submitted to the AO. (As noted, our staff examined 593 actual case files for 2001–2003, but only 11 files for 2004–2005; had they examined a larger number of 2004–2005 files, they may have found more errors.)

We do not question the overall picture presented by the circuit-submitted data but are concerned about the apparent underreporting of matters not dismissed by the chief judge. More specifically:

- As noted above, the 593 files revealed six special investigative committee appointments in 2001–2003, but the circuit data reported only one of them. Table 11 of the 2003 *Judicial Business of the United States Courts* reports the work of all six committees only because AO staff identified them through a supplemental telephone survey.
- The circuit-submitted data include no instance where a council, rather than deny a petition to review a chief judge's dismissal, instead sent the matter back to the chief judge for appointment of a special committee. The case files, however, reveal one such council action (discussed as case C-3 in Chapter 4).
- The circuit-submitted data reveal no instances in which the council ordered a suspension in the assignment of new cases. However, the case files reveal that in one instance of public censure (discussed as case C-16 in Chapter 4), the council also imposed a minimum of six months leave of absence, which would have suspended the assignment of new cases.
- Court personnel sometimes misclassified complaining litigants and prisoners as "other persons." Also, the forms identify attorneys as filing only 2% (81) of the complaints from 2001–2005, but the 593 case files for 2001–2003 reveal several attorney complainants whom the corresponding forms misclassified as "other persons," probably because they did not participate in the underlying case. Thus, the total population of complaints includes at least slightly more attorney complainants than indicated in the circuit-provided data.
- Examination of the case files reveals, as Barr and Willging found in 1993,[18] that circuit staff's coding of allegations often varied among the circuits. Some use the "other" designation to include narrower issues that are related to the existing categories shown above in Table 5.

These discrepancies undergird our seventh recommendation in Chapter 6.

Chapter 3

How the Judicial Branch Administers the Act—Process

This chapter describes the processes and procedures the regional circuits use for implementing the Act. (We have not included the three national courts in these descriptions because they receive very few complaints and their structural arrangements are different from those of the regional circuits.)

Key findings:

1. **Many courts do not use their websites to provide the public with information about the Act and about how to file a complaint.**
2. **In most circuits, staff in the clerk's office or in the circuit executive's office analyze complaints and present them to the chief circuit judge, often with a draft order.**
3. **Chief judges report that, consistent with the Act, they reserve for themselves decisions whether to undertake further inquiries about complaint allegations,** e.g., **seeking a response from the judge, speaking to witnesses, or other inquiries that go beyond simple inspection of routine documents.**
4. **In the 593-case sample (i.e., the sample that overrepresents complaints most likely to allege conduct that the Act covers):**
    - **chief judge orders were ordinarily consistent with the statutory requirement that they state reasons and with Judicial Conference policy that they restate the complaint's allegations; and**
    - **in about half the instances chief judges undertook limited inquiries—the most common limited inquiry took the form of an examination of the record in the underlying court case.**

Providing information about the Act

Before describing circuit-level procedures for resolving complaints, we answer a broader question: What do federal courts do to make individuals aware of the Act, what it covers and does not cover (e.g., the merits of judicial decisions), and how to file a complaint? We did not have the resources to study the degree to which courts use all the means available to them to make this information available, e.g., through notices posted in the clerk's office and speeches to bar or civic groups. We therefore

determined to assess the availability of information on the courts' websites. In 2002, the Judicial Conference (on the recommendation of its Review Committee and two members of Congress) urged "every federal court to include a prominent link on its website to its circuit's forms for filing complaints of judicial misconduct or disability and its circuit's rules governing the complaint procedure."[19]

Our research staff examined all court of appeals and district court websites; they spot-checked bankruptcy court websites sufficiently to justify the impression that patterns in the bankruptcy courts would be similar to those observed in the district courts.

This research entailed three questions:

- Did the website include information about the complaint process, and, if so, what information?
- Was the information available on the homepage, or did a user have to open some other place on the website to get the information, and, if so, what was the title or designation of that link?
- How many "clicks" were required to get to the information?

The main research was performed in the spring of 2005; spot checks in the spring of 2006 suggest only a few changes from the situation observed in 2005.

Courts of appeals

At the time of the research, all 13 courts of appeals websites included information about the Act. The information in each instance was the judicial council's rules governing complaint filing and processing and the form for filing (or a statement that no form was necessary but identifying the information necessary to include in a complaint); a few websites included a brief explanatory preface to the rules.

- Three websites had the information about the Act on the homepage, under titles such as "Judicial Misconduct."
- Eight required one click beyond the homepage.
- Two required at least two clicks.

The link on the homepage typically was "Rules and Procedures" or some variation.

District courts

A person who wanted to file a complaint against a district judge would turn to the respective court of appeals website only if he or she were familiar with the Act's filing requirements. One not familiar with the Act would turn naturally to the website of the district of the subject judge. That no doubt is why in 1994 the Judicial Conference urged each district court to include in its local rules a reference to the Act and the circuit's rules,[20] and, as noted, in 2002 the Conference urged each court to prominently display on its webpage links to the complaint form and to the circuit rules.[21]

Our research staff could find no information about the complaint procedure on 53 of the 94 district websites examined in 2005. Of the 41 sites that had some information at the time of the research:

- four had the information on the homepage itself;
- a majority required one click to get the information;
- 15 had the information in their local rules;
- 12 had the information under "General Information" or some variation; other links were "Forms," "FAQs," "Judges," and "Links"; and
- 28 had links to the circuit's rules and complaint form; 13 told the user to obtain the information by calling, writing, or visiting the office of the circuit clerk or executive, or, in a few instances, the district clerk's office.

Sites that included complaint information in their local rules typically provided the user no onscreen cue that the rules had the information. The user would have to surmise that the "Local Rules" would provide information on filing a complaint, then open the local rules, then surmise that the civil rules, not the criminal rules, had the information (in almost all districts), and then scroll through the rules or their table of contents looking for a heading such as "Judicial Complaints," which were typically located in the 80s (e.g., local civil rule 83).

In any event, it appears that providing easy website access to information about filing complaints does not result in a higher rate of complaints filed. Our research staff compared data on website information availability with the number of complaints (adjusted for the number of judges) and found no consistent statistically significant relationship.

Appendix H includes two websites that provide ready access to information that would assist persons seeking to learn about the complaint process.

Initial analysis of the complaint

We turn now to describe how the circuits process complaints once filed. These descriptions are based on staff interviews and follow-up inquiries in the spring of 2006.

In two regional circuits, the complaint goes directly to the chief judge's chambers. In the other ten circuits, a staff person outside the chief judge's chambers is responsible for at least some initial review of the complaint and, in most cases, preparation of a draft order or a memorandum analyzing the complaint, or both. That task falls to the

- circuit executive's office in five circuits;
- clerk's office in three circuits;
- staff attorney's office in one circuit; and
- appellate conference attorney's office in one circuit.

At least four circuits provide for some review of this staff-prepared material before it goes to the chief judge, usually by another staff person in the same office.

Submission to the chief judge

In five of the ten circuits in which the complaint does not go directly to the chief judge's chambers, the chief judge receives, along with the complaint, a draft order and supporting memoranda. In the other five, the chief judge receives the complaint, the draft order and analysis, and, if appropriate, supporting material that the staff finds relevant and readily available in the public record, such as docket sheets.

Chief judges told us that the staff typically alerts them to unusual complaints. One said in an interview, for example, that the chief deputy "might alert me that there's something tricky," giving as an example one of the high-visibility complaints we discuss in Chapter 4. "In such cases," the chief judge continued, "we may want an answer from the respondent judge."

Chief judge orders

In finalizing the disposition order, chief judges report that they may revise the staff-prepared orders to some degree. One former chief judge said the staff person "would send me a proposed disposition. I would do light editing on [the] draft, and that was that. For those few cases that were not insubstantial, I would do the further work, [the staff person] was not involved. Then I would get help from a law clerk if there were legal questions."

One particular issue is whether the chief judge, in orders dismissing or concluding a complaint, has

- "stat[ed] his or her reasons" (section 352(b) of the Act); and
- "set forth the allegations of the complaint and the reasons for the disposition," as recommended by the Judicial Conference.[22]

The AO-372 forms that circuits provide the AO do not indicate how often chief judge dismissal orders comply with these provisions. However, as explained in Chapter 4, our staff reviewed the case files of a sample of 593 cases drawn from all terminations in 2001 through 2003. These files provide information about procedural characteristics of the complaint dispositions that the AO forms do not provide. As explained in Chapter 4, the sample complaints are more likely than a sample of complaints drawn totally at random to allege conduct that is the focus of the Act. One cannot assume that the percentages below would necessarily obtain in an analysis of all terminations.

With that caveat, the chief judge orders that terminated the complaints in the 593-case sample almost always restated an allegation from the complaint (92% of the orders) and offered reasons that supported the disposition (86% of the orders). These compliance levels are quite similar to those found in the 2002 study of a sample of complaints drawn completely at random, as shown in Table 9.

Table 9. Percentage of Orders Restating Allegations and Giving Reasons, 2002 and 2004

	2002 random sample[23]	2004 stratified sample
Restated allegations	89%	92%
Stated reasons	88%	86%

The reasons offered in the 593-case sample usually involved citation to the council's rules for processing complaints (67% of the orders) or to a previous order of the circuit council (24% of the orders). They rarely cited the Code of Conduct for United States Judges (4% of the orders) or advisory opinions issued by the Codes of Conduct Committee of the Judicial Conference of the United States (2% of the orders).

In Committee interviews, chief judges emphasized the importance of both these elements (restatement of allegations and the reason for the disposition) of their orders. For example, "[t]he complainant has a reasonable expectation of a reasoned resolution, so we don't do boilerplate." "The complainant should know from our public order that I did read the complaint, even if complainant doesn't like my disposition." Another said, "I try to be careful and forthcoming in the dismissal orders. Not just 'You lose,' but to explain politely, even to a complainant who is using the wrong procedure, why the complaint doesn't work. This is necessary to accord the process some dignity."

Limited inquiries

Section 352(a) authorizes the chief judge to "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 are incapable of being established through investigation." Section 352(a) says a limited inquiry can include the chief judge's seeking a response from the subject judge and can include the chief judge or his or her staff designees communicating orally or in writing with the judge, the complainant, or other witnesses, and examining relevant documents.

The circuits are fairly consistent as to when inquiries go beyond the face of the complaint. In all circuits, staff in or outside the chief judge's chambers have the authority to attach the docket sheets, and perhaps transcripts, in the underlying case if they believe those materials will aid the chief judge in evaluating the complaint and proposed disposition. (Personnel in three circuits emphasized that the chief judge's approval is necessary before staff may order a transcript produced at government

expense.) And, of course, the chief judge may always call for transcripts or docket sheets in cases where the staff did not provide them. Three circuits reported that staff may make minor inquiries of the subject judge or a witness without consulting with the chief judge. For example, one staff member said in an interview that if a complaint alleged a pattern of delay but the judge's statistics indicated none, the staff member might ask the judge about it.

In all circuits, though, it is for the chief judge alone to decide whether to undertake a more extensive inquiry, one that would involve contacting the subject judge or a witness about any nontrivial factual allegation, or, as the statute provides, seeking a written response from the judge. As one chief judge put it in a Committee interview, "[o]ccasionally staff will call and say, this complaint is unusual, can we do additional investigation? . . . Staff won't generally do any investigation beyond looking at the public record unless I first give the go-ahead." Inquiries of the subject judge or witnesses are not the only kind of inquiries. One former chief judge said, "[o]ccasionally, I feel my own lack of trial experience. So sometimes I need to talk to someone whose judgment I trust. Often I go to a particular long-time circuit judge who was once a district judge as well." Another said, "I also consult with an executive committee consisting of the former chief judge, a senior judge with extensive experience with code of conduct matters, and an active court of appeals judge."

Circuit data submitted to the Administrative Office do not indicate how often limited inquiries occur, but our staff obtained that information from the case files of our modified random sample of 593 cases. The files in 302 of the 593 cases in the sample include some form of limited inquiry because they contain information beyond the complaint itself. Of those 302 limited inquiries:

- the most common was obtaining the record in the underlying case (87% of the 302 files, including several circuits that routinely include the underlying record in the information provided the chief judge);
- in 11%, the files show that the chief judge asked the subject judge for a written response; and
- in 23% percent, the chief judge made some other form of limited inquiry, such as examining previous allegations of misconduct, discussing alleged incidents with other judges and attorneys, or examining the subject judge's workload when charges included undue delay in responding to a motion.

Table 10 shows these various types of inquiries as a percentage of all inquiries and of all cases in the sample. The total percentages exceed 100 because one complaint may have occasioned more than one type of inquiry.

Table 10. Types of Limited Inquiries in 593-Case Sample, 2001–2003

	Complaint files revealing limited inquiry	% of all complaints with limited inquiries	% of 593-case sample
Complaints with limited inquiries	302		51%
Examined underlying record in case	264	87%	46%
Sought written response from judge	34	11%	6%
Other form of limited inquiry	68	23%	11%

Again, these percentages might differ in a randomly drawn sample of complaints.

Monitoring petitions for review

Finally, most circuits provide for monitoring of the complaint through the judicial council petition process. In eight circuits, that task falls to the same office that prepares the initial write-up of the complaint. (One chief judge said in a Committee interview, "I always read the petitions for review of my dismissal orders. I want to make sure I didn't blow the facts [when] I'm writing detailed orders.")

Chapter 4

How the Judicial Branch Administers the Act—Results

This assessment of how chief circuit judges and judicial councils terminated complaints is based on our analysis of three separate groups of actual terminations.

Key findings:

1. **Overall, terminations that are not consistent with our understanding of the Act's requirements are rare, amounting to about 2% to 3% of all terminations.**
2. **Chief circuit judges' rate of problematic dispositions is consistent with the rate reported in 1993 (for the period 1980–1991) by the National Commission on Judicial Discipline and Removal, despite the substantial increase since 1991 in the per-judge caseload of circuit judges (including chief judges) as well as in the number of complaints with which chief circuit judges must deal.**
3. **The rate of problematic dispositions is significantly higher, about 29%, for complaints that have come to public attention. The higher rate may reflect the greater complexity of such cases and less familiarity with their proper handling as a result of their infrequent occurrence. The high rate in such cases is of particular concern because it could lead the public to question the Act's effectiveness, and it may discourage the filing of legitimate complaints.**
4. **Most of the dispositions labeled "problematic" were problematic for procedural reasons, in particular the chief judge's failure to undertake an adequate inquiry into the complaint before dismissing it. We did not attempt to determine whether appropriate handling would have changed the substantive outcome.**

We assessed three groups of dispositions:

- a sample of 593 complaints terminated from 2001–2003 that overrepresented complaints most likely to allege behavior covered by the Act (see "593-case sample" in this chapter);
- a separate sample of 100 termination from 2001–2003, drawn at random (see "100-case sample" in this chapter); and
- 17 "high-visibility" complaints terminated from 2001–2005 (see "Disposition of high-visibility complaints" in this chapter).

The section titled "Comparison of assessments, comments" summarizes and compares the three assessments and offers conclusions.

Overall considerations

Time frames—Our first two samples came from 2,108 terminations, in fiscal years 2001–2003, that circuits reported to the Administrative Office by September 30, 2003 (the last full year prior to our May 2004 appointment). (The circuits reported 77 additional 2003 terminations after September 30, too late to be included in our database.)

We began the assessment of high-visibility complaints in October 2005 and thus were able to draw from the 2001–2005 pool of terminations.

Confidentiality of files, redaction of information—Section 360(b) of the Act requires that any written order of a judicial council or the Judicial Conference imposing some form of sanction be available to the public through the clerk's office. By its silence, the statute also permits the circuits to release chief judge and judicial council dismissal orders. Following Illustrative Rule 17(b), circuits make council orders imposing discipline and dismissal orders (which do not include judges' or complainants' names) available for public inspection in the court of appeals clerk's office and at the Federal Judicial Center.

Beyond those orders, section 360(a) bars "any person in any proceeding" from disclosing "papers, documents, and records of proceedings related to investigations conducted under" the Act. Illustrative Rule 16(h), however, suggests that judicial councils authorize disclosure of such material if the disclosure is "justified by special circumstances and . . . not prohibited by" section 360. Rule 16(h) would authorize disclosure to "Judiciary researchers" studying the Act's operation, if the study has been approved by the Judicial Conference or its Review Committee. Most circuits have adopted these provisions. A letter dated August 16, 2004, to our chairman from Judge William Bauer, then-chair of the Review Committee, provided the approval identified in Rule 16(h), whereupon Justice Breyer wrote on August 26 to each circuit and national court chief judge requesting access to complaint files. All chief judges responded affirmatively save for one specific instance of a highly specialized complaint disposition.

Our descriptions of the cases quote from the chief judges' and councils' orders, which are public, and, if they have been made public, other documents (such as subject judges' responses to complaints). We have not quoted from nonpublic documents other than passages quoted in public documents. Where it would be impossible to describe the matter at hand based solely on the public order, we have paraphrased other documents, typically at a higher level of factual generality.

Rule 16(h) calls for "appropriate steps . . . to shield the identities of the judge complained against, the complainant, and witnesses from public disclosure." We identify no judges, complainants, witnesses, or circuits by name, even in cases where the subject judge waived the Act's confidentiality provisions or in highly publicized cases where many readers will know the subject judge's identity.

***Committee Standards*—**Key to our assessment of the terminations are our "Standards for Assessing Compliance with the Act." We adopted them because the Act's provisions often speak generally, and we believed it important to have a common point of reference as to the Act's meaning. The Standards are based on language in the Act, language in the Illustrative Rules and their commentary, and understandings of the Act revealed in over 20 years of the Act's application. Thus, to say a chief judge's disposition is "problematic" under Committee Standard 7 means that the disposition is inconsistent with our understanding of section 352(b)(2) of the Act (chief judge may conclude the proceedings on a finding that "appropriate corrective action has been taken") as revealed in the meaning of its words and elaborated by the Illustrative Rules and commentary, and interpreted by chief judges.

We approved the Standards in August 2004 and revised them slightly in June 2005 and March 2006, as their application to actual cases revealed the need for some adjustment to ensure they captured our understanding of the Act's requirements. We summarize the Standards (and describe the adjustments we made) in our discussion of the terminations. The full text is at Appendix E.

593-case sample

This section describes our review of a sample of 593 complaint dispositions drawn from 2,108 complaints terminated during statistical years 2001–2003 (October 1, 2000, through September 30, 2003). This phase of our research extended from July 2004 through January 2006.

***Drawing the sample*—**The sample included, first, all complaints that were most likely to involve allegations that come within the Act's reach, and then a random sample of the remaining complaints. The sample components are shown in Table 11 with a comparison to the full population.

Table 11. Complaints in 593-Case Sample

Complaint type	Sample Number	Sample Percentage	Population Number	Population Percentage
All complaints that involved some action other than dismissal or denial of further review by the chief judge or the judicial council	38	6.4%	38	1.8%
All remaining complaints filed by attorneys, court officials, and other public officials	41	6.9%	41	1.9%
All remaining complaints that chief judges dismissed as not in conformity with the statute without stating other reasons	139	23.4%	139	6.6%
A 33% random sample of the remaining complaints that chief judges dismissed as (1) frivolous or (2) not in conformity with the statute and frivolous and/or merits-related	181	30.5%	597	28.3%
A 15% random sample of remaining complaints dismissed by the chief judge as merits-related (perhaps among other reasons) or with no reason given	194	32.7%	1,293	61.3%
TOTAL	593	100% (rounded)	2,108	100% (rounded)

Table 12 shows that the stratification resulted in proportions of filers and dispositions different from the population of all 2001–2003 complaints.

Table 12. Filers and Dispositions in Sample and Population

	Sample	Population
Complaints by attorneys	7%	2%
Complaints by prisoners	37%	44%
Complaints found not in conformity w/Act	24%	15%
Complaints found frivolous	39%	48%
Complaints found merits-related	31%	69%

Table 13 shows that the individual circuits and courts were represented in the sample in proportions very similar to those in the entire population of 2001–2003 terminations.

Table 13. Distribution of Complaints in the Sample, by Circuit

	Sample		Population	
Circuits	Complaints	Percent	Complaints	Percent
All	593	100%	2,108	100%
1st	16	3%	58	3%
2d	67	11%	210	10%
3d	33	6%	140	7%
4th	53	9%	191	9%
5th	57	10%	278	13%
6th	71	12%	227	11%
7th	28	5%	98	5%
8th	61	10%	185	9%
9th	97	16%	340	16%
10th	31	5%	119	6%
11th	42	7%	187	9%
D.C.	33	6%	64	3%
Fed.*	2	<1%	2	<1%
CIT*	0	0	2	<1%
CFC	2	<1%	7	<1%

* As drawn, the sample did not include the two complaints from the Court of Appeals for the Federal Circuit; we added them so as to include each court covered by the Act. One complaint in the sample as initially drawn came from the Court of International Trade, but the record in that matter had been sealed.

Of the complaints in the sample, 87% arose in the context of an underlying case. Less than 1% involved administrative actions related to court staff or extrajudicial conduct. None concerned behavior prior to appointment as a judge. Twelve percent were difficult to classify, and a few were very hard to understand.

***Method of review*—**After drawing the sample and identifying the 593 terminated complaints, at least two members of the research staff, starting in September 2004, reviewed case files in the circuit headquarters, completing a coding form for each, which did not include the name of the judge. The researchers' task was to assess whether each termination was consistent with the Act, as interpreted by the Committee-approved Standards.

To be sure the researchers were applying the Standards as we expected, in January 2005 we reviewed 53 of their assessments drawn from the roughly 300 they had assessed to that point—a random sample of 40 terminations they regarded as "non-

problematic" and all 13 they regarded as problematic. We met on January 14, 2005, to establish how we would review the case files in our individual offices. Appendix I includes a sample of the form we used in this review. A fourth member of our staff, the one not involved in conducting the field research, analyzed our responses and reported by memorandum of February 28, 2005, that we agreed in full as to the "nonproblematic" terminations and agreed unanimously or by substantial majorities as to the problematic terminations.

In October 2005, the research staff provided us their final assessment of all 593 terminations, their analyses of the 25 terminations they found to be problematic, and files of those 25 terminations, redacted to obscure the complainant, subject judge, witnesses, and the circuit (and thus the chief judge who acted on the complaint).

We met on October 5, 2005, to establish how we would review these files in our offices, using forms (see Appendix I) with four options for each of the 25 terminations: (1) inconsistent with our Standards, (2) consistent with our Standards, (3) inconsistent but nonproblematic nevertheless, and (4) a recusal option (based on familiarity with the case). We did not review terminations that the researchers assessed as nonproblematic because our January 2005 review agreed unanimously with them as to nonproblematic terminations.

We received the analysis of our review (again, prepared by the staff member who had not taken part in the field research) on December 19, 2005, and met in Washington, D.C., on January 12, 2006, to go over each case individually.

Problematic dispositions in the full sample—A majority of the Committee members (i.e., those not recused) agreed with the researchers as to 20 of the 25 problematic dispositions. The 20 dispositions we saw as problematic were 3.4% of the 593 terminations in the sample.

To say a chief judge's disposition was "problematic" is not to say that the complaint's allegations were true. Most of the terminations were problematic for procedural reasons, mainly because the chief judge failed to undertake an adequate inquiry into the allegation before dismissing it. Furthermore, we applied our Standards strictly, producing, for example, the result in case A-9, an allegation by a prison inmate that the circuit judges who ruled against him had themselves assigned out of the normal rotation so they could falsify information in his habeas appeal. Although this allegation, part of a larger attack on the outcome of his case, was almost surely false, we found the dismissal problematic because the chief judge did not have staff check the case file to be certain.

We speculate below that in many of the problematic terminations the further inquiry would still have justified dismissal. Some of the problematic terminations involved the chief judge's failure to appoint a special committee to investigate facts that were reasonably in dispute. We are not in a position to judge whether such a committee would have found facts indicating misconduct.

Of the 20 dispositions we found problematic:

- 11 involved dismissals in which the sole problem was the chief judge's failure to undertake an adequate limited inquiry before dismissing the complaint, usually as "frivolous";
- two involved dismissals in which the main or sole problem was the chief judge's mistakenly regarding the complained-of behavior as "directly related to the merits of a decision or procedural ruling";
- one involved a dismissal in which the chief judge mistakenly characterized the complaint as "not in conformity with section 351(a)," i.e., not alleging "conduct prejudicial to the effective and expeditious administration of the business of the courts [or inability] to discharge all the duties of office by reason of mental or physical disability";
- two were problematic solely because of misapplication of the "corrective action" provision;
- four were problematic equally because of an inadequate limited inquiry and one other matter: improperly finding corrective action in two cases, improperly dismissing for merits-relatedness in another, and improperly finding nonconformity in another; and
- none involved a failure to dismiss a complaint that should have been dismissed.

Below we describe each of these 20 terminations. Within each of the categories, we start with the cases on which we were unanimous. We then discuss the five terminations over which we disagreed with the research staff.

Inadequate limited inquiries

Section 352(a) authorizes the chief judge to "conduct a limited inquiry" to determine whether appropriate corrective action has been or could be taken or whether the facts in the complaint are either "plainly untrue" or incapable of being established through investigation. A chief judge who encounters matters "reasonably in dispute" should not make findings of fact but rather appoint a special investigative committee to do so. Section 352(a) authorizes the chief judge or staff to communicate orally with the subject judge, complainant, or witnesses and examine relevant documents in the case, and authorizes the chief judge to seek a written response from the judge.

Whether there was an adequate inquiry usually involved complaints dismissed as "frivolous." In evaluating the dismissal of a complaint as frivolous, i.e., as lacking in supporting factual substantiation, the central question is: Does the complaint allege enough to call for a limited inquiry rather than a simple dismissal as frivolous? Most of the dismissals we discuss below are, like the allegation of a manipulated appellate panel assignment above, problematic not because a limited inquiry would have suggested facts sufficient to merit appointment of a special committee. They are

problematic rather in light of Illustrative Rule 4's commentary's assumption that the chief judge will contact a third party if the "complainant alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified." Doing so helps identify the small number of complaints that may merit further investigation, and, even for the much larger number of complaints that turn out to be meritless, it helps make clear that the judicial branch takes complaints seriously.

Thus

- our Standard 4 says that there should be a limited inquiry if a "complaint . . . that is not inherently incredible and is not subject to dismissal on other grounds . . . assert[s] that the complaint's allegation is supported by the transcript or by a named witness" or "sets forth allegations that are capable of being verified by looking at identifiable transcripts or questioning identifiable witnesses"; and
- our Standard 5 deals with a limited inquiry that goes no further than questioning the subject judge. The Act permits dismissal "[w]hen a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence" (section 352(b)(1)(B)). Standard 5 says that "an allegation is not 'conclusively refuted by objective evidence' simply because the judge complained against denies it."

In 271 of the 593 complaints, chief judges dismissed the complaint as frivolous. In 93, that was the sole ground for dismissal. We believe 11 of these 93 dismissals were problematic for a failure to conduct an adequate limited inquiry. These 11 constitute 4% of the 271 terminations and 1.8% of the full sample. We discuss these 11 terminations below, starting with the cases on which all nonrecused Committee members agreed. Later we discuss four other terminations that were problematic because of both the inquiries and other aspects.

A-1 Failure to inquire about a complaint that material on a court's publicly available website suggested a judge's racial insensitivity and lack of impartiality

***Facts and complaint*—**Complainant (who was not a litigant) alleged that material on what the chief judge's order called the district court's "intranet directory of judges and employees" contained, for the subject judge, historical imagery that was the subject of national controversy at the time of the complaint and that, according to the complainant, created an "appearance of impropriety" by suggesting that the judge honored racist movements in the nation's past and thus that the judge was racially biased.

***Chief judge order*—**The chief judge dismissed the complaint for failure to allege misconduct within the statutory standard: "The complaint . . . provides no basis from which to conclude that the pictures on the web page have an adverse effect on the decision-making process. The web page is a non-public site accessible only by employees of the federal courts, and complainant's assertion that the web page creates an appearance of impropriety is equally unsupportable."

The chief judge sought no response from the subject judge because this circuit does not provide the complaint to the judge if it can be quickly dismissed on its face. Upon dismissal, the subject judge receives the complaint and the dismissal order. So the judge did not know of the complaint until receiving the order. (All other circuits give the subject judge the complaint when it is filed, as required by section 351(c), directing the circuit clerk to forward complaints to the chief judge and the subject judge "simultaneously.")

***Assessment*—**Dismissal of the complaint is inconsistent with Committee Standard 4. The chief judge's order found that the "assertion that the web page creates an appearance of impropriety is . . . unsupportable," but it states no reason for that finding, only that the "web page is a non-public site accessible only to [federal court] employees." The complaint acknowledged that the webpage was viewable only from within the court and the staff verified that the site was not accessible through the Internet. The chief judge, though, could have asked the complainant how he saw the internal website and, if called for by the response, asked the court staff how truly "nonpublic" the website was.

The complaint's principal allegation, however, was that the imagery on the website—imagery that, it noted, was the focus at the time of civil rights protests in several states—created "an appearance of impropriety" (regardless of whether the website was public or not, material on a nonpublic website could still offend court personnel). The chief judge evidently saw printouts of the imagery attached to the complaint, but the chief judge provided no reasons for concluding that the assertion of an "appearance of impropriety" was "unsupportable," and made no inquiry of the subject judge about the allegation. However, as explained below, the subject judge evidently saw merit in the assertion, because, once he learned of the website, he ordered the imagery removed.

Complainant petitioned the judicial council to review the chief judge's order. Complainant's petition explained that he had viewed the internal website on the public computers in the clerk's office. The subject judge, who learned of the complaint only when he received the dismissal order and petition for review, filed a response, saying that he had been unaware of the website material, which related in part to an ancestor of the judge and which clerk's office personnel had posted without the judge's knowledge. The judge said he had contacted the clerk's office and the material had been removed. A limited inquiry would have enabled the subject judge to respond and take action before the chief judge ruled and permitted the chief judge to con-

clude the proceedings based on corrective action or intervening events as provided in section 352(b)(2).

A-2 Failure to investigate allegation that a magistrate judge had signed a blank arrest warrant

Facts and complaint—A prisoner complained that a magistrate judge signed a blank warrant for the prisoner's arrest. He said an FBI agent showed him the blank warrant during the arrest and told him it was valid because a judge signed it. Complainant said that his alleged offense was added to the warrant before it was presented in court.

Chief judge order—The chief judge dismissed the complaint as "conclusory and frivolous" in a form order that neither restated the allegation nor explained further the reasons for dismissal. This circuit no longer issues form dismissal orders.

Assessment—The dismissal is inconsistent with our Standard 4. Dismissal would be appropriate if both the subject judge and the agent denied the allegation.

A-3 Failure to investigate allegation of a judge's bias against minority attorneys

Facts and complaint—A litigant complained that a bankruptcy judge conspired to defraud him. Among the complaint's nearly 50 allegations were two involving race: (1) that the judge ran a check of the bar status of any minority attorneys in complainant's Chapter 11 case but did not check the status of complainant's first attorney, who was white (and had been disbarred some years before); and (2) that when the litigant sought to replace this disbarred attorney with a minority attorney, the judge denied the request until that attorney found a Chapter 11-competent co-counsel. The judge allegedly said that she knew of no Chapter 11-competent minority attorneys and gave complainant a list of white attorneys.

Chief judge order—The chief judge properly dismissed the conspiracy allegations, but didn't mention the racial allegations. Neither did the judicial council's conclusory affirmance, although complainant repeated those allegations in his petition for review.

Assessment—The dismissal is inconsistent with our Standard 4. Transcripts may have captured the alleged interchange, or witnesses may have recalled it. If not, the chief judge could have asked the judge to respond.

A-4 Failure to investigate adequately a complaint that a judge ordered a transcript altered

Facts and complaint—A prisoner litigant complained that a district judge was responsible for two alterations in the litigant's Rule 11 hearing transcript: (1) deleting the

reading in open court of the "stipulation of facts" complainant had signed as part of his plea bargain, and (2) deleting the judge's alleged statement that complainant could raise at sentencing his problems with the criminal justice system. The complainant said he needed these parts of the record to appeal the judge's denial of his petition seeking review of his conviction under 28 U.S.C. § 2255.

The complainant offered no specific evidence that the judge was responsible for any significant omissions, but he said that only the judge could have ordered the court reporter both to alter the transcript and still swear to its accuracy. Asked by the chief judge to respond, the judge said that, as was his practice, "the stipulation was not read into the record at the plea [hearing], and so it was not appropriate for it to appear in the transcript." He said the prosecutor paraphrased the stipulation. The prosecutor's paraphrase did appear in the transcript. The complainant implied that the paraphrase included the stipulated facts that he said had been deleted from the signed stipulation that was read at the hearing. The transcript, however, shows that at the plea hearing he assented to the prosecutor's paraphrase, and the complaint does not allege that that portion of the transcript was doctored.

***Chief judge order*—**The chief judge quoted at length from the judge's response, then dismissed the complaint without further discussion, citing what is now section 352(b)(1)(A)(i), permitting dismissal of a complaint that does not allege misconduct or disability that is the subject of the Act.

***Assessment*—**The dismissal is inconsistent with our Standard 5 ("an allegation is not 'conclusively refuted by objective evidence' simply because the judge complained against denies it"). Complainant said that the stipulation of facts was read at the hearing; the judge said that it was not. To resolve this factual dispute, the chief judge could have asked, or could have had staff ask, counsel and the court reporter what was said. Also, the judge's response does not mention the allegation that the transcript omitted the judge's telling complainant that he could raise at sentencing his problems with the criminal justice system. The complaint's inconsistencies regarding the stipulation of facts undercut its credibility, but not enough to obviate the need for a more extensive inquiry.

A-5 Failure to inquire into allegations of ex parte communications

***Facts and complaint*—**A prison inmate complained that the judge handling his bankruptcy case had an ex parte contact with an assistant U.S. attorney (AUSA) who was prosecuting a criminal case against complainant. The complaint said that because the AUSA was privy to information not available to the judge, any ex parte exchange of information between them would be unethical and possibly prejudicial to complainant's bankruptcy case.

***Chief judge order*—**The chief judge dismissed the complaint: "complainant has not alleged that the contact between the bankruptcy judge and the AUSA was a communication which touched on the merits of complainant's bankruptcy case."

***Assessment*—**The dismissal is inconsistent with our Standard 4. Although the complaint did not explicitly allege that the communication touched on the merits of the bankruptcy case, it implied that it did, and thus alleged a potentially cognizable act and identified two witnesses, the AUSA and the judge. Neither the chief judge nor staff contacted them.

A limited inquiry would have revealed that the contact was about that case but was proper. The complainant's subsequent petition for review of the dismissal order explained that the judge referred a matter arising from the bankruptcy proceedings to the AUSA for possible criminal prosecution.

A-6 Failure to inquire about claims of a judge's bias toward a litigant

***Facts and complaint*—**A litigant filed a complaint against the judge who presided over his long-closed criminal case. He had sought the return of government-seized property and alleged that his attorney told him that the judge, angry because the sentence he imposed on complainant had been partially reversed, said he would bar the complainant from a status conference on the motion for return of the property, didn't like complainant, would not see him, and would have given him more prison time if he could. As for complainant's unreturned property, the judge allegedly said, "Tough." Complainant contended that the judge had injected personal animus into the case.

***Chief judge order*—**The chief judge dismissed the complaint, in part on the proper ground that its objections to the judge's rulings were merits-related. But the chief judge went on to state, "To the extent that Complainant alleges improper animus, the allegations are totally conclusory, contain no suggestion of corroboration in the record, and do not appear to have any basis in fact. Hence, the complaint is legally frivolous . . . ."

***Assessment*—**The dismissal is inconsistent with our Standard 4. The allegations are not "totally conclusory"; they point to specific comments allegedly made by the judge to the attorney, who allegedly would support the allegations. If the attorney contradicted the allegations, the chief judge's limited inquiry could end there.

A-7 Failure to inquire into claims a judge exhibited bias against a litigant and favoritism toward state government defendants

***Facts and complaint*—**A public interest organization complained that the magistrate judge, in the organization's case against a state government, ridiculed its attorney, threatened him with sanctions, accused him of lying about settlement negotiations,

retaliated against him for refusing to settle, and granted an ex parte stay of proceedings. The complaint alleged that the judge tried to cover up his misconduct by directing the clerk not to docket complainant's recusal motion. The complaint contended that the judge showed bias for the state and against complainant and its client and that local attorneys said that the judge, formerly a government attorney, favored the government in settlement negotiations.

Chief judge order—The chief judge dismissed parts of the complaint on merits-related and nonconformity grounds. With regard to the allegations of bias toward the state and against complainant, including the allegation that the judge vindictively directed the clerk's office not to docket the recusal motion, the chief judge said, "Complainant's unsupported allegations of unfairness and vindictiveness are dismissed as frivolous."

Assessment—The dismissal is inconsistent with our Standard 4. The complaint's allegations could have been investigated by resort to the record and transcripts and by questioning clerk's office personnel, the complainant's attorney, and other attorneys referenced in the complaint. This disposition did not note the complaint's assertion that unnamed attorneys shared complainant's perception of the judge's favoritism toward state defendants. That assertion makes it problematic to say that the complaint's allegations of favoritism and bias were entirely "unsupported" and "frivolous." If appropriate in light of what an inquiry of the record and transcripts revealed, the chief judge could have asked complainant to identify persons who would support the allegations of favoritism, even though the charge, jumbled up with the merits of the judge's various rulings in state defendant cases, would be very difficult to prove.

A-8 Failure to inquire adequately about claims that judges lied about sources of information in a grievance proceeding and may have engaged in improper ex parte conduct

Facts and complaint—An attorney filed similar complaints against four judges on a court's grievance committee, which, following his state disbarment, had imposed reciprocal discipline and ordered his federal district court disbarment.

Complainant alleged that the judges' order referred to "information concerning correspondence sent by complainant to various . . . state officials." Complainant said he repeatedly queried the judges about the source of this information, whereupon they issued an order explaining that he himself had submitted it in a document he filed with them.

His section 351 complaint denied that his filing contained this information. He also alleged that some of the information in the judges' order related to events that occurred *after* he submitted the document that the judges said contained the state bar information. He alleged that the judges violated the Code of Conduct by making

a false statement regarding the information's source and that this false statement created a reasonable suspicion that the judges obtained the information through some ex parte contact with state bar officials. Complainant did not allege such conduct directly.

***Chief judge order*—**The chief judge dismissed the complaint: "There is no indication on the record before us that the Judges deceived the Complainant with respect to the source of the information . . . , other than the complainant's conclusory allegations." The chief judge did not address the potential issue of ex parte contacts, and whether prohibitions on ex parte contacts applicable to ordinary litigation also governed the disciplinary proceeding. In any event, the chief judge addressed only the complaint's allegations of the judges' deceit, and found these allegations conclusory.

The complaint file contains no evidence of any inquiry other than the inclusion of the docket sheets from the underlying matter, apparently routine practice in this circuit.

***Assessment*—**The dismissal is inconsistent with our Standard 4. The complainant alleged enough to call for a broader limited inquiry: it identified a document, the disputed filing. Such a broader inquiry might entail reviewing the complainant's disputed filing that he said did not contain the state bar information; investigating the allegation that information referred to by the judges occurred after complainant's filing; and requesting a response from the judges. A broader limited inquiry by judge or staff may have demonstrated that complainant's allegations were baseless.

A-9 Failure to inquire about a claim of improper appellate panel manipulation

***Facts and complaint*—**A prisoner litigant complained that three circuit judges who ruled against him "had themselves assigned out of rotation to falsify information" in his habeas appeal.

***Chief judge order*—**The chief judge summarily dismissed this allegation: "[T]he complaint is meritless to the extent that it asserts that the subject judges 'had themselves assigned out of rotation' . . . . There are well-established case processing arrangements at the Court of Appeals to ensure against judges picking their cases."

***Assessment*—**The dismissal is inconsistent with our Standard 4. The file in complainant's case or the court staff responsible for assigning judges to panels would almost certainly verify what the chief judge assumed to be true—that no exception had been made in complainant's case—but the chief judge undertook or ordered no inquiry to confirm the assumption. The same chief judge undertook such an inquiry in two other matters in the 593-complaint sample that raised similar allegations about district judges. His dismissal order in one of those matters said that "the record reflects that complainant's cases were assigned according to the district court's normal procedures."

A-10 Failure to inquire beyond the judge's denial of a complaint that he let someone impersonate him on the bench

Facts and complaint—A prisoner litigant alleged that in a hearing in his case, the judge allowed a young man, probably his intern, to conduct the proceedings while sitting, robed, on the bench. The complaint alleged that both the assistant U.S. attorney (AUSA) and the federal defender had the tape of the proceedings, and that the voice on the tape would not be the judge's.

The chief judge, "out of an abundance of caution," asked the judge to respond. He unequivocally denied it and added that at the time of the hearing, he had no intern and his law clerk was an older woman. He said that his secretary and the AUSA would verify the falsity of this allegation.

Chief judge order—The chief judge dismissed the allegation as "frivolous on its face," especially in view of the judge's unequivocal denial. The chief judge made no inquiry of the AUSA, the federal defender, or the secretary, and made no attempt to see—or to have the staff see—whether the tape existed, and, if so, verify that it was the judge's voice.

Assessment—The allegation, albeit bizarre, is not so outlandish as to be what our Standard 4 calls "inherently incredible," and thus the dismissal is inconsistent with our Standard 5 ("an allegation is not 'conclusively refuted by objective evidence' simply because the judge complained against denies it"). The complaint identified two lawyers who allegedly witnessed the incident and had a tape recording of it, but the chief judge inquired no further than the subject judge.

A-11 Failure to investigate a claim of improper ex parte contact

Facts and complaint—A pro se prisoner complained that a magistrate judge had an improper ex parte contact with the defense counsel in his civil rights action against prison officials. According to the complaint, the judge, in a telephone conference, instructed both parties to submit settlement offers to her. Complainant submitted an offer. The complainant alleges that defense counsel later told him that the defendant did not submit an offer because the judge told him complainant's offer was "in the millions," too high to trigger further discussion. Complainant alleged that when he wrote to the judge to complain about the ex parte communication, she acknowledged talking with the defense counsel but stated this was an accepted mediation practice. But, she said, she had not communicated complainant's confidential offer.

The chief judge requested the judge's response. She said she did not *instruct* either side to submit offers, but rather *invited* the plaintiff (only) to file an offer with her. She said that in mediating prisoner settlements, she invites the plaintiff to file an offer, and if it is reasonable (many are not) she communicates it to defendants

as a starting point for discussions. Complainant's response insisted that the judge instructed both parties to file offers.

Chief judge order—The chief judge's dismissal order noted that Code of Conduct Canon 3A(4), prohibiting ex parte contacts, has an exception for settlement efforts "with the consent of the parties." The order said the judge engaged in no improper ex parte contact. "Settlement negotiations are voluntary, on the part of both the parties and the judge."

Assessment—The dismissal is inconsistent with our Standard 5. The chief judge did not question the lawyer about what the judge said in the telephone conference. Although settlement negotiations are voluntary, complainant said that this settlement effort was not voluntary on his part. Complainant also at least implicitly denied consenting to the judge's ex parte discussion of the complainant's settlement offer with defendant's counsel. The chief judge did not discuss this factual inconsistency. The order stated that complainant and the judge "agree that the judge invited complainant to submit a written settlement demand." The file suggests that complainant, not an attorney, simply misunderstood the details of what the judge said, but further inquiry was necessary before reaching that conclusion.

Dismissals based on a direct relationship to the merits of a decision or procedural ruling

The merits-relatedness ground for dismissal seeks to insulate judges from sanctions for their decisions and thus protect independent decision making. The Act tells chief judges to dismiss complaints that are "directly related to the merits of a decision or procedural ruling" (section 352(b)(1)(A)(ii)). Illustrative Rule 1(b) says that conduct covered by the Act "does not include making wrong decisions—even very wrong decisions—in cases."

Our Standard 2 says "[t]he . . . complaint procedure cannot be a means for collateral attack on the substance of a judge's rulings. The interest protected is the independence of the judge in . . . deciding . . . cases or controversies." But it adds: "an allegation . . . that the judge ruled against the complainant because the complainant was Asian, or because the judge doesn't like the complainant personally, is *not* merits-related. What the allegation attacks is the propriety of arriving at rulings with an illicit or improper motive [and] thus goes beyond a mere attack on the correctness of the ruling itself."

An often-misunderstood aspect of merits-relatedness involves the availability of a judicial remedy for the conduct complained of. Under our Standard 2, as a general matter, "whether or not an allegation is merits-related has nothing to do with whether or not the complainant has an adequate appellate remedy." The "merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. . . . [A]n allegation that is otherwise cognizable

under the Act should not be dismissed merely because an appellate remedy appears to exist . . . ."

In 327 of the 593 complaints, chief judges dismissed the complaint on the ground that it was directly related to the merits of a judicial decision or procedural ruling. In 141 complaints, that was the sole ground for dismissal. We believe that three chief judge actions (2%) were problematic. We discuss two of them here and one (case A-19) in the section called "Dispositions with two problematic elements."

A-12 Improperly finding as merits-related a complaint that a judge ordered the clerk not to accept a motion for his recusal

Facts and complaint—An individual complained that a district judge ordered the clerk not to accept papers the complainant filed in relation to a case in which he claimed that his bank records had been made available to law enforcement officials without telling him. Complainant said he tried to move to recuse the judge from the case and to seek relief from the orders affecting his bank accounts, but the clerk refused to file his motions. The complainant was not a party to the litigation.

Chief judge order—The chief judge speculated that ordering the clerk not to file papers "remains within the realm of case related decisions since it may have been made, correctly or not, in response to the sensitive posture of the proceedings and because it remains subject to normal appellate review." The chief judge said that a not-to-file order "is reviewable through normal appellate processes such as the filing of a petition for a writ of mandamus, as is the [district judge's] failure to disqualify himself." He added, "I am not prepared to say that judicial misconduct would never occur if a judge has, in fact, directed a clerk not to perform the ministerial duties required in regard to filing papers."

Assessment—An order not to accept papers for filing, issued independently of any case or controversy, might not be directly related to the merits. If so, dismissing the complaint was inconsistent with our Standard 2 (a merits-related dismissal protects "the independence of the judge in deciding Article III cases or controversies"). The chief judge's order did not connect the rejection of papers to any order, ruling, or other judicial activity. His speculation—that directing the clerk not to perform the ministerial act of filing papers could be misconduct—appears to concede a failure to show a direct relationship to the merits of a decision or procedural ruling.

A-13 Improperly finding merits-related a complaint that a judge and defendant engaged in improper ex parte conduct

Facts and complaint—A lawyer who represented herself in a suit against her former employer alleged ex parte contact between the defendant and the judge. She said that the defendant stated in a filing that it had provided the judge a lengthy docu-

ment with all its discovery responses, but that she was not provided a copy of the document, had never seen it, and could not find it in the court's public file or docket. Accordingly, she said that the document was an ex parte communication that the judge should not have accepted.

Chief judge order—The chief judge dismissed this allegation on the ground that a judicial remedy was available and the attorney–complainant was seeking that remedy, having filed a motion to strike the document. Further, the complaint gave "no evidence . . . as to when or how these [ex parte] communications allegedly occurred."

Assessment—Dismissal of the complaint is inconsistent with our Standard 2. There was no showing that the alleged receipt of the document had any relationship to the merits of a decision or procedural ruling. The remedy, if merited, in the case-related proceeding would be for the court to strike the document from the file; but striking the document would not address the allegation of ex parte communication in accepting the document. In the misconduct proceeding, the remedies, if merited, would be a council reprimand or the judge's acknowledging misconduct and taking appropriate corrective action. However, the chief judge made no inquiry into whether the judge received such a document and, if so, whether the circumstances and reasons for the judge's acceptance of it made such acceptance an ex parte contact.

Dismissal for nonconformity with the statutory standard of misconduct

One of the three statutory grounds for dismissing a complaint is "not in conformity with section 351(a)" (section 352(b)(1)(A)(i)). In other words, a complaint may be dismissed if its allegations, even if true, do not constitute conduct "prejudicial to the effective and expeditious administration of the business of the courts."

This language does not appear susceptible to precise definition outside the context of particular fact situations. Accordingly, our Standard suggests reference to the Code of Conduct for U.S. Judges and prior interpretations of the provision in chief judge public orders. Standard 3 says that the question is "whether a reasonable observer would see a significant possibility that the allegation did meet the statutory standard."

In 208 of the 593 complaints, chief judges dismissed the complaint as not in conformity with the statute. In 109 matters, that was the sole ground for dismissal. We believe that two of the chief judge actions (1%) are problematic. We discuss one of them below and the other (case A-20) in "Dispositions with two problematic elements."

A-14 Improperly dismissing a complaint on the grounds that an appellate affirmance of the underlying litigation put the judge's courtroom behavior beyond the Act's reach

Facts and complaint—Two attorneys complained that the district judge who presided over an employment discrimination suit in which they represented the plaintiffs used intemperate language and facial gestures disparaging the attorneys, was dismissive of the female attorney, showed a lack of respect for her and for female witnesses, and frequently voiced disapproval and impatience toward complainants and their witnesses.

At the close of plaintiffs' evidence the judge granted judgment as a matter of law for defendants. Plaintiffs appealed and the attorneys then filed this misconduct complaint, which the chief judge held in abeyance pending resolution of the appeal.

The court of appeals affirmed the judgment and said the judge's conduct did not affect its merits, but the court criticized the conduct nevertheless. For example: "[A]t various times the judge made remarks on the record, some in the presence of the jury, using language that would charitably be called salty, and that many would consider vulgar, particularly in a courtroom. We consider this type of language to be unbefitting a federal judge."

The chief judge then asked the judge to respond to the complaint. The judge, for the most part, did not dispute the allegations about his conduct; instead, he explained the provocation for it. He acknowledged use of coarse language and "a lack of patience and a tendency toward sarcasm," and explained his low opinion of complainants' legal ability.

Chief judge order—Several paragraphs of the chief judge's order read like a reprimand (e.g., the "judge's language and conduct . . . have tarnished . . . the image of the federal judiciary"). The chief judge nevertheless concluded that "in light of the affirmance of the judge's dismissal of the underlying lawsuit, the judge's conduct was not prejudicial to the effective and expeditious administration of the business of the courts within the meaning of [28 U.S.C. § 351(a)]."

Assessment—That the plaintiffs' case was weak is irrelevant to whether the judge's language and deprecating comments constituted misconduct. Dismissal of the complaint is inconsistent with our Standard 3 ("discourtesy transcends the expected rough-and-tumble of litigation and moves into the sphere of cognizable misconduct . . . if a reasonable observer would regard it as prejudicial to the effective and expeditious administration of the business of the courts"). Conduct that was questionable enough to deserve the court's and chief judge's harsh criticism merited a special committee to determine if it met the statutory standard for misconduct. Moreover, the special committee and judicial council stages need not entail inordinate time and burden, at least for a matter (like this one) with little or no factual dispute. And a censure from

the judicial council would carry greater weight than one from the chief judge alone, and indicate that any sanction reflects more than one judge's views.

Concluding the proceedings based on appropriate corrective action

Section 352(b)(2) authorizes the chief judge to "conclude the proceedings" on a finding "that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events." Our Standard 7 says:

- Corrective action is "appropriate" when it remedies "the problem raised by the complaint[;] . . . the emphasis is on correction of the judicial conduct that was the subject of the complaint." Thus, "changing a procedural or court rule a judge has allegedly violated will not ordinarily be sufficient to remedy judicial conduct that was alleged to be in violation of a preexisting rule," and, by the same token, a "remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or by agreeing to comply with it does not constitute corrective action under the statute."
- As to conduct producing a specific harm to an individual, "corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future." Also, the object of the misconduct should be "meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the judge complained against, or otherwise."
- "[V]oluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint" and its form should "be proportionate to any sanctions that a judicial council might impose after investigation . . . such as a private or public reprimand or a change in case assignments."

Our sample included all complaints that chief judges or councils concluded based on corrective action. Chief judges concluded the proceedings in 17 of those complaints, and judicial councils did so in four complaints, three of which were against the same judge and were combined into a single proceeding.

We found four chief judge or council actions to be problematic. We discuss two of them below; two others are referenced in the section on "Dispositions with two problematic elements" (cases A-17 and A-18) and discussed as cases C-4 and C-5.

A-15 Finding corrective action in an apology that did not cover all the alleged misconduct

Facts and complaint—A chief judge identified a complaint based on information that alleged an improper ex parte meeting between a district judge and an attorney. The attorney informed opposing attorneys of the alleged meeting; one of the opposing attorneys delivered a letter to the judge recounting the allegations and asking him to recuse. The information further alleged that the judge asked the attorneys to destroy the correspondence that had transpired.

Judicial council order—The chief judge appointed a special committee. The judicial council noted that the subject judge had recognized an error, that the incident had not disadvantaged the parties, and that the judge had recused from the case. The council admonished the judge for any improper ex parte conduct and dismissed the complaint.

Assessment—With respect to the ex parte meeting, the steps the judge took appear to satisfy Standard 7's call for the judge "to acknowledge and redress the harm." The recusal and admonition served as the equivalent of an apology and provide the primary basis for concluding the proceeding. Also at issue, however, but not mentioned in the order, was whether the judge's alleged request to destroy the correspondence was misconduct. As such, the order may have failed to satisfy our Standard 7's requirement that the action "remedy the problem raised in the complaint."

A-16 Failure to notify complainant of a corrective action

Facts and complaint—An attorney complained that a district judge was mentally and physically disabled, citing information from public and private sources about his frailty and disorientation. Records not in the file verify that the judge took senior status before the chief judge concluded the complaint.

Chief judge order—The chief judge concluded the complaint with an order quoted here in full: "[T]he proceeding may be concluded if appropriate corrective action has been taken or action on the complaint is no longer necessary because of intervening events. I find that this proceeding should be concluded under this subsection." In most matters the chief judge informs the complainant and the public of the corrective action in a memorandum attached to a public order. That memorandum would have been sent to the complainant and made available to the public in the clerk's office and at the Federal Judicial Center. Nothing in the file revealed the form of the corrective action, or what communications may have occurred between the judge and the chief judge or staff. (This is the only corrective action disposition from 2001 to 2003 where the chief judge's order and memorandum did not document the corrective actions taken.)

***Assessment*—**Our Standard 7 says "[o]rdinarily . . . the complainant or other individual [should be] meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the judge complained against, or otherwise." The researchers' conversation with the chief judge revealed considerable attention to correcting the apparent disability and to limiting the judge's caseload once he took senior status. Failure to apprise the public about these matters appears to have been motivated by the chief judge's desire to respect the privacy of the subject judge.

Dispositions with two problematic elements

Four of the 20 terminations were equally problematic for two reasons. All four involved inadequate limited inquiries and perhaps improper failure to appoint a special committee. Two also involved improperly finding corrective action; one involved improperly finding the complaint to be merits-related; and one involved improperly finding the complaint to allege behavior outside the scope of the Act.

A-17 (1) Problematic failure to inquire into a complaint that a judge failed to timely acknowledge a misdeed and (2) improperly finding the judge's apology to be corrective action

Full discussion of this case is under C-4, on high-visibility complaints.

A-18 (1) Problematic failure to conduct an inquiry to determine whether a judge contested allegations of improper procedural manipulation and (2) improperly finding corrective action in steps taken by the court, steps that did not directly involve action by the judge against whom allegations were made

Full discussion of this case is under C-5, on high-visibility complaints.

A-19 (1) Failure to inquire into allegations of ex parte contact and (2) improperly finding merits-related a complaint alleging bias in affording hearings to some but not all parties

***Facts and complaint*—**Several town residents complained of improper ex parte contact by the judge in their suit against a state water control board. They alleged that the judge consulted with defendant's attorney, but not theirs, before denying their motion for a preliminary injunction and dismissing the case. One complaint alleged that the judge's ruling was known to the control board's attorney seven days before the group's attorney received notice. Another said the ruling was communicated to a town meeting four days before the judge actually granted the motion to dismiss; another complaint specified the name and occupation of the leader of that meeting

and the town in which it was held. Complainants contended that these circumstances suggest the judge's improper ex parte contact with the board's counsel and favoritism toward the board.

Chief judge order—The chief judge examined the docket sheet and determined that docketing of the order and mailing the notice occurred after the town meeting. The chief judge dismissed the complaint, stating in part:

> Complainants did not provide supporting documents for their contentions. Rather, their assertions are based on statements made and relayed at various town meetings and in private conversations. A review of the docket sheet identifies that on September 19, the judge ruled on the motion to dismiss, rendering plaintiffs' preliminary injunction moot. Notice was sent to all parties on the 20th and again by fax on the 21st. Moreover, the allegations pertaining to improper ex parte communications and bias in favor of the defendants are conclusory, and consist of inferences drawn from hearsay and gossip.

In addition to dismissing the complaint as unsupported, the chief judge stated:

> These complaints relate to the judge's decision in the case, including the decision to deny hearings on certain matters. A complaint will be dismissed if it is directly related to the merits of a judge's ruling or decision in the underlying case . . . . The charges related to the judge's decisions are, therefore, dismissed.

Assessment

Limited inquiry—Dismissal on the grounds that the complaint was unsupported, with no further inquiry, is inconsistent with our Standard 4. The complaint alleged that the town meeting participants were told of the judge's rulings days before the official docketing of the judge's order. The chief judge noted that "a discrepancy exists as to the exact dates" but did not inquire into it. That the docket shows that official notice was sent to both parties contemporaneously does not resolve allegations about what was said at the town meeting days earlier. The chief judge could have, as first steps, requested a response from the subject judge, and/or communicated with the water control board's counsel.

Merits-related dismissal—Dismissal of the complaint as merits-related is inconsistent with Committee Standard 2 (complaints that go "beyond a mere attack on the correctness . . . of the ruling itself" are not necessarily merits-related). A decision to deny hearings to all parties is merits-related, but the complaints here alleged that the judge may have given some type of hearing to the defendants but not to the plaintiffs, or somehow informed the defendants of rulings before informing plaintiffs.

A-20 (1) improperly finding that the complaint alleged behavior outside the scope of the Act and (2) failure to conduct a limited inquiry of complaints that judge exhibited racial bias against a court employee

Facts and complaint—A former pretrial services officer complained that a magistrate judge "banned" her from his courtroom because he doubted her credibility and said he did not wish to work with her. These problems were tied up with the pretrial services office's decision to reassign her and then terminate her, which produced her resignation. Complainant, an Hispanic/Native American, contended that white pretrial services officers made errors similar to hers, but that the judge was not similarly harsh in his treatment of those officers. The complaint alleged that the judge's dissimilar treatment of the two situations showed racial bias.

Chief judge order—The chief judge dismissed the complaint as follows:

> Although complainant submitted numerous exhibits, they do not present any objectively verifiable proof of the judge's racial bias or other alleged improper conduct. Conclusory charges that are wholly unsupported, as here, will be dismissed . . . . In any event, the Misconduct Rules are not designed to redress court personnel matters. Complainant can pursue this matter through her agency's EDR [employee dispute resolution] or other administrative procedures.

Assessment

Nonconformity—Dismissal of the complaint on the ground that alleged judicial misconduct comes within the ambit of judicial branch adverse action remedies and thus does not constitute misconduct under the statute is inconsistent with our Standard 3. Complainant was the pretrial services office's employee, not the judge's, and could use what the order called "her agency's EDR . . . procedures" to bring a complaint against the office, but, we presume, not against the judge. A reasonable observer would conclude that allegations of racial bias by judges in dealing with court officials, if true, involve conduct covered by the Act. If the evidence showed that the judge discriminated based on race, such action would constitute misconduct regardless of whether the employee had an administrative remedy against the pretrial services office.

Limited inquiry—Assuming as we do that the allegation was cognizable under the Act, its dismissal is inconsistent with Committee Standard 4. The complaint identified at least one witness, the magistrate judge, and the complaint alleged a particular example of disparate treatment of similarly situated employees. Limited inquiry into the alleged disparate treatment could have included asking the judge to respond, and perhaps inspecting personnel records. If the judge explained why he deemed the two situations to be different, and other information revealed by a limited inquiry was consistent with the judge's explanation, dismissal would be proper.

Dispositions determined not to be problematic

We agreed with the research staff as to 20 of the 25 terminations that they found problematic. A majority of Committee members concluded that the other five dispositions may have been inconsistent with our Standards but still were proper, revealing a need to adjust the Standards. In three terminations, the question was whether the chief judge undertook an adequate limited inquiry before dismissing the complaint as frivolous or plainly untrue. In two, the question was whether the chief judge should have dismissed as merits-related a complaint about a judge's statement in a judicial opinion without inquiring into the motives behind the statement.

Complaints dismissed as frivolous or untrue

A-21 Bribery allegation

A prisoner suing the prison physician alleged that the physician told him that he had bribed the judge. The chief judge examined the record, found the judge's rulings to be clearly based on the evidence, and noted that the inmate had filed over 50 pro se lawsuits and that this was his second section 351 complaint against the subject judge, whom the litigant had previously called "biased, senile, [forgetful], confused or drunk."

Arguably, under a strict reading of our pre-amended Standard 4, the chief judge should have inquired of the doctor, because the complaint was not "inherently incredible" and the doctor was a "named witness." We concluded, however, that although the complaint was not "inherently incredible," it was so obviously untrue as to merit no further inquiry.

A-22 Various allegations of misbehavior

A prison litigant's section 351 complaint accused a judge of improper ex parte contacts, accepting bribes, and misuse of office; the litigant offered no supporting facts but said that the record in the underlying case "explains everything." The chief judge's staff reviewed only the docket sheet in the case, and the chief judge dismissed the complaint because it "offers no support for [the] assertions . . . [T]hese allegations appear to be no more than inferences the complainant has drawn from the fact that the judge dismissed his" case.

Arguably, under a strict reading of our pre-amended Standard 4, the chief judge or staff should have reviewed the motions and pleadings because the complaint was not "inherently incredible" and the complaint identified documents, his case filings. We concluded, however, that the failure to offer any support for the allegations (other than trying to incorporate his case filings by reference into his complaint) relieves the chief judge of the obligation to inquire into them.

A-23 Drunk driving allegation

A prisoner litigant complained that a district judge had been arrested, charged, and convicted for drunk driving. The chief judge dismissed the allegation that the judge had been convicted of drunk driving because the chief judge's "preliminary investigation [found] the allegation to be factually false and plainly untrue. The judge, while charged, was never convicted, and the charge itself was dismissed some time ago."

Arguably, under a strict reading of our pre-amended Standard 4—given that this complaint "was not inherently incredible and [set] forth allegations that are capable of being verified by looking at identifiable transcripts or questioning identifiable witnesses"—the order should have explained what the "preliminary investigation" revealed to justify the finding that the allegation of drunk driving was "plainly untrue." We concluded, however, that the plain untruth of the allegation of *conviction* for drunk driving justified dismissal of that allegation. Given the earlier state court dismissal of the charge of drunk driving, and because the complaint put forth no facts about the judge's underlying conduct itself (apart from the dismissed DWI charge), we concluded that the allegations were insufficient to support a complaint.

Complaints dismissed as merits-related without a limited inquiry into the motives behind the judge's statement that was the object of the complaint

A-24 Allegation of improper motive in an opinion

Plaintiff's attorneys in a tort action that did not appear to have any racial aspect filed a recusal motion after entities associated with the defendant organization and its attorney gave the judge public awards. The judge denied the motion in a written opinion, calling it a "race-based" tactic to remove her because of dissatisfaction with her ruling on an earlier motion. The attorneys then filed a complaint under the Act alleging that the judge's "groundless accusation of racism," enshrined in legal databases, "irreparably and severely damaged" each attorney's "personal and professional reputation." The chief judge dismissed the complaint as merits-related, saying that the remedies for alleged damage to the lawyers' professional reputations and for bias were available through a petition for mandamus and the "normal appeal process."

Arguably, under a strict reading of our pre-amended Standard 2, the chief judge should have questioned the judge about the motives behind her statement, because a complaint that "attacks . . . the propriety of arriving at rulings with an illicit or improper motive . . . goes beyond a mere attack on the correctness [the merits] of the ruling itself" and "an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist . . . ."

We concluded, however, that the need to protect judges' independence in deciding what to say in an opinion means that if a judge's language in an opinion was relevant to the case at issue, as it was here, the chief judge may presume the judge's choice of language was merits-related.

A-25 Allegation of improper motive in an opinion

A lawyer in a law firm not involved in the underlying case complained that a judge's dissenting opinion included a statement about the firm that was unsupported and that relied on manipulated facts. The statement came in a footnote to the dissent's argument that a state regulation, which the majority upheld, was ineffective. The chief judge dismissed the complaint as merits-related. The chief judge said he expressed no opinion on the statement's accuracy and quoted the circuit's rule for processing complaints that said the complaint process must protect judicial decisions, even if wrong.

Arguably, under a strict reading of our pre-amended Standard 2, the chief judge should have questioned the judge about the motives behind the statement because a complaint that "attacks . . . the propriety of arriving at rulings with an illicit or improper motive . . . goes beyond a mere attack on the correctness [the merits] of the ruling itself," and the complaint alleged that the statement was an illicit or improper attack on the law firm and was unrelated to the merits of the dissent. As with case A-24, we drew a different conclusion: the need to protect judges' independence in deciding what to say in an opinion means that if a judge's language in an opinion was relevant to the case at issue, as it was here, the chief judge may presume the judge's choice of language was merits-related.

Amendments to our Standards

Our pre-amended Standards 2 and 4, when applied to these actual cases, could be read to require limited inquiries more extensive than are necessary under the Act. We thus amended the Standards to reflect our experience.

As to limited inquiries into complaints that seem frivolous or unsupported, we added what is now the final paragraph to Standard 4. That paragraph begins "An allegation may be dismissed as inherently incredible even if it is not literally impossible for the allegation to be true," and then elaborates.

As to whether complaints about statements in opinions are merits-related if the complaint alleges they reflect improper or illicit motives, we added what is now the final paragraph of Standard 2. It includes this statement: "If the judge's language was relevant to the case at hand, then the chief judge may presume the judge's choice of language was merits-related" and elaborated. We said this Standard is necessary "[b]ecause of the special need to protect judges' independence in deciding what to say in an opinion or ruling."

100-case sample

From January to March 2005, we reviewed a separate sample of 100 cases drawn purely at random from the 2,081 complaints terminated in 2001–2003. Unlike in the stratified 593-complaint sample, characteristics of this sample track the total population of terminations, with accommodation for sampling error.

Table 14 shows that the proportions of filers and dispositions in the randomly drawn sample are very similar to the population of all 2001–2003 complaints.

Table 14. Filers and Dispositions in 100-Case Sample

	Sample	Population
Complaints by attorneys	3%	2%
Complaints by prisoners	42%	41%
Complaints found not in conformity w/Act	14%	15%
Complaints found frivolous	49%	48%
Complaints found merits-related	68%	69%

Table 15 shows that the individual circuits and courts were also represented in the sample in proportions similar to those in the entire population of 2001–2003 terminations.

Table 15. Distribution of Complaints in the 100-Case Sample, by Circuit

	100-case sample	Population	
Circuits	Number (and %)	Percent	Number
All	100 (%)	100%	2,108
1st	5 (%)	3%	58
2d	10 (%)	10%	210
3d	6 (%)	7%	140
4th	11 (%)	9%	191
5th	9 (%)	13%	278
6th	16 (%)	11%	227
7th	5 (%)	5%	98
8th	8 (%)	9%	185
9th	15 (%)	16%	340
10th	3 (%)	6%	119
11th	8 (%)	9%	187
D.C.	4 (%)	3%	64
Fed.	0	<1%	2
CIT	0	<1%	2
CFC	0	<1%	7

At our January 14, 2005, meeting, we established procedures for reviewing these cases. Each Committee member completed a form on 15 or 16 separate case files (see Appendix I); there was no separate staff review. We determined to review collectively any dispositions that a Committee member identified as problematic.

The tabulation we received on March 24 reported that out of the 100 terminations, members identified three as problematic. We were able to review all three in the course of reviewing the 25 researcher-assessed problematic terminations in the 593-case sample. We found:

- two of the three also appeared in that sample—the research staff independently assessed them as problematic (cases A-4 and A-14 above), so they were among the terminations submitted to us in October 2005; we agreed that both were problematic; and
- the third termination in the 100-case sample deemed problematic by a Committee member did not appear in the 593-case sample, but for convenience we reviewed it in conjunction with our review of the 25 cases; a majority of the Committee determined the disposition was not problematic under our Standards.

Therefore, as to the two samples, we assessed as problematic 3.4% of the terminations in the 593-case sample, drawn to overrepresent complaints most likely to allege behavior covered by the act, and 2% of the terminations in a pure random sample.

Dispositions of high-visibility complaints

At our October 5, 2005, meeting, we determined to examine, apart from the 593- and 100-case samples, dispositions of complaints that have brought public and legislative attention to the Act. We refer to them here as "high-visibility" complaints. We undertook this phase of our work from October 2005 to March 2006.

***Identifying high-visibility complaints*—**To assemble our high-visibility cases for analysis, we first identified five such cases in the 593-case sample of 2001–2003 dispositions, based on our collective knowledge of activities in the judicial realm and news articles in the complaint files. It is highly unlikely that there were any high-visibility complaints among the 1,515 cases that were not included in our 593-case sample. Our sampling criteria would pick up cases likely to be of general interest. It included all cases filed by attorneys, public officials, and court employees, and all cases terminated by some method other than dismissal.

To identify high-visibility complaints terminated after September 30, 2003, the research staff searched all newspapers in the Lexis/Nexis and Westlaw legal and general news databases, which include national and selected local newspapers and legal-related publications. The research staff's search criteria included "judicial misconduct" and "federal judge" in various combinations, along with a host of specific terms such as

"abuse," "disable," "recuse," "reprimand," and variant word forms. The search covered January 1, 2003, to August 15, 2005. This span would catch complaints that received attention in 2003 even if they were closed after September 30, and most complaints, whenever they were initiated, likely to have been closed by our January 2006 cut-off date. (By "closed," we mean a case in which the deadline has passed to appeal the chief judge's section 352 order or the council's section 354 order.)

The staff classified a complaint as "high visibility" if the Westlaw or Lexis databases yielded at least one article about it and if the article indicated a complaint had been filed. These criteria identified 11 post-2003 complaints. Most of the complaints have had some national visibility, at least within judicial circles; a few received only regional or local attention and qualified as "high visibility" only because of the "at least one article" rule. (In all cases but one, the complainant was an attorney, a public official, or a court employee; the exception, case C-9, has the weakest claim of the 17 on being "high visibility.")

The staff of the House Judiciary Committee made its complaint files available to our researchers. (Those files include cases forwarded to it by its counterpart Senate Committee.) The files contained no high-visibility complaints not already identified.

By mail ballot, we agreed that our list of high-visibility complaints would comprise:

- two complaints terminated in 2001–2003, both of which we had already assessed as problematic;
- three complaints terminated in 2001–2003 that the staff had not assessed as problematic and thus had not been presented to us for review (upon review, we agreed with the staff as to all three);
- 11 complaints terminated after 2003; and
- one matter that had not produced a complaint but was the subject of extended criticism by some legislators, and concerning which the chief circuit judge had declined to identify a complaint in December 2002.

It is likely that there were news articles in 2004–2005 about judicial behavior that produced complaints but that did not appear in the two databases our staff canvassed, but we are confident that the 17 we identified include all the matters in this period that generated significant national legislative and public attention and probably all that generated significant regional attention.

***Method of review*—**For the 11 terminated complaints that the staff had not already researched, they used the same method of in-circuit file review as with the 593-case sample; separate document review was necessary for the final matter in the list above. Their January 25, 2006, report and accompanying files covered those 12 matters plus the three from 2001–2003 they had not assessed as problematic. They assessed three of those 15 to be problematic. We reviewed all 15 matters, using the form in

Appendix I. A March 15, 2006, tabulation, again by the staff member who did not participate in the field research, reported agreement as to all 15.

Therefore, we found five of the 17 high-visibility terminations to be problematic, including two assessed as such during our review of the 25 cases discussed earlier in this chapter.

Below we assess all 17 high-visibility cases, not just the five problematic terminations. Within each category, we discuss the nonproblematic dispositions first.

Dispositions in which the primary point of interest is the adequacy of the investigation (including the lack thereof) by the chief judge or the judicial council

C-1 Complaint against two district judges concerning an employee grievance, properly dismissed by the chief judge and judicial council

Facts and complaint—The probation office terminated an officer because her FBI background check uncovered serious credit problems and because she was married to a felony probationer and tried to hide her marriage from the probation office. She appealed the termination through the court's adverse action grievance procedure. After several exchanges, revealing more negative information, the chief district judge terminated her on the chief judge's authority. The employee invoked the adverse action procedures again. A judge chaired an ad hoc committee that upheld the termination.

The officer then filed her section 351 complaint alleging that the two judges had abused their authority and denied her due process and that the chief district judge should have recused because the judge's secretary was the chief probation officer's sister-in-law. The matter received some local press coverage in a metropolitan area.

Chief judge order and judicial council order—The chief circuit judge dismissed the complaint on the ground that the complaint and exhibits contained no evidence to suggest that the two judges had abused their authority, or that the chief district judge acted with a conflict of interest. There was no hint of any procedural irregularity. The judicial council affirmed the chief judge's dismissal of the complaint.

Assessment—The chief circuit judge's dismissing the complaint was not problematic. Nothing in the file suggested any abuse of authority by the chief district judge that would call for any limited inquiry beyond that done. The chief district judge had the authority to terminate the officer and the second judge simply upheld that action. The chief circuit judge did not explain the basis for finding no conflict of interest arising from the secretary's relationship to the chief probation officer, but the finding seems clearly correct. Even in litigation, if a judge's secretary is related to a party or counsel, the judge can simply isolate the secretary from the case and not recuse.

C-2 Nonproblematic dismissal of a complaint against a circuit judge for membership on a board of a judicial education organization

Facts and complaint—An organization filed separate complaints in four circuits, each alleging that a judge violated the Code of Conduct by serving on the board of directors of the Foundation for Research on Economics and the Environment (FREE). Three judges resigned from the board; we discuss these complaints at C-12-13-14. Here we discuss the disposition of the complaint against the judge who did not resign.

The complaint said that FREE espouses a clear political stand on environmental issues—what FREE calls "rejection of top-down, command and control environmentalism"—and that FREE tries to advance its views by inviting judges to all-expense-paid seminars to influence their views of environmental cases. The complaint alleged that:

- service on FREE's board ran afoul of the Codes of Conduct Committee's published opinion advising judges not to serve on boards of non-profits if doing so would appear to endorse the views of the non-profits on issues likely to come before the judge in litigation;
- the judge's service called into question the judge's impartiality because, although FREE does not litigate environmental cases, some of its corporate donors, or their donees, do; and
- a number of well-known critics of environmental laws, including litigators and corporate executives, also serve on FREE's board, so the judge's service creates the impression that these persons are in a position of special influence with the judge.

The judge filed a response to the complaint, apparently without being requested to do so.

Chief judge order—Through intercircuit assignment procedures, another chief circuit judge served as acting chief judge for this complaint. He conducted what he called "a somewhat expansive initial inquiry" about FREE and its seminars, then dismissed the complaint because his inquiry "demonstrate[d] that the 'allegations . . . lack[ed] any factual foundation or [were] conclusively refuted by objective evidence' 28 U.S.C. § 352(b)1)(B)." Service on FREE's board did not reasonably create an appearance that the judge was advancing a policy agenda because:

- FREE does not take positions on political and social issues;
- highly respected observers consider FREE seminars to present a diverse range of viewpoints and to be of the "'highest intellectual quality'"; and
- the Second Circuit's court of appeals, after surveying views about the seminars' alleged bias, said the matter of bias "'depends so heavily on each individual's view'" as to make impossible "'a search for a consensus as to what is a balanced presentation.'"

The chief judge also found that FREE's seminars themselves are paid for entirely by "deadmen's" foundations, not by corporations or frequent litigants, and that no corporate entity donated more than a small percentage of FREE's overall income. That certain corporate donors engage in environmental litigation therefore had no ethical implications, nor did service on a board with other influential members of the community. Otherwise, judges would be unable to serve on the board of any educational organization.

***Assessment*—**Our task is not to second-guess a chief judge's factual conclusions, absent clear error. Here, the chief judge's factual conclusions are reasonable applications of the Act. It is true that the chief judge quotes FREE publications that could be read to undercut the finding that FREE does not take positions on political and social issues, e.g.:

> While our seminars are explicitly pro-environment, they explain why ecological values are not the only important ones. We stress that trade-offs among competing values are inescapable.

This would seem to advocate a position on issues of political and social controversy. But that only suggests that service on FREE's board may possibly raise ethical issues, not that it constitutes misconduct under the Act. The order notes that "individual judges may differ on the appropriateness of serving on FREE's board" and points out that "this is a decision for each judge to make, applying the standards of the Canons" of the Code of Conduct for United States Judges.

C-3 Nonproblematic judicial council dismissal of a complaint against a chief district judge

***Facts and complaint*—**A public interest organization not a party to any of the litigation complained that a chief district judge assigned two cases involving President Clinton to Clinton appointees, believing that the appointees would be disposed to render decisions favorable to the administration, and that these assignments were misapplication of a (since rescinded) local rule authorizing the chief district judge to make nonrandom assignments of cases likely to be "protracted."

Based on the judge's response, the acting chief circuit judge dismissed the complaint as unsupported, finding that the judge had assigned the cases to promote efficient case management. The chief judge cited the subject judge's reliance on the local rule as a basis for dismissal but noted that the "lack of objective standards to govern the rule's use makes possible both actual and perceived abuses, and the subject judge notes that perhaps 'our special assignment system needs to be reexamined.'"

While a petition for review was pending before the council, a House Judiciary Committee member submitted a letter to the clerk of the court of appeals alleging additional improper case assignments, bringing to nine the number of cases at issue.

The Office of the Independent Counsel had brought two, and the Justice Department's Campaign Finance Task Force had brought seven.

Chief judge and judicial council order—Although the chief circuit judge found the original complaint to be unsupported, he appointed a special committee after the judicial council, on remand, suggested such a committee to investigate the first complaint (the one originally dismissed) and the second complaint from the House member.

The committee hired as counsel a former U.S. attorney appointed by a Republican President. Counsel interviewed 60 witnesses (judges, court clerks, the chief district judge's law clerks, prosecutors, and defense attorneys), reviewed court records, subpoenaed documents, and examined grand jury proceedings. His 136-page report concluded that there was not even a preponderance of evidence, much less clear and convincing evidence, to support a claim that the subject judge engaged in "conduct creating an appearance of impropriety." The special committee and the council adopted that finding. The council dismissed the two complaints as "conclusively refuted by objective evidence," 28 U.S.C. § 352(b)(1)(B).

Assessment—Some aspects of the chief circuit judge's initial findings may have merited further inquiry—why, for example, did the subject judge not reassign the two cases to judges with the lowest criminal caseloads rather than, as she said she did, to the judges with the second and third lowest criminal caseloads at the time of the assignment? On the other hand, the two judges had the lowest criminal caseloads within several months of the assignments, a matter the chief district judge might have known would occur when making the assignments.

Finding, as did the chief circuit judge, that the facts rebutted any reasonable inference of impropriety may have conceivably violated section 352(a)'s admonition that chief judges not make factual findings about matters reasonably in dispute. The special committee appointment, however, was clearly consistent with that admonition. The committee's hiring counsel whose judgment was likely to be respected by all counterbalanced the complaint's underlying charge of partisan favoritism. The thoroughness of the examination along with counsel's credentials gave the appearance and reality of a rigorous test, and justified the dismissal.

Days before remanding the matter to the chief circuit judge, the circuit council abrogated the local rule that authorized the chief district judge to assign protracted cases. The council had before it the chief circuit judge's dismissal order, which recommended reexamination of the local rule, and the Judicial Conference's action a year earlier rescinding a decades-old resolution recommending such rules.

C-4 (1) Problematic failure to inquire into a complaint that a judge failed to timely acknowledge a misdeed and (2) improperly finding the judge's apology to be corrective action (also case A-17 above)

***Facts and complaint*—**(The subject judge waived his confidentiality rights under the statute.) Two members of Congress filed this complaint in May 2002 against a circuit judge whom the Chief Justice had assigned to the Special Division of the D.C. Circuit, which appointed and oversaw independent counsels. The complaint involved the judge's revealing to the press, on the eve of Vice President Gore's nomination for President in 2000, that the Whitewater independent counsel had impaneled a grand jury to investigate President Clinton. The judge's comment came in response to a press inquiry as to why he voted to continue the independent counsel's probe when he had voted a year earlier to terminate it. Because news accounts did not reveal the source, the Vice President's supporters charged publicly that the independent counsel, or perhaps one of the other special division judges (both Republican appointees), had disclosed the information in an effort to embarrass Gore and the Democratic party. (The subject judge was a Democratic appointee.)

The judge issued a statement late in the afternoon of the day after the leak was reported, saying that he "inadvertently referred to the existence of a newly empanelled grand jury as another reason for the continuance of [the independent counsel's] office," that his disclosure "has led to considerable controversy, based on its timing," and that "the timing resulted solely from the press inquiry." He offered "apologies to all concerned."

The complaint alleges, however, that the judge "may have sought to conceal from the independent counsel and the other judges . . . his responsibility for the disclosure," stating that after the media published the leaked information, the judge delayed for more than 24 hours in revealing that he was its source.

In support of this allegation (one of several in the complaint), the complaint recounts a 90-minute conference call on the day after the leak, at the end of which the judge revealed he was the source and then issued the statement quoted above. Participants in the call were the judge, the other two special division judges, and the independent counsel. In it, the other two judges agreed that there must be an investigation into the leak. The subject judge allegedly said an investigation was unnecessary and minimized the leak's importance. As the conference call proceeded, the judge allegedly did not admit that he had disclosed the grand jury information, an admission that would have rendered the conversation moot. The independent counsel said an investigation of the leak might be a time-consuming waste of his office's resources. The complaint alleged that the other two judges said that they believed there must be an investigation, and if the subject judge did not agree, he could dissent. Then the judge allegedly said he was the source.

By contrast, the judge (in a letter to a legislator two months after the incident) said he realized the morning after the leak that the charges against the independent

counsel were "terribly unfair," that he intended to admit publicly that he disclosed the grand jury information, that he would not do so until he informed the other two judges, and that other participants' schedules precluded having the conference call until the afternoon, but that he opposed an investigation because it would be hypocritical "to vote to investigate his own leak." He said "his 'only motive in making the admission was concern that [the independent counsel] was being unfairly accused' and thus his admission 'was entirely gratuitous, spontaneous, and unforced by any other person.'"

Chief judge order—The order of the acting chief judge of the judge's home circuit restated and responded to each allegation of the complaint. He dismissed the allegation alleging delay in confessing as follows: "The fact that [the judge] did not say this at the outset of the conversation cannot reasonably be regarded as a delay of such magnitude as to constitute an ethical violation. The complaint does not indicate what ethical rule or principle the delay might have violated." He concluded the proceedings, saying that although the disclosure

> was unfortunate, [the judge] apologized for the flap that ensued as well as seeking [sic] to mitigate its impact by prompt admission that he was the source . . . [T]he statute authorizes me to conclude a proceeding if I find that "appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events." This statutory language could have been drafted with this matter in mind. [The judge's] apology is corrective action and [several] intervening events . . . make it clear that no further investigation is necessary[, including] the complaint itself and its exhibits . . . .

Assessment

Limited inquiry—The dismissal is inconsistent with our Standard 4 (limited inquiry called for if a "complaint . . . that is not inherently incredible . . . assert[s] that [its] allegation is supported by . . . a named witness"). The complaint alleged, with factual support, that the judge failed to admit that he disclosed the grand jury impaneling until it became clear that there would be an investigation. The chief judge could have made some appropriate inquiry of the conference call participants before dismissing the allegation. It is immaterial how long the judge waited before admitting in the conference call that he disclosed the information if, as the complaint alleges, he acknowledged it only when he realized that the other judges might launch an investigation. Also, the call occurred the day after the grand jury information became public, so the judge already had delayed a day in acknowledging that he was the information's source.

The exhibits in the file and alluded to in the order, of course, include the judge's version of these events, which is sharply at odds with the complaint.

Corrective action—Concluding the complaint on the basis of corrective action is inconsistent with several elements of Committee Standard 7 ("corrective action is appropriate when it serves to remedy the problem raised in the complaint"; "the emphasis is on correction of the judicial conduct that was the subject of the complaint"; "[v]oluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint"). The judge apologized for the disclosure but not the arguably more serious allegation that he tried to avoid acknowledging it.

Concluding this proceeding based on corrective action bypassed the appointment of a special committee and thus an official judicial branch investigation into troublesome publicly aired allegations, leaving the public with no authoritative conclusion from the circuit council as to whether misconduct occurred and, if so, how it should be corrected.

C-5 (1) Problematic failure to conduct an inquiry to determine whether a judge contested allegations of improper procedural manipulation and (2) improperly finding corrective action in steps taken by the court that did not directly involve action by the judge against whom allegations were made (also case A-18 above)

Facts and complaint—A public interest organization (not a party to the underlying litigation) complained that a chief circuit judge tried to affect the outcome of two cases: a capital habeas case, by failing to circulate petitions for a stay in a timely fashion; and a university admissions/affirmative action case by delaying a vote on petitions for an en banc hearing until two judges who might have been expected to have opposed the chief judge's view of the case took senior status and became ineligible to vote on the petition for, or sit on, the en banc. The conduct had been the subject of separate concurring and dissenting opinions in F.3d, which received national news attention.

Chief judge order and judicial council review—The memorandum of the acting chief judge (hereinafter "chief judge") set out four sets of facts "relied upon by the complainant." The memorandum noted that the complaint drew those facts from dissents in the cases, and that concurring opinions objected to aspects of the dissents. But it said that the particular facts in the memorandum "have not been disputed." The chief judge did not seek a response from the subject judge and ruled that the complaint could not be dismissed under the statute because those "undisputed" facts "'raise an inference that misconduct has occurred.'" The four sets of facts said to be undisputed are copied below essentially verbatim from the supporting memorandum:

1. The judge in question failed to give notice or seek votes from all the active members of the court regarding the sua sponte en banc motion for a 30-day stay in [the capital case].

2. The judge did not circulate the October 30, 2001, motion to stay the evidentiary hearing in [the capital case] until after the hearing had begun on November 5, 2001, and provided no justification for this untimely distribution.
3. The judge did not circulate the May 14, 2001, [university admissions case] en banc petition until October 15, 2001, a date which fell after [two court of appeals judges] took senior status and were therefore ineligible to participate in the en banc proceeding.
4. The judge inserted himself into the three-judge [university admissions case] panel—an action which is contrary to the random draw rule prescribed by . . . Cir. I.O.P. 34(b)(2). See [university admissions case], . . . (. . . , J., concurring).

The chief judge concluded the proceedings based on corrective action and intervening events. The corrective action that the chief judge identified was:

> a comprehensive review of the court's internal procedures, and how those procedures are implemented. In meetings and correspondence, this court has clarified and is continuing to address its procedures governing [Cir. I.O.P.] 34(b)(2) "must panel" cases, motions review, en banc petitions, and emergency or "last minute" capital appeals, and by doing so the court has greatly reduced the potential for future incidents.

Furthermore, "the imminent operation of 28 U.S.C. § 45(a)(3)(A) [limiting the term of the chief judge to seven years] makes additional action unnecessary."

Complainant petitioned for judicial council review on the grounds that the corrective action did not address the misconduct alleged in the complaint. The subject judge also petitioned the council to review the chief judge's findings and to dismiss the complaint as meritless. The council affirmed the conclusion of the proceedings based on the corrective action found by the chief judge, but said it "makes no findings of fact concerning the allegations of the complaint and expresses no opinion with respect to its content."

Assessment

Limited inquiry—The disposition is inconsistent with section 352(a)'s admonition that the "chief judge shall not undertake to make findings of facts about any matter that is reasonably in dispute." Here the chief judge found adverse facts to be undisputed and said those facts created an "inference of misconduct" without asking the subject judge if he disputed them. The result was a finding of misconduct and a public reprimand without a hearing. In fact, the subject judge's petition for council review of the chief judge's order disputed all four sets of facts that the order declared "undisputed."

The chief judge's approach also appears inconsistent with the spirit of Rule 4(e) of the circuit council's "Rules Governing Complaints of Judicial Misconduct or Disability." The rule, which closely tracks Illustrative Rule 4(e), provides that "ordinarily a special committee will not be activated until the judge complained about has been invited to respond to the complaint and has been allowed a reasonable time to do so." Here, the chief judge did not appoint a special committee. But the purpose of the rule is to accord the subject judge an opportunity to be heard before the chief judge takes steps that could lead to a (council) finding of misconduct.

The dissents and concurrences in the university admissions case clearly reveal disputes about the facts that the chief judge said were undisputed. True, some of the events occurred in the sequence and on the days cited in the chief judge's memorandum. For example, it was undisputed that the judge did not circulate the May 14 en banc petition in the university admissions case until October 15. What was disputed is when the judge or panel received the petition from the clerk's office, and whether court rules and operating procedures authorized the judge or panel to refer it to the entire court before briefing was completed. Had the chief judge requested a response from the judge, this and other factual disputes would have become apparent, as they did in the judge's petition for review.

Finding the facts to be undisputed circumvented the appointment of a special committee, which is the statutory method for pinning down elusive facts and presenting them to the judicial council to determine whether misconduct occurred and whether appropriate corrective action had been taken. The council's saying that it "makes no findings of fact concerning the allegations of the complaint and expresses no opinion with respect to its content" seems to respond to the subject judge's argument, in his petition, that the chief judge had no authority to enter findings of fact about matters in dispute.

Corrective action—The finding of corrective action is inconsistent in several ways with our Standard 7, which "emphasi[zes] correction of the judicial conduct that was the subject of the complaint" and states that corrective action "means voluntary action taken by" the subject judge. "Accordingly, changing a procedural or court rule a judge has allegedly violated will not ordinarily be sufficient." Furthermore, "[a] remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or by agreeing to comply with it does not constitute corrective action."

Here, the allegation was not that the judge improperly wrote a rule of procedure but that he manipulated preexisting rules. Our Standard 7 says a rule change "will not ordinarily be sufficient to remedy judicial conduct that was alleged to be in violation of a preexisting rule." Furthermore, the posited corrective action did not involve the judge's voluntary action to correct his alleged misconduct. He did not participate in formulating the corrective action except perhaps as a member of the court in drafting or reviewing any rule change.

Also, concluding the complaint in part on the grounds that the subject judge's seven-year term as chief judge was about to expire is inconsistent with our Standard 8 ("Ordinarily, stepping down from an administrative post such as chief judge . . . does not . . . render unnecessary any further action on a complaint . . . . As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct should be treated on its merits."). A number of chief judges and judicial councils have ruled that leaving the bench renders a misconduct complaint moot because there is no forward-looking purpose to examining the conduct of someone who will no longer exercise judicial duties. Former chief judges who continue to exercise judicial duties, however, have frequent opportunities to interpret and apply rules designed to protect litigants and the public from abuses of judicial power.

This incident may reflect an understandable desire to avoid appointing a special committee in a contentious matter that divided the court's and circuit's judges. Alternatives were available, however. The chief judge or judicial council could have explored transferring the complaint to another circuit, as was done at the chief judge level in other cases discussed in this report. Also, section 354(b)(2)(B) authorizes the judicial council to transmit a proceeding directly to the Judicial Conference if it determines that a matter "is not amenable to resolution by the judicial council." The public would have benefited from an investigation and resolution of this highly visible controversy.

C-6 Improper failure to conduct a limited inquiry of ex parte contact and improper public comments, no petition for review

Facts and complaint—A state legislator complained that a district judge—assigned to oversee a regional utility following a consent decree—engaged in conduct that created an appearance of impropriety and that violated several provisions of the American Bar Association's Model Code of Judicial Conduct.

The complaint alleged that the judge:

- shortly after receiving an ex parte written request from a state official, issued an order strengthening the authority of a regional advisory body that the judge had created, after the governor vetoed legislation that would have shifted control of the utility from the city to suburban governments;
- announced the order at a press conference with city officials and said he was willing to issue further orders as necessary; and
- had made earlier public statements to the press criticizing the vetoed legislation.

The complaint requested no sanctions against the judge, only his removal from the case.

Chief judge order—The chief judge dismissed the complaint for nonconformity with the statute. Citing Rule 1(e) of the circuit's Rules Governing Complaints of Judicial

Misconduct or Disability (identical to Illustrative Rule 1(e) on this point), the chief judge ruled that "the complaint procedure may not be used to have a judge disqualified from sitting on a particular case."

The order also noted the complaint's assertion that receipt of the state official's letter and participation in the press conference "violated several provisions of the Model Code of Judicial Conduct." The chief judge responded that federal judges are not subject to that code but rather to the Code of Conduct for United States Judges and that "[s]everal of the provisions of the Model Code relied on by the complainant do not exist in the Code of Conduct for United States Judges." He did not discuss the applicability of the Code of Conduct for United States Judges to any specific allegation of the complaint. The order noted that complainant seeks only "removal of the judge from the case" and "specifically states in his complaint that he seeks no discipline against the judge."

***Assessment*—**The dismissal of the request to remove the judge from the case is consistent with our Standard 2, which says that an "allegation that a judge should have recused is indeed merits-related." The chief judge dismissed the complaint based on nonconformity with the statute; he could also have dismissed it as merits-related.

The chief judge did not confront the allegation's facts and documentary support that suggested the subject judge's conduct arguably violated provisions of the Code of Conduct for United States Judges concerning ex parte contacts and public comment about pending litigation. Complainant attached

- the letter that he said the state official sent the judge, asking him to convene the advisory board—further inquiry might resolve whether the judge shared the letter with all parties; and
- news articles quoting the judge on the legal effect of proposed legislation and its conflict with his order—those media reports could be inaccurate, but further inquiry might resolve the question of whether the judge's conduct violated the Code's admonition "to avoid public comment on the merits" of pending actions.

That the complaint sought no discipline of the subject judge is apparently the reason the chief judge did not inquire about, or appoint a committee to investigate, the ex parte contact and public comment allegations. However, that the complainant sought no discipline is irrelevant to the need for an inquiry. The Act directs the complainant to state the facts on which the complaint is based, authorizes the chief judge to accept a corrective action remedy, and authorizes the council to apply any remedy under the statute (without any regard to what remedy, if any, the complainant may wish).

C-7 Complaint against a district judge inadequately investigated and improperly dismissed by chief judge, review petition improperly dismissed by judicial council

Note—At issue in this complaint are two actions of a district judge involving the bankruptcy case of a probationer whom he was supervising: his withdrawal of the reference in her bankruptcy proceedings (a case not assigned to him), and enjoining a state court order evicting her from a house owned by the creditors. The court of appeals vacated both actions in 2002. In February 2003, an attorney involved in neither case filed this complaint. Later that year, the chief judge dismissed the complaint, but the council remanded it for further investigation. The chief judge again dismissed it in late 2004; in September 2005, the council affirmed the dismissal, over three dissents. Complainant attempted to appeal the judicial council order to the Judicial Conference. In April 2006, the Judicial Conference Review Committee decided, 3–2, that it had statutory authority only to review judicial council orders resulting from a special committee investigation. We understand that the chief judge, after the Review Committee's decision, appointed a special committee, but our assessment is limited to the proceedings up to and including the council's September 2005 order.

Facts and complaint—Complainant is an attorney with no connection to the underlying litigation and who apparently based his complaint on information in public accounts and legal materials. He and the district judge have a long history of public antagonism dating back to the judge's imposing sanctions against him in a civil case, an action the court of appeals reversed and remanded to a different judge.

Here, complainant alleged that the judge took two actions to assist a probationer whom the judge was supervising:

- withdrawing the reference in her case from a bankruptcy court—sua sponte and without stating any reason—in a matter that had not been assigned to him (or any other district judge); and
- reimposing a stay that the bankruptcy court had vacated, which precluded creditors from enforcing a state court unlawful-detainer judgment entitling them to possession of premises occupied by the debtor/probationer. The judge twice denied the creditors' request to lift the reimposition. According to the court of appeals, his only stated reason was "because I said it."

Probation office records indicate that the debtor, her probation officer, and the judge met less than a month before the judge withdrew the reference. In its 2003 order, the council referred to information (provided by council staff) that the secretary of the probationer's bankruptcy attorney had ghost-written a letter from the debtor/probationer to the subject judge asking for help with the eviction. The council's order says, referencing the staff-provided information, that "[a]ccording to the secretary," the debtor/probationer delivered the letter "'a day or two before . . .

[the judge] withdrew the reference,' and the next time they saw each other, the debtor told [the secretary] 'the letter had "worked."'"

In response to an inquiry from the chief judge, the judge said the bankruptcy case "was related to my program of working with probationers to help their rehabilitation," a program that he said the probation office deemed "successful." He said that during one of his meetings with the debtor about her probation community service, she "advised [him] that there was an unlawful detainer action pending in the Municipal Court to evict her from the property in which she and her minor daughter were living that was nominally owned by . . . [the creditors] but was given to them when she married her then estranged husband. . . . I re-imposed the stay to allow the state matrimonial court to deal with her claim. From her explanation of the proceedings in the state court it appeared to me that her attorney had abandoned her interest so it could not be adequately presented to the state court." Based on this information the district judge took over the bankruptcy case and issued the injunction against the state court proceedings.

There is nothing in the file to indicate that the other parties to the bankruptcy proceeding were aware of this conversation between the judge and probationer.

The judge also said that he had learned that the probationer's presentence report had been, according to the chief judge's 2004 order, "unlawfully filed and/or referred to" in the bankruptcy and state court proceedings and that he withdrew the reference to prevent further confidentiality violations.

The court of appeals had vacated both the withdrawal of the reference and the injunction. The court held that the "district court's reference was withdrawn without the requisite showing of cause," and "the district court abused its discretion when it issued an injunction . . . because it failed to provide notice as required . . . ." The court of appeals found that the debtor "has occupied the property for almost three years, resulting in a $35,000 loss of rental income" to the creditor.

***Chief judge, council, and review committee orders*—**There have been two rulings by the chief judge and two by the judicial council. In the initial 2003 ruling, the chief judge dismissed the complaint as directly related to the judge's ruling or decision in the underlying case and also as frivolous or unsupported. In a supplemental order in 2004, the chief judge said that "the unlawful filing and reference to a confidential presentence investigation report in defendant/debtor's bankruptcy proceedings constituted a legitimate basis for the District Judge's initial assumption of jurisdiction in the bankruptcy case, sufficient to preclude a finding of judicial misconduct."

Both grounds for dismissal seem problematic, but given the case's lengthy record, we focus mainly on the second of the chief judge and council orders.

In its first order, the council found, 6–4, that the chief judge "erred in dismissing the complaint as frivolous or unsubstantiated; it is plainly neither." The council vacated the dismissal order and remanded the case to the chief judge for further proceedings. The council said it is "well-established that a judge may not exercise judicial power

based on secret communications from one of the parties to the dispute" and a "judge may not use his authority in one case to help a party in an unrelated case."

On remand, the chief judge apparently investigated the judge's relationship with the probationer (the complaint alleged the judge intervened to "benefit an attractive female") and concluded that the "suggestion of an improper personal relationship . . . is entirely unfounded." The chief judge investigated the claims relating to the alleged ghost-written letter to the district judge asking for help and found that "no such letter had been transmitted to, or received by, the district judge," and that "there is no basis for a finding that credible evidence exists of a letter or other 'secret communication' having passed between the defendant debtor and the district judge . . . or for finding that there was any private meeting or discussion between them at any time." The chief judge again dismissed the complaint, this time without specifying a statutory ground. The council said it would "not upset" these "factual findings."

The council affirmed the dismissal in September 2005, finding that appropriate corrective action had been taken. The council noted that "[t]he withdrawal of the reference by the district judge was dealt with by the court of appeals," which held it an abuse of discretion.

The council's September 2005 order also recounts that in May it had "communicated with the district judge setting forth with specificity the nature of the inappropriate conduct that he had engaged in relating to the withdrawal of the reference . . . and setting forth the necessity for appropriate and sufficient corrective action including an acknowledgment by the district judge of his 'improper conduct' and 'a pledge not to repeat it.'" The judge responded through counsel, who said "[u]pon reflection, [the judge] recognizes that if he had articulated his reasons for withdrawing the reference and reimposing the stay, and his underlying concerns that led to those actions, misunderstandings by the parties could have been prevented. As would any dedicated jurist, he recognizes that it was unfortunate [that misunderstandings] occurred in this situation. He does not believe any similar situations will occur in the future."

The council indicated it was "satisfied that adequate corrective action has been taken such that there will be no re-occurrence of any conduct that could be characterized as inappropriate."

Three members dissented separately. Two of them concurred with the dismissal of the aspect of the complaint alleging an improper relationship between the judge and the debtor/probationer. As to the other allegations, one council member said "the record is insufficient," particularly as to the bankruptcy stay and the judge's reason for imposing it. Another said the chief judge and council had yet to address "persuasive evidence of misconduct." As to the dismissal on corrective action grounds, he said it "is impossible to determine if misconduct has been corrected until the misconduct is precisely identified," and the misconduct in this case "has never been corrected." That misconduct, citing the circuit's misconduct rules, appeared to be "'improperly engaging in discussions . . . with parties in the absence of representatives of opposing

parties,'" and failure to "accord the parties a 'full right to be heard according to the law,'" in violation of Canon 3(a)(4) of the Code of Conduct for United States Judges. Furthermore, the court of appeals' finding that the district judge abused his discretion was "a resolution of an appellant's legal claim, not an admonishment of a judge's conduct." And, the judge's statement "misses the mark" because "[t]he misconduct was not the failure to explain, but the granting of an ex parte favor without giving anyone notice or a chance to respond. The district judge has never apologized for that." The same council member said the council should return the matter to the chief judge with directions to "appoint a Special Committee," which could hold "hearings where the district judge may put on a full defense." Anything less would "deny to the district judge the very due process that he is accused of denying to others."

A third council member's 39-page dissent discussed inferences that might be drawn from information uncovered during the chief judge's and council's limited investigations, concluded that serious misconduct had been established, and called for a public reprimand, for ordering the subject judge to compensate the bankruptcy creditors for the loss of rental income, and for the judge to apologize to the creditors.

Two days after the second council order, the complainant petitioned the Judicial Conference for review of the council's order under 28 U.S.C. § 357(a). The Conference's Committee to Review Circuit Council and Disability Orders, to which the Conference has delegated its authority under the Act, held, on April 29, 2006, by a 3–2 vote, that it had no jurisdiction to review council actions other than that exercised pursuant to section 354. The majority of the Committee said that the Act is clear that the Conference may only review council actions taken pursuant to a report of a special investigative committee; the chief judge had not appointed such a committee to investigate this complaint, but instead had dismissed the complaint under section 352, a dismissal upheld by the council's second (2005) order.

Two Review Committee members said in dissent that they would return the case to the chief circuit judge with orders to appoint a special committee. They said that the chief judge and council had misapplied the Act by dismissing allegations that clearly were in dispute and that thus required the appointment of a special committee. The dissenters noted the rule that "labels used by subordinate tribunals do not conclusively determine the jurisdiction of appellate tribunals," and said that the chief judge and council should not be able to use labels to frustrate the application of national standards that Conference review is designed to achieve. They said precluding review in this case will weaken public confidence in the judiciary's exercise of its delegated authority of self-regulation.

***Assessment*—**The chief judge and judicial council actions are inconsistent with our Standards in respect to the chief judge's fact finding and the council's finding of corrective action.

Chief judge fact finding—The chief judge determined, as reported by the 2005 council order, that the alleged ghost-written letter had not been sent to or received by the district judge. Such a finding is contrary to 28 U.S.C. § 352(a)'s admonition that the "chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." Whether there was ex parte communication appears to have been reasonably in dispute. In its first order, the council pointed to evidence from the council staff that there was such a communication. According to one of the dissents, the chief judge contacted the judge and debtor/probationer; they disputed the matter and denied that such a communication had been sent or received. The original information, however, was not retracted and the state of the record reveals a dispute. One dissent devotes nine pages to analyzing the nuances of these conflicting bits of information and concludes that "[a]t the very least, then, we have a conflict in the evidence that only an adversary hearing can resolve. And an adversary hearing can only be held if the Chief Judge convenes an investigative committee. . . ." The chief judge "is not the trier of fact. . . . Her authority is limited to determining whether there is credible evidence of misconduct, and she may dismiss the complaint only if credible evidence is entirely lacking. . . . [She] did not contact the lawyer or his secretary and they did not retract statements they had made to our investigator."

Corrective action—The final council disposition is inconsistent with our Standard 7: when conduct results in "identifiable and particularized harm to the complainant" or anyone else, "appropriate corrective action" should include steps by the subject judge "to acknowledge and redress the harm, if possible," such as an apology, recusal, or pledge to refrain from similar conduct; any corrective action should, if possible, "serve to correct a specific harm to an individual"; corrective action will ordinarily be "appropriate" to conclude a complaint only when the judge complained against, or someone else, informs the aggrieved individual of the nature of the corrective action that is stated in the chief judge's order.

The complaint alleged that the judge took actions sua sponte in a case without giving the litigants notice or opportunity to be heard, based on information he had received ex parte in another matter (the probation supervision). Those actions benefited the debtor/probationer and damaged the creditor. His response to the judicial council admitted that he acted ex parte to advance the rehabilitation of the probationer. The council said in its first order that those actions clearly violated norms of judicial conduct.

When the council asked the judge for a statement of corrective action, his attorney acknowledged no misconduct and treated the matter simply as a misunderstanding based in part on the judge's failure to explain his reasons fully. The judge offered no meaningful apology, provided no redress in the form of words or otherwise to the creditor for its losses, and did not promise not to repeat such conduct but simply predicted it wouldn't recur.

The council also cited the court of appeals' opinion as part of the corrective action, a position also inconsistent with our Standard 7 (corrective action does not include a remedial action directed by an appellate court without the subject judge's "participation . . . in formulating the directive or . . . agreeing to comply"). The Act is clear that only the council can impose a formal remedy or sanction in response to a complaint. Thus, the council's citation of the ruling in the underlying case does not support a finding of corrective action. Two of the dissents elaborated. One pointed out that an appellate holding of abuse of discretion is a legal conclusion connoting "mere error—not wrongdoing. . . . Merely reversing an erroneous judgment that is the product of the misconduct does not undo the misconduct." Another said that the appellate finding that the judge "abused his discretion is a resolution of an appellant's legal claim, not an admonishment of a judge's conduct. Indeed, [the appellate case] never addressed in any way the misconduct issue before us."

Need for special committee appointment—We believe that appointment of a special committee was called for in the first instance, as the council's first order suggested but did not direct. Both chief judge dismissals of the complaint appear inconsistent with the Act, as does the judicial council's second order.

Chapter 6 includes recommendations for steps the judicial branch can and should take within its current statutory authority to avoid situations similar to this and other problematic terminations.

C-8 Problematic failure by a chief judge to identify and investigate a complaint against a district judge

Facts—A chief circuit judge wrote a letter to the director of the Administrative Office of the U.S. Courts, responding to a phone call from the director in which the director reported that the chief counsel to the House Judiciary Committee and to one of its subcommittees suggested to the director that the chief judge review House Report 107-769 "with an eye [quoting here from the chief judge's letter] toward instituting judicial misconduct proceedings against [a district judge] . . . ." No one filed a complaint in the matter, but the Act says a chief circuit judge, "on the basis of information available to the chief judge . . . , may, by written order stating reasons therefor, identify a complaint . . . and thereby dispense with the filing of a written complaint" (section 351(b)).

The House Report alleged that the district judge had

- lied, or at least been seriously misleading, in Committee testimony and later supplementations;
- illegally departed downward from the sentencing guidelines in drug cases, implying that he had done so in bad-faith disregard of the applicable law; and

- improperly closed a sentencing proceeding and sealed transcripts of other sentencing proceedings, perhaps to hide his allegedly illegal acts.

Chief judge letter—The chief circuit judge's letter to the AO director gave three main reasons why he declined to identify a complaint.

First, he found that the judge's alleged false testimony could not constitute misconduct under the Act because he did not testify as

> part of his official duties as a United States District Judge, nor was it "the business of the courts" that he was about that day. He was a volunteer, invited by members of the Committee to provide his personal views on a piece of pending legislation about which he professed to possess some knowledge, albeit acquired during his service as an Article III judge. He made it clear to the Subcommittee that he was not representing the courts or the Judicial Conference.

Second, the court of appeals, in one of the cases at issue, had taken "sufficient corrective action" by ruling that the judge had abused his discretion—"embarrassingly harsh words of public criticism for any trial judge to hear and read." The other case was on appeal and the chief judge was reluctant to preempt the matter by instituting disciplinary hearings.

Third, the Judiciary Subcommittee had requested additional information from the district judge about the alleged closed sentencing hearings and sealed transcripts, and it was advisable to await the judge's response to that request. The chief judge also noted that the full Committee had requested a report by what was then the General Accounting Office on all drug cases in which the judge had departed downward; the chief judge doubted the wisdom of this legislative intervention but saw no point in conducting a duplicative investigation.

Assessment

Improper finding of nonconformity—The chief judge's first reason for not identifying a complaint is inconsistent with our Standard 3 (conduct off the bench can be "conduct prejudicial the effective and expeditious administration of the business of the courts" (section 351(a))). The statute's legislative history makes clear that the Code of Conduct for United States Judges gives substance to that phrase. The Code expressly bars judges from fundraising for a charity, which makes it problematic to conclude that lying to Congress (if that happened) would not be misconduct under the statute because the judge was not testifying on behalf of the courts. Moreover, the Judiciary Committee no doubt invited him to testify as a federal judge about matters that are at the heart of his judicial duties, something very different from appearing, say, as a homeowner before a local zoning board.

Improperly finding corrective action—The chief judge's second reason for not identifying a complaint is inconsistent with our Standard 7 ("'[C]orrective action' . . . means voluntary action taken by the judge complained against. A remedial ac-

tion directed by . . . an appellate court without the participation of the subject judge in formulating the directive or by agreeing to comply with it does not constitute corrective action."). However, this inconsistency with the Committee Standards was harmless because the allegation of improper sentencing departures, if raised in a formal complaint, could be dismissed as merits-related and as unsupported.

Deferring to legislative investigations of closed hearings and sealed transcripts—The chief judge said that the judge's motives for closing a sentencing hearing or sealing sentencing transcripts could be cognizable under the Act, but that investigating them would unnecessarily duplicate the House Subcommittee and GAO investigations. Deferring to a congressional investigation of alleged misconduct, outside the impeachment process, is arguably in tension with the Act's fundamental policy that the judiciary should police itself so as to avoid the separation-of-powers concerns raised by congressional investigation. We recognize, however, the difficult spot this aspect of the complaint created for the chief judge and assume that it represents a rare exception to normal procedure.

In any event, the House Report's allegations about the judge's motives in closing hearings or sealing transcripts, had they been raised in a section 351 complaint, would properly have been dismissed as merits-related and unsupported. For example, the Report alleges that the judge sealed a sentencing hearing in the face of a general statutory requirement to sentence in open court. The Report acknowledges that there may be many legitimate reasons for a judge to seal a proceeding, but speculates that "this case may be one in which [the judge] granted yet another departure below the guideline range, which he sought to conceal from the public and from the Subcommittee by unlawfully sealing the transcript." Absent evidence that there actually was an unlawful departure in that case, and given the judge's openness in testifying voluntarily before the House Committee on the very issue of departures, this speculation would not constitute an adequate factual basis to require further inquiry.

Failure to identify complaint—As the chief judge stressed in his letter, the Act leaves the decision to identify a complaint to the chief judge's uncabined discretion. The chief judge appears to have declined to identify a complaint in this case mainly because he believed he would dismiss the complaint, once it was properly before him, on the grounds of nonconformity and corrective action. However, a chief judge's decision to identify a complaint is separate from that chief judge's later decision to dismiss or conclude that complaint or appoint a special committee. Illustrative Rule 2(j) says that once a chief judge identifies a complaint, he or she "will perform all functions assigned to the chief judge" for determining the complaint's disposition.

We think the better course would have been for the chief judge, in this very public matter, to identify a complaint, undertake whatever limited inquiry was necessary, and dismiss any elements that merited dismissal.

Our Standards as originally drafted did not deal with identification of complaints, but this case caused us to amend them by adding Standard 9. Standard 9 recognizes

that there are many good reasons for not identifying a complaint, but says a chief judge should not decline to do so solely because the chief judge believes that he or she would ultimately dismiss it. The more public and high-visibility the matter, the more desirable it will be for the chief judge to identify a complaint (and then, if warranted, dismiss or conclude it without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

Dispositions in which the primary point of interest is the chief judge's merits-related dismissal

C-9 Complaint against a district judge properly dismissed, review petition dismissed

***Facts and complaint*—**A litigant complained that, in his lawsuit against local prosecutors, the judge showed bias, "acted as counsel for defendants," and improperly dismissed portions of the lawsuit. The complaint said that the defendants were "high ranking [local] officials that [the judge] has had prior affiliation with," and that the judge's misconduct occurred while complainant's recusal motion was pending. The local press covered the lawsuit and some Internet postings discussed the complaint.

***Chief judge order*—**The chief judge dismissed the complaint as merits-related, and also as frivolous for lack of any factual substantiation for the allegations of bias and improper demeanor.

***Assessment*—**The chief judge's dismissal is consistent with Committee Standard 2 on merits-relatedness. This appears to be a typical complaint that assumes bias because the judge ruled against the complainant. The file shows that the chief judge's staff reviewed the transcript of the hearing mentioned in the complaint and advised the chief judge that the transcript contained no indication of any bias, irregularity, or improper demeanor.

C-10 Complaint against a district judge properly dismissed, review petition dismissed

***Facts and complaint*—**These facts come primarily from the complaint, which complainant filed on its website; the chief judge's public order; the court file, which circuit personnel redacted heavily before providing it to the Committee staff; and, in a few instances, from apparently objective information in news articles.

Two public interest organizations, not parties to the litigation, complained that a district judge ruled in a case whose outcome could substantially affect his financial interests. The case was a state government suit, with the intervention of at least one environmental group, challenging a United States Forest Service rule that would prohibit road construction on 58 million acres of federal land across the country.

Complainants alleged that the judge's oil and gas stocks and royalties would be affected by his ruling, and they submitted copies of the judge's financial disclosure forms to document his interests.

None of the parties or interveners asked the judge to recuse. Complainants invoked the complaint process three weeks after the judge enjoined enforcement of the rule.

The judge's response to the complaint said that his annual financial disclosure reports had long disclosed all of his stock and royalty interests, that those interests were not parties to the litigation, and that whether his decision would benefit any of them depended on numerous factors over which he had no control. He asserted that the complaint was directly related to the merits of his decision, and, based on precedents he cited, there was no statutory conflict of interest or the appearance of such.

Chief judge order—The chief judge said the complainant, in effect, asked the council to find "that the . . . judge should have recused himself from the case . . . and then to punish him for failing to do so." The chief judge dismissed the complaint as directly related to the merits of the judge's implicit decision not to recuse. "Whether to recuse is a case-specific decision," and "the only valid avenue available for examining alleged partiality lies within the context of a particular case." A nonparty may encourage such an examination by "contacting the parties and providing them the information that complainants believe supports their claim that the respondent judge should have recused himself." Otherwise, anyone could file a complaint under the Act, "even if the judge's decision had been challenged and affirmed on mandamus or appeal—and ignore the existing appellate procedure for correcting district court errors."

Assessment—The chief judge's dismissal is consistent with our Standard 2, based on Illustrative Rule 1(e) (an "allegation that a judge should have recused is indeed merits-related"). Standard 2 says the only circumstance in which the Act might be applied in a recusal matter is when "the judge knew he should recuse but deliberately failed to do so for illicit purposes," something for which the complaint alleged no facts.

The complainant's petition for review, which the council dismissed without opinion, challenged the chief judge's order because the judge's failure to inform the parties of his holdings "effectively prevented the parties from filing a timely recusal motion and preserving the issue on appeal." But the judge said he had disclosed his holdings for many years. Complainants offered no evidence to rebut that claim or to indicate that the judge tried to hide his holdings. Complainants relied solely on the absence of a specific disclosure of the holdings to the litigants in this case.

They also asserted that the chief judge's order thwarted the congressional goal of providing a remedy to what section 351(a) calls "[a]ny person" who files a complaint, and that the "directly related to the merits of a decision" language applies only when litigants attempt to relitigate a matter settled in the course of litigation. We believe, however, that the chief judge's interpretation of the merits-related language is well settled.

C-11 Complaint against a district judge properly dismissed, no petition for review

***Facts and complaint*—**(The underlying litigation is still active; our summary is based solely on the section 351 complaint presented in the matter and deals solely with that and not with any legal issues pending or resolved in the litigation after the resolution of the complaint in May 2004.) A law professor complained that a district judge abused his power in two cases by "gratuitous and unsupported public vilification of numerous government employees." (The complainant appended his law review article, *Judge . . .'s Reign of Terror at the Department of Interior*.) The judge responded extensively to the complaint and made that response part of the public record in the matter.

The complaint mainly attacked the judge's conduct in a then-eight-year-old challenge to the Department of the Interior's accounting for funds it holds in trust for Native Americans. Several appeals had upheld the judge's substantive rulings but not his treatment of some contempt proceedings as civil rather than criminal. The other case challenged the operation of a working group of President Clinton's healthcare task force. Complainant alleged that the judge

- held five individuals in contempt in the Department of the Interior case without any basis and without required procedural safeguards;
- threatened to issue "citations against scores of individuals" to force them into positions with which he agrees;
- ordered the Department "to disconnect all of its computers from the Internet . . . at enormous cost to the government and with no adequate basis in law or fact"; and
- characterized named government attorneys' statements in the task force case as "dishonest," "outrageous," "reprehensible," and manifestations of a "cover-up." Complainant asserted these statements were unjustified and baseless.

***Chief judge order*—**The chief judge dismissed the complaint, finding that most of the allegations challenged the merits of the judge's orders. As to the alleged threats against the attorneys, the chief judge, after reviewing the judge's response, dismissed them as unsupported and related to the merits of contempt proceedings. Noting that the complaint referred only to "an anecdote related by an unnamed source," the chief judge ruled that "unsubstantiated assertions of wrong-doing . . . are clearly insufficient" because they can "neither be refuted by the subject judge nor substantiated through investigation."

***Assessment*—**The treatment of the anecdote from the anonymous source is consistent with our Standard 4's insistence on allegations supported by the transcript or by named or identifiable witnesses.

The dismissal is consistent with Committee Standard 2, concerning merits-related allegations. The judge used strong language to describe the behavior of attorneys and other officials. The allegations about the Department of the Interior case failed to examine the context in which the contempt proceedings and the alleged threats occurred. Our Standard 3 recognizes that the "rough and tumble" of litigation may require a strong hand to control strategic litigation behavior. Punishing this judicial conduct could inhibit other judges' efforts to apply the rule of law in an unruly case and thus encroach on the judicial independence needed to manage such litigation.

The specifics of the healthcare task force case also illustrate the relation of that language to the merits. The judge characterized an attorney's declaration as "dishonest" and the government's arguments and other behavior as a "cover-up." The judge did so while ruling whether to award attorneys' fees because the government's position was "not substantially justified." The statements were an integral part of the judge's legal rulings and showed no evidence of being motivated by illicit or personal concerns. He named the individuals responsible for the statements but did not engage in ad hominem attributions or manifest any personal or political bias.

Dispositions in which the primary point of interest is the chief judge's or council's concluding the proceedings because of corrective action or intervening events

C-12-13-14 Three complaints, in three circuits, against three judges properly concluded by chief judges, no petitions for review

***Facts and complaint*—**The organization that filed the complaint discussed at C-2 filed nearly identical complaints in three other circuits alleging that two circuit judges and one district judge had violated the Code of Conduct for United States Judges by serving on the FREE board. The three judges resigned from the board while the complaints were pending.

***Chief judge order*—**Each of the three chief judges concluded the complaint, one on the twin bases that the judge had taken appropriate corrective action and that intervening events had rendered the complaint moot, and the other two on the single basis that intervening events had rendered the complaint moot. (In one circuit, all the circuit judges recused and the matter was transferred by intercircuit assignment procedures to the chief judge of another circuit.)

***Assessment*—**The chief judges' dismissals are consistent with Committee Standard 7 on voluntary corrective action and Standard 8 on proceedings concluded based on intervening events. Clearly the judges' resignations from the board constituted appropriate corrective action and/or mooted the complaints. One can imagine hypothetical situations in which resignation might not constitute sufficient corrective

action (e.g., a judge's accepting and then resigning a post on a political party steering committee), but that was not the case here.

C-15 Chief judge properly identified a complaint against a district judge and properly concluded it based on corrective action, no petition for review

***Facts and complaint*—**The chief judge identified a complaint based on "[i]nformal telephone complaints received by the Circuit Executive's Office and extensive newspaper coverage." The complaint alleged that the subject judge wrote to a judge on the same court about that judge's sentencing of a former assistant U.S. attorney. The letter "described the defendant's contributions to combating organized crime" during the subject judge's tenure as U.S. Attorney and "explicitly asked [the sentencing judge] to consider the defendant's contributions in determining . . . sentence."

The subject judge's response to the chief judge acknowledged "a clear violation of [Code of Conduct for United States Judges] Canon 2B [for which] I am exceedingly sorry and sincerely apologize to the Judicial Council and to my fellow judges . . . ." The response waived the Act's confidentiality provisions and requested that all materials relating to the complaint be made public.

***Chief judge order*—**The chief judge concluded the complaint on the basis of corrective action. He found that the judge's sentencing letter violated Canon 2B and appeared to constitute misconduct under the statutory standard—especially because "the letter was written to a judge of [the judge's] own court and that it was sent on official stationery." The chief judge noted that the judge had publicly withdrawn his letter, had agreed that his conduct was unethical, had sincerely apologized, and had made the materials public. The chief judge observed, "[s]uch publication, in my view, will achieve as much benefit as would be achieved by a formal investigation and will do so far more rapidly." Thus the chief judge directed that the complaint, the judge's response, and the chief judge's order "be filed and made public without redaction."

***Assessment*—**The chief judge's order is consistent with Committee Standard 7 (corrective action is "voluntary self-correction of misconduct"). The corrective action was action taken by the judge himself, was commensurate with the violation, was tailored to provide whatever benefit was possible to persons directly affected by the violation, and was swiftly made public. This is a model for the effective administration of the Act.

C-16 Complaint against a district judge properly concluded by judicial council order, no petition for Judicial Conference review

***Facts and complaint*—**(These facts are drawn from the judicial council's public order and apparently reliable wire service and local newspaper reports.) State and federal prosecutors, federal public defenders, and private attorneys complained that a district

judge abused them orally and in one case physically, stemming from his obsession with attorney conduct and ethics. The chief judge appointed a seven-member special committee.

The committee eventually scheduled a formal hearing, at which various persons, including the state's governor, appeared to testify. At that point, the judge admitted the truth of the allegations and agreed to go on administrative leave for at least six months, during which he would undergo behavioral counseling, and to waive any doctor–patient privilege so that his doctor could consult with the special committee's expert.

Judicial council order—The council adopted the committee's settlement recommendation, including barring the judge from cases involving a number of the attorneys for three years (and in one case, forever). The public order recited the settlement terms and announced that the judge had admitted the allegations of abusive behavior. Six months following the council order, the judge applied to resume full judicial service. The committee refused but agreed to reinstate him six months later. Newspaper accounts some months later said that the judge was receiving "glowing" reviews from the bar.

Assessment—The judicial council's order is consistent with our Standard 8 ("[v]oluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint"). This would appear to be a deft resolution of a difficult problem, giving full effect to the statutory policies of reforming judicial misconduct, maintaining public confidence in the judiciary, and preserving judges' independence.

C-17 Complaint against a circuit judge properly concluded by judicial council order based on corrective action and public reprimand, no petition for Judicial Conference review

Facts and complaint—A circuit judge, at an American Constitution Society forum, compared the means by which President Bush attained the presidency in 2000 to how Mussolini and Hitler had assumed power, and stated that American democracy should reassert itself by defeating President Bush in 2004. A few days later, after a wave of press accounts and criticism, the judge released a public letter to the chief judge acknowledging impropriety and apologizing. The chief judge released a public memorandum to all circuit judges, forwarding the letter, admonishing the judge for his misconduct, and warning all judges to avoid similar conduct.

Thereafter, five complaints were filed under the Act. One, by 15 members of Congress, complained about the remarks and also alleged that it was improper for the judge to speak at the event at all, because the Society is "partisan" and "left-leaning." An attorney, a litigant, and two others filed the other complaints. All alleged that the judge had improperly compared President Bush to Mussolini and Hitler;

two alleged that he had improperly called for the President's defeat; one alleged that he demonstrated his unfitness by publicly disagreeing with *Bush v. Gore*; one alleged that the judge's wife publicly stated at an anti-Bush rally that she was there "on behalf of herself and her husband."

The chief judge recused from handling the formal complaints. The acting chief judge appointed a special committee, thereby not concluding the matter based on corrective action (the judge's apology). Following the special committee's report to the council, the council issued a published memorandum and order.

***Judicial council order*—**The council found that comparing President Bush to Mussolini and Hitler and calling for his defeat was a "clear and serious" violation of Canon 7 of the Code of Conduct for United States Judges and "that all of the purposes of the judicial misconduct provisions are fully served by" the judge's public apology, the chief judge's public admonitory memorandum, "and the Judicial Council's concurrence with the admonition in the Memorandum. . . . These actions constitute a sufficient sanction and appropriate corrective action."

The council dismissed:

- the allegation that criticizing *Bush v. Gore* showed incompetence: "reasonable people disagree over the soundness of the opinions in that case";
- the allegation about the judge's wife for lack of factual support—she said she had no recollection of stating she was speaking for her husband, and the judge said that he never authorized her to state that she was speaking for him, and that he had long counseled her to the contrary; and
- the allegation that it was improper for the judge to speak at an American Constitution Society event—Code of Conduct Committee advisory opinions say that a judge may not engage in political activity but may speak at an event sponsored by a group that has an identifiable political or legal orientation.

***Assessment*—**The council's order with respect to the judge's remarks is consistent with our Standard 7 ("corrective action should be proportionate to any plausible allegations of misconduct in the complaint"). This was serious misconduct, in a matter receiving national press coverage. The chief judge's public admonition occurred outside the formal complaint process and was not tantamount to a public reprimand by the circuit council. The acting chief judge realized this, as seen in his appointment of a special committee. The council's concurring in the chief judge's informal reprimand, as part of the formal statutory process, added considerable moral and legal force to the reprimand.

Standard 7 says "corrective action should be proportionate to any plausible allegations of misconduct in the complaint. . . . [A] slight correction will not suffice to dispose of a weighty allegation." Much misconduct is mild enough that a public apology from the judge constitutes adequate corrective action, but some misconduct is serious enough that an apology alone is insufficient. The public needs to see some

form of "discipline" meted out by the judicial council. The council's statement that it joined in the chief judge's earlier admonition to the judge met this need.

The council's dismissals of the two subsidiary allegations are consistent with our Standard 5, which calls for dismissal of allegations if investigation shows they lack any factual foundation or are conclusively refuted by objective evidence.

Comparison of assessments, comments

Table 16 summarizes, in the first three rows, our assessments of three different sets of complaint dispositions. The last row shows the number of problematic dispositions identified in the 1991–1992 study of the Act's administration in eight circuits, conducted for the National Commission on Judicial Discipline and Removal.

Table 16. Problematic Dispositions in Complaints Committee Examined, and Those Examined in the 1993 Study

	Dispositions		
Dispositions	In sample	Problematic	%
Modified random sample from all terminations, 2001–2003	593	20	3.4%
Pure random sample from all terminations, 2001–2003	100	2	2.0%
High-visibility cases, 2001–2006	17	5	29.4%
Modified random sample from all terminations, in eight circuits, 1980–1991[24]	469	12	2.6%

Table 16, earlier research on the Act's administration, and our assessments reported in this chapter prompt several observations.

No significant change in problematic dispositions over time

The slight difference in the proportion of problematic dispositions in 2001–2003 and 1980–1991 does not mean that judicial branch implementation of the Act has grown more problematic. That is so for several reasons:

- The difference in estimates of problematic cases between the two studies does not meet conventional standards of statistical significance. This is true when comparing our overall proportion of problematic complaints (20 of 593) to the 1993 finding (14 of 469) ($p = .40$) and when restricting the comparison to the eight circuits studied in 1993 (406 of our 593 terminations came from those eight circuits; 14 were problematic) ($p = .29$). In other words, the small

difference in the rate of problematic terminations in 1993 and in our study may well be the result of chance differences in sampling rather than a change in incidence over time.

- The earlier study used a similar but not identical sampling strategy.
- Labeling dispositions as problematic or not involves close calls. Had we, or the authors of the earlier study, decided against identifying one or two hard cases as problematic, it would have produced different percentages of problematic dispositions.

Chief judges apparently continue to terminate complaints largely free of problems despite a substantial overall increase in the work demanded of them. In Table 17:

- the first row displays the percentage of problematic dispositions in the major samples of cases in the two periods, an apparently negligible increase;
- the second row shows that the average circuit judge judicial caseload in the two periods has increased by 55%; and
- the third row shows a 214% increase in the annual average number of complaints filed under the 1980 Act from 1982–1991 and the annual average filed from 2001–2003.

Chief circuit judges, whether or not they take a reduced caseload, are likely facing more appeals than their counterparts in the 1980s, and are surely facing a major increase in complaints under the Act. And, of course, Table 17 does not capture the increases in other aspects of chief judges' administrative responsibilities.

Table 17. Measures of Circuit Judge Workload

	1982–1991	2001–2003	% change
% of problematic dispositions[25]	2.6%	3.4%	+0.8%
Average annual cases per judgeship[26]	227	351	+55%
Average annual complaints[27]	232	728	+214%

As we discuss in Chapter 6, this positive finding involves *filed* complaints. A separate question is whether chief judges are *identifying* complaints adequately in order to take cognizance of allegations of misconduct and disability that do not produce filed complaints.

Comparatively high proportion of problematic dispositions of high-visibility cases is cause for concern

We assessed 29.4% of the dispositions in high-visibility cases as problematic (five of 17). If we exclude two of the 17 that were high visibility only by our "one news story" rule—C-1 (dismissed probation officer) and C-9 (litigant suing local prosecutors)—

the proportion rises to 33% (five of 15). By contrast, we assessed as problematic only 20 (3.4%) of the dispositions in the sample of 593 largely unexceptional cases.

The explanation for this sizable difference lies in differences in the two types of complaints. The overwhelming majority of the 593 cases were obvious candidates for dismissals, even given the overselection of cases more likely to be meritorious. Were we able to identify and remove those unexceptional cases from the sample, the denominator of 593 would shrink considerably and the 20 problematic cases would constitute a much higher percentage, closer to the 29.4% observed in the 17 high-visibility terminations.

Each of the 17 high-visibility cases, by contrast, is in our study because members of Congress took a serious interest in it or because journalists paid attention to it, or both. These cases aroused interest and attention because they presented the plausible possibility of some misconduct—not necessarily an obvious possibility, but simply a more plausible possibility. Complaints that are more plausible than most are infrequent, and moreover are likely to confront the chief judge or circuit council with more decisions than in the typical case: identify a complaint? undertake a limited inquiry? seek a response from the judge? appoint a special committee? regard an appellate reversal in the underlying litigation as corrective action? With the greater number of decision points and less familiarity in dealing with these types of complaints comes a greater possibility of a mistake.

Whatever the reasons, the fact remains that chief judges and councils made a greater number of mistakes, proportionately, among these more complex complaints. That is a source of concern for its own sake and because these cases are, for practical purposes, the public face of the judicial branch's efforts to resolve allegations of judicial misconduct and disability. Perceived failure to deal with alleged misconduct in these publicly visible complaints may lead those with valid complaints to conclude that the likelihood the complaint will be investigated is too low to justify the trouble of filing.

Chief judge inquiries and special committee appointments

The main cause of the problematic dispositions in both our main sample (the 593 cases) and the high-visibility complaints is the lack of adequate chief judge inquiries before dismissing the complaint, and the related failure to submit clear factual discrepancies to special committees for investigation. Of the 20 problematic dispositions in the 593-case sample, at least 15 were problematic wholly or in large part for one or both of those two reasons. Of the five problematic dispositions of high-visibility complaints, four were problematic for these reasons (although two cases represent double counting—A-17/C-4 and A-18/C-5). (The fifth high-visibility problematic termination involved failure to identify a complaint.) Of the two problematic dispositions in the 100-case sample, one was the result of an inadequate inquiry, and one the result of mistakenly finding the complaint alleged behavior not covered by the Act.

Chapter 5

Activity Outside the Formal Complaint Process

Key findings:

1. **Based primarily upon our interviews, we conclude that informal efforts to resolve problems remain (as the Act's sponsors intended) the principal means by which the judicial branch deals with difficult problems of judicial misconduct and disability.**
2. **The main problems that the informal efforts seek to address are decisional delay, mental and physical disability, and complaints about the judge's temperament.**
3. **The 1993 *Report of the National Commission on Judicial Discipline and Removal* recommended that committees of local lawyers serve as conduits between lawyers and judges to communicate problems of judicial behavior. The Judicial Conference endorsed the proposal but few committees have been created.**
4. **The Ninth Circuit has created a program to make counseling available at all times both to judges who may benefit from it and to other judges who may seek guidance as to how to deal with colleagues. Ninth Circuit judges report that the program has proved successful.**

The Judicial Conduct and Disability Act is not the only mechanism that seeks to remedy judicial misconduct or disability or prevent its occurrence. The operation of these procedures was not part of our charge and we have not analyzed them. We list some principal mechanisms below:

- the rarely used Constitutional provisions for impeachment and removal (13 judicial impeachments and seven convictions)[28] under what Chief Justice Rehnquist called the "guiding principle" that judges' "rulings from the bench . . . would not be the basis for removal from office";[29]
- judicial council orders issued, not under the Act, but under 28 U.S.C. § 332(d)(1)'s mandate to "make all necessary and appropriate orders for the effective and expeditious administration of justice within [the] circuit" and judicial councils' certifying disability under 28 U.S.C. § 372(b);
- statutory mechanisms to encourage trial judges to dispose of matters promptly by requiring the Administrative Office of the U.S. Courts to publish semi-annual lists of judges with motions and bench trials pending

more than six months and cases not terminated within three years of filing[30] (some courts of appeals have adopted procedures to encourage expedition, such as the requirement in the Court of Appeals for the District of Columbia Circuit that "a judge who has three or more assigned opinions pending from a term that are not in circulation to the panel by August 15 is not allowed to sit on any new cases until this backlog is cleared"[31]);

- criminal and civil actions (absent judicial immunity);
- writs of mandamus;
- recusals sua sponte or on motion under 28 U.S.C. §§ 144 & 455;
- appellate reversals aimed at improper judicial conduct;
- statutory limits on judges' (and other officials') outside income and receipt of gifts, and requirements to disclose financial holdings annually; and
- the Judicial Conference's Code of Conduct for United States Judges and the advisory opinions of the Conference's Codes of Conduct Committee, which seek to prevent problematic behavior from occurring.

Examining the use of these other formal mechanisms was not in our charter and we did not do so.

Neither were we charged by Chief Justice Rehnquist to examine informal activity that deals with alleged judicial conduct and disability problems outside the confines of the formal complaint process. "Informal activity" connotes efforts by judges, especially chief judges, to deal with the behavior of a judge who may have become disabled, is seriously behind in his docket, or exhibits other actions or conditions that need to be remedied. We have not assessed the extent or effectiveness of informal activity beyond this brief chapter, which draws heavily on comments provided during Committee and staff interviews.

Some mention of informal activity is appropriate, however. For one thing, the Act's sponsors assumed informal action would continue to be the main means by which the judicial branch tries to deal with problems. Senator Dennis DeConcini, a major sponsor of the Act, said "the informal, collegial resolution of the great majority of meritorious disability or disciplinary matters is to be the rule rather than the exception. Only in rare cases will it be deemed necessary to invoke the formal statutory procedures and sanctions provided for in the act."[32]

Moreover, effective informal action depends on effective implementation of the Act. The 1993 *Report of the National Commission on Judicial Discipline and Removal* said "a major benefit of the Act's formal process has been to enhance the attractiveness of informal resolutions."[33] There is, however, a link between the Act and alternative, informal methods to deal with allegations of problematic behavior. As one chief judge put it over 15 years ago, "[t]he Act [is] a bargaining chip the chief judge could use, hanging in the background."[34] But, to be effective, the bargaining chip needs to be credible. Judges who may be engaging in questionable behavior or suffering the

effects of a disability are more likely to be amenable to informal entreaties from colleagues if they perceive that a complaint, if filed, will get serious consideration and produce action appropriate to the credibility and gravity of the complaint.

Extent of informal activity

Previous studies, as well as our own experiences and those reported by colleagues, testify to the extent of informal activities. The National Commission summed it up well: "Informal approaches remain central to the system of self-regulation within the judiciary."[35] This conclusion was bolstered by research for the Commission by Professor Charles Geyh, who asked chief circuit judges and former chief judges for their impressions of the frequency of use of five formal means of judicial discipline (including the Act) and three informal means. The responses ranked the informal means as the three most frequently used mechanisms; in order they were (1) activity by the chief circuit judge, (2) activity by the chief district judge, and (3) "peer pressure."[36] Several years prior to Geyh's study, Circuit Executive Collins Fitzpatrick from the Seventh Circuit reported that his inquiries of personnel in all the circuits revealed nine federal judicial retirements nationwide that occurred "after a judicial complaint was filed or looming" as well as other changes in judicial behavior short of retirement, leading him to conclude that attention to "the most serious judicial problems [has] not been initiated with a formal complaint."[37]

Our Committee's interviews with chief judges, former chief judges, and circuit staff provided nothing to suggest a lessening reliance on these informal mechanisms. As one chief judge put it, "[t]he informal aspect is the most valuable part of the Act . . . , the most serious matters were not the subject of a complaint at all." Another said, "[t]here have been no special committees during my time as chief judge. That underscores how much the formal process interacts with, but does not necessarily govern, the most serious cases." Chief judges cited several reasons why they prefer to proceed informally. One said that rather than identify a complaint, "I would start with the informal process because there is a greater chance of long term corrective action. If the matter becomes formal, it gets more adversarial."

Typical objects of informal activity

Barr and Willging's 1991–1992 study for the National Commission pointed to three examples of problems dealt with by informal actions. Disability allegations were the most frequent—"a host of physical and mental symptoms ranging from a memory afflicted by Alzheimer's disease to an inability to speak as a result of a stroke."[38] Chief judges also recounted examples of informal actions to deal with alleged delay in disposing of cases, and other allegations, ranging from claims of substance abuse to intemperate remarks and even a judge's feet-on-the-bench behavior while a group of schoolchildren were visiting his courtroom to observe a trial.[39]

Our interviewees' observations run parallel to these to the extent they mentioned delay, disability, and temperament. As one chief judge put it, "[t]he three primary problems of delay, aging, and temperament: it's amazing how seldom they pop up in formal complaints. The informal process is the best way to deal with those. The really thorny problems are dealt with informally." These problems, moreover, were not the subject, comparatively speaking, of many formal complaints. Table 5 in Chapter 2 indicates that of the 5,277 allegations in complaints from 2001–2005, undue decisional delay constituted 6.9% of the total; mental or physical disability, 3.6%; and demeanor, 2.5%.

These problems stimulate various informal approaches. One chief judge said, for example, "[a]mong informal matters, it's primarily delay, that's the most frequent problem. With delinquent cases, we'd have the clerk call and ask the judge about it." Another said, "[i]f there is some concern about delay, there'll be a quick phone call. [Court official] will make that call, he has an easy manner."

On the other hand, said one chief judge:

> I did face problems of the aging process, that's the most difficult by far to deal with . . . . In most cases, the judge recognized it and got off the bench. But not in all cases. I talked to family members. I got them to approach the judge. You can't slap a formal complaint at the end of his career on an 83-year old judge who has rendered distinguished service. . . . I tried to approach that with great delicacy, through family members.

But, added another: "If using the family is a possibility, then you want to try that, but that's a mixed bag."

Dealing with problems not likely to produce complaints under the Act

These informal mechanisms are essential for another reason: not all problematic behavior by judges would be likely to produce complaints, either filed or identified by chief judges.

There are at least three types of such behavior. First, some objectionable behavior does not rise to the level of what 28 U.S.C. § 351(a) calls "conduct prejudicial to the effective and expeditious administration of the business of the courts" or a "mental or physical disability" that creates an inability to discharge all the duties of the office. Yet such behavior may well need attention. One chief judge said in an interview: "[t]here's a substantial difference between misconduct and the kind of bad manners that . . . ought to be corrected, . . . for example, the judge is peremptory and sarcastic. That judge needs counseling, but it's not misconduct." Another said

> [s]ometimes . . . the judge's court mannerisms don't contribute to a feeling of fairness. So the chief judge or some other judge will go talk to him. This generally helps. One situation we had—the judge had a [physical]

> problem. He was an excellent judge, but the parties got the idea he wasn't listening. We talked to him and explained the problem, how this appeared to litigants. He took steps to remedy the perception.

One chief noted

> [s]ome people have abusive temperaments. . . . You pick that up on the grapevine, at a judicial conference, at a bar meeting. In temperament cases, sometimes it works if you reverse the judge in a real sharp way. This has to be approached very carefully. You don't want to look as if you're moving against a judge because of stylistic differences or—God knows—because of the judge's views. You could easily compromise the independence of the courts, doing that.

Second, some judicial conduct may be thought of as misconduct under the Act but is not, such as judges' failure, typically inadvertent, to recuse in cases in which they may have even very minor stock ownership in one of the parties. As discussed regarding several terminations in Chapter 4, recusal decisions are almost always merits-related and not subject to the Act, but chief judges can use informal methods to persuade judges to maintain up-to-date conflict-of-interest lists, such as through the use of conflict-avoidance software.

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.

Possible other approaches

Bar committees—Recognizing that lawyers sometimes won't raise problems even informally for fear of retaliation, the 1993 *Report of the National Commission on Judicial Discipline and Removal* recommended that each circuit council charge a committee or committees "broadly representative of the bar but that may also include informed lay persons" to present to the chief judge "serious complaints against federal judges." Such committees, said the Commission, could, among other things, help identify "patterns of alleged misconduct" and "provide anonymity for a complainant concerned about retaliation if the chief judge identifies a complaint [under 28 U.S.C. § 351(b)], and provide a deterrent against retaliation if the complainant is identified."[40] The Judicial Conference endorsed a more general formulation—that circuits and courts consider "structures or approaches . . . [that] might best serve

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the purpose of assuring that justified complaints are brought to the attention of the judiciary without fear of retaliation."[41]

One former chief judge told us he had recommended to his judicial council the creation of such a committee—"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." This chief judge's judicial council rejected his suggestion. Circuit Executive Collins Fitzpatrick reported in 2005 that his informal canvass of chief judges and others suggested that no circuit had created such a committee.[42] One chief judge, however, told us that he had endorsed a proposal by the head of a large city bar association in the circuit to create a committee that could listen to complaints from lawyers and raise appropriate items with the chief district judge of the judge in question, without going through the formal complaint process, and "the ultimate complainant can remain anonymous . . . . Lawyers are reluctant to do anything formally."

Evidently responding to the same concern, at least one district has created the position of ombudsman, "a lawyer in private practice appointed by the court" to act, according to the district's website, as an "intermediary" between the judges of the district and the bar. The ombudsman, says the website, "acts on an informal basis to interface and address those matters lacking an institutional mechanism or forum for redress. All contacts with [the ombudsman] remain confidential."

Counseling programs—One other program deserves mention, involving a way to provide counseling to judges and to chief judges. By way of background, there is little evidence in Barr and Willging's 1991–1992 study that mental health professionals played much of a role in dealing with problematic behavior, either in advising chief judges how to deal with it or in helping the subject judges themselves. If that picture was accurate in the early 1990s, it may have changed somewhat. Our interviews asked chief judges whether they have "had occasion to consult with or employ a psychiatric/psychological expert to help with a problem of judicial conduct or disability." Chief judges in five circuits responded affirmatively, but the help sought does not appear to have been extensive.

The Ninth Circuit judicial council, however, has established a program to provide such assistance to judges whenever they request it. The circuit's Judicial Disability Task Force recommended in 2000 a variety of steps for the circuit to take, one of which resulted in the circuit's "Private Assistance Line Service," described by a Ninth Circuit judge as being "available 24 hours a day, seven days a week, to assist federal judges, their families, and staff with questions relating to a judge's well being," all on a confidential basis.[43] This service is similar to one that has been available to California state judges for over ten years. The calls to the service are answered by "an independent contractor with more than 14 years experience providing assistance to judges and attorneys."

According to the contractor, calls fall into three broad categories. Most are from chief judges seeking advice on how to deal with a judge or staff member whose behavior has been problematic or whose health threatens performance. A second group of calls are from senior judges or their families, seeking either information on dealing with chronic illness or, as to judges still able to perform useful judicial work, on alternative living arrangements because they can no longer live in their homes without assistance. A third group of calls come from judges seeking some sort of treatment program to help deal with a family or personal problem, such as marital conflict.[44]

The current chief judge said in an interview that the "concept is sinking in now, that professional help is available to our judges."

Chapter 6

Recommendations

This chapter presents our overall assessment of the administration of the Judicial Conduct and Disability Act and our recommendations to enhance that administration.

Principal findings

Our research shows that chief circuit judges and judicial councils are doing a very good overall job in handling complaints filed under the Act. The overall rate of problematic dispositions is quite low and has not increased measurably over more than a decade despite steep increases in the number of complaints filed and the overall workload of chief circuit judges. However, legislative and public confidence in the Act's administration is jeopardized by less-effective handling of the small number of complaints that are in the public eye, and by chief judges' reluctance to use their authority to identify complaints in order to provide public resolution of public allegations of judicial misconduct cognizable under the Act. More specifically:

- In a pure random sample of 100 complaint terminations drawn from over 2,000 terminations in 2001 to 2003, we concluded that two terminations (2%) were procedurally problematic under our "Standards for Assessing Compliance with the Act."
- From the same years, in a separate, stratified sample of 593 terminations reviewed first by our staff, we identified 20 (3.4%) to be "problematic" applying the same Standards. The slightly higher proportion of problematic terminations is most likely because the sample overrepresented complaints likely to allege conduct covered by the Act.

  Most of the terminations were problematic because the chief judge failed to undertake an adequate inquiry into the allegation before dismissing it or because the chief judge did not appoint a special committee to investigate facts that were reasonably in dispute. We do not know if further inquiry or investigation would have led to a finding of misconduct, but we doubt it would have in most cases, based on the nature of the allegations (such as the claim in case A-9, noted above, that circuit judges manipulated the assignment system to falsify records in a prisoner's habeas case).
- Applying our Standards to 17 complaints that attracted national or regional press attention in fiscal years 2001 to 2005, we assessed five (29.4%) as

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problematic. Unlike the overwhelming majority of the complaints in the two samples, each of these 17 cases presented at least some possibility of misconduct. That is what gained them legislative or press attention. Even a slight possibility of misconduct makes cases more complex. Especially because such cases are so few and far between, chief judges and councils are somewhat more prone to mistakes in their disposition than in the mine run of cases that are properly dismissed with little or no inquiry. Four of the five problematic terminations resulted from the inadequacy of the chief judge's limited inquiry or the failure to appoint a special committee.

These findings suggest how the administration of the Act serves two related purposes. Its major purpose is to provide an opportunity for any individual to file a misconduct or disability complaint and have it considered by the chief judge (and, in rare cases, the judicial council). Within that framework, the Act also permits disposition of the relatively few misconduct allegations that are in the public eye—disposition either through a dismissal that exonerates the accused judge or the judicial council's imposition of some form of action that provides a measure of public accountability.

In this regard, three aspects of our findings suggest potential problems:

- The comparatively high proportion of problematic terminations of high-visibility complaints—precisely because they are in the public eye—could send the message to persons who believe they have a valid complaint that filing it will do no good because it will not be adequately investigated.
- Chief judges are making very limited use of their statutory authority to identify complaints under section 351(b). Our stratified sampling scheme was designed to include all identified complaints. It found two in the 2001–2003 period, one of which involved public allegations of misconduct (case C-15). We also discussed case C-8, involving very public allegations that produced no filed or identified complaint. We doubt these matters represent the only times, in three years, that there were public allegations of judicial misconduct about which no one filed a complaint but that the chief judge could have resolved publicly by identifying a complaint. Examples of such claims in 2006 include press reports that judges have made statements clearly inconsistent with the Code of Conduct for United States Judges, and charges that judges have failed to report the value of financial payments or reimbursements received to participate in private judicial education programs.

  Of course, the Act does not cover all types of misconduct, and chief judges cannot identify complaints about behavior that does not fall under the statute. Complaints about judges' failures to recuse themselves in cases in which they have even very minor stock holdings are almost always merits-related matters not subject to the Act. The judicial branch, though, is not

without means of dealing with this matter, including informal actions by chief judges, or encouraging or mandating use of conflict-avoidance software to allow checking for conflicts.

- Our review of court websites, reported in Chapter 3, suggests that most courts have not done enough to make people aware of the Act and their rights under it. Our survey in 2005 revealed that over half the district courts have no information about the Act on their websites, and that those courts that present information often present it in a way that would stump most persons seeking to learn about how to file a complaint.

Summary of recommendations

Our recommendations fall into five groups:

- "so that the chief judge is not out there alone," as one experienced chief judge put it, we recommend providing advice and information to those responsible for administering the Act, including a new, formally recognized, vigorous advisory role for the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, and resources to help chief judges and others understand the Act's terms and how others have interpreted them (Recommendations 1–4);
- promoting, on the part of potential users, knowledge of the Act and its appropriate use (Recommendations 5–6);
- providing accurate information for legislators, the press, the public, and the judicial branch about how the Act operates (Recommendations 7–10);
- clarifying the authority of the Judicial Conference to review decisions of its Committee to Review Circuit Council Conduct and Disability Orders (Recommendation 11); and
- creating programs, such as that in the Ninth Circuit, to make assistance available by phone for all judges of the circuit (Recommendation 12).

We include also a brief commentary that does not deal directly with the Act's administration, but rather the problem of failures to recuse.

Recommendations aimed primarily at enhancing chief judges' and council members' ability to apply the Act

Here we recommend

- a formally recognized, vigorous advisory role for the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders in providing advice to chief judges and judicial councils facing difficult complaint situations;

- emphasis in that advisory role on the desirability, in appropriate cases, of chief judges' identifying complaints, transferring complaints to other circuits, and appointing special committees;
- an individual orientation program for each new chief circuit judge and an online "compendium," both of which should provide guidance on the meaning of the Act's provisions and how to apply them, based on our Standards for Assessing Compliance with the Act; and
- online availability of selected chief judge and judicial council orders.

1. The Judicial Conference should authorize the chair of its Review Committee, or a designee, to provide advice and counsel to chief circuit judges and judicial councils regarding the implementation of the Act.

The Act, in provisions codified in the fourth paragraph of 28 U.S.C. § 331 (the Judicial Conference's organic statute), authorizes the Conference to appoint a standing committee to exercise the Conference's statutory role in reviewing judicial council actions on complaints. Pursuant to that authority, the Conference created its Committee to Review Circuit Council Conduct and Disability Orders. Section 331 also authorizes the Conference to "prescribe and modify rules for the exercise of the authority provided in chapter 16," i.e., the Act.

To provide help to chief judges and councils faced with difficult situations, we recommend that the Conference use that rule-making authority to foster, on the part of the Review Committee, a vigorous advisory role to address and ameliorate the kinds of problematic terminations that we describe in Chapter 4.

2. In dealing with chief judges and judicial councils in this more aggressive advisory role, Review Committee members should stress the desirability, in appropriate cases, of the following:

- chief judges' using their statutory authority to identify complaints when accusations become public—the Conference should authorize the chair of the Review Committee (or a designee member of the Committee), when the chair becomes aware of public allegations of misconduct that have not led to a complaint filed under section 351(a), to consult with the chief judge of the circuit about the matter, and, depending on those discussions, recommend that the chief judge identify, or consider identifying, a complaint under section 351(b);
- transferring complaints to other circuits for initial investigation by another chief judge and, depending on that investigation, appointment of a special committee to report to the judicial council (in Recommendation 3, below, we elaborate on factors relevant to a transfer decision); and

- consultation with the Review Committee chair on appointment of special committees—the Conference should make clear that chief judges or judicial council members or both can alert the chair of the Review Committee to complaints in which the chief judge or some council members believe appointment of a special committee may be warranted, for whatever advice, with whatever emphasis, the chair believes appropriate for the situation. The chair (or a designated Committee member) would approach disagreements as one familiar with the Act but removed from specific tensions that may be causing disagreements within the specific circuit. Consultation with such a source might have avoided several of the problematic terminations discussed in Chapter 4 by encouraging chief judges to appoint, or councils to order the appointment of, special committees.

We do not believe the Review Committee's involvement in encouraging the identification of a complaint or the appointment of a special committee would create a conflict of interest were the matter at hand to come before the Committee in a petition to review a council action. Conflict-of-interest rules that govern judges in judicial proceedings need not govern judges' actions when they act, as here, in administrative capacities. Administrators regularly make decisions in particular matters and then revisit those matters as they progress through the organization.

Furthermore, in neither the identification of a complaint nor the appointment of a special committee would the Review Committee chair (or designee) be commenting on the specific matter that would come before the Committee if the complainant or subject judge petitioned the Conference to review a council order issued under section 354. The matter that would come before the Committee in that situation would not be the propriety of identifying a complaint or appointing a special committee, but rather the soundness of a judicial council order based on a special committee investigation. And if, despite this fact, there were still concern over a conflict of interest, the Review Committee chair could recuse from considering a petition to review a council's section 354 order.

Indeed, the Conference may wish to rely on the recusal option to empower the chair to provide advice to chief judges and councils on a broader array of matters, including the substance of section 354 orders. Judges now seek advice from the Committee's AO staff but may in some cases prefer to get the advice of the Review Committee chair, who could recuse in the unlikely event the subject of the advice came before the Committee in a petition.

3. The Review Committee, with the assistance of the Federal Judicial Center, should create and maintain two resources to help chief circuit judges, judicial council members, and circuit staff—especially those new to these positions—understand the Act and how to apply it: an individual in-court orientation program for new chief judges and a compendium available to all.

New chief circuit judges receive no systematic orientation to their responsibilities under the Act. They may learn something of these responsibilities from their predecessor chief judge and the circuit staff that assists in processing complaints, but this on-the-job training is likely to be uneven across the circuits. The Administrative Office provides each new chief judge an orientation program in Washington, D.C., but the program's agenda is crowded and allows little time if any to cover duties under the Judicial Conduct Act. There are not enough new chief judges in any one year to make a group orientation seminar feasible. Annual meetings of all chief judges are likewise difficult to arrange.

The time of the Judicial Conference's semi-annual meeting is the only period in which all chief circuit judges meet together. The Federal Judicial Center has conducted seminars dealing with the Act in conjunction with these meetings. Those seminars have been valuable and should continue. However, the judges' schedules have made it difficult to convene such seminars more often than every four years. (Chief district and chief bankruptcy judges, although they do not receive complaints under the Act, still confront real and alleged misconduct or disability. The Center is able to hold its conferences for those chief judges annually, and they often include sessions on informal efforts to resolve problems.)

Furthermore, just as chief circuit judges receive no specific orientation to the Act, they lack any reference source to which they may turn when they encounter an unfamiliar problem. Several experienced chief circuit judges elaborated on this need during our interviews. One called for "a set of examples to guide judges and councils . . . . It [would be] helpful to have the options spelled out someplace, so the chief judge is not out there alone." Another said:

> I think the Act works well. Its failings come from inadequate education about how it ought to be administered, and inadequate materials and backup for a busy, beleaguered chief judge . . . . What we need is a compendium-like gloss on the . . . statute, going from analyses of the statute's general language to applications of the statute to particular fact-situations. . . . [It] could treat general concepts like "merits-relatedness," to teach chief judges to understand the ambiguities, how the statute works. Then you could treat specific recurring problems and how they fit under the statute, like how to deal with delay.

Such a resource would be of value not only to chief judges, but also to judicial council members and to circuit staff.

Accordingly, we recommend a two-pronged program to provide initial and continuing assistance to chief circuit judges and to provide a resource for council members and circuit staff.

Individual in-court orientation program for each new chief judge—We recommend that:

- the Review Committee advise each new chief circuit judge that a team consisting of an experienced current or former chief judge and one or two members of the Administrative Office General Counsel's Office who staff the Review Committee will travel to the circuit to participate, with the chief judge and members of the circuit staff that help to process complaints, in a short seminar on the Act and its administration;
- the Federal Judicial Center work with the Committee and its AO staff to design a common curriculum for this in-court program, to help promote uniformity in the topics covered, and to help ensure appropriate curriculum elements, such as hypothetical scenarios; the program curriculum should be coordinated with the elements of the online compendium, discussed below; and
- the basis for the seminar curriculum should be our Standards for Assessing Compliance with the Act (Appendix E), subject to Judicial Conference review and approval; those Standards explain the reasons underlying the Act's provisions, as interpreted in the Illustrative Rules and chief judge and council orders, and explain how the provisions apply to specific allegations.

One might ask, "Why bring an experienced chief judge from outside the circuit rather than have the former chief judge of the circuit participate in the seminar?" We see the seminar not only as a dedicated training session for the new chief judge, but also an opportunity for periodic reassessment of circuit practices and policies—a chance either to reaffirm current practices or consider new ones. A chief judge from outside the circuit is in a good position to foster that reassessment by providing a possibly different perspective. We can envision situations, however, in which the outgoing chief judge would be a valuable participant in the seminar along with the outside chief judge.

The goal here should be to provide each new chief judge with a framework for understanding what the Act requires of him or her and for assessing the circuit's current procedures for implementing the Act. That assessment would benefit from seminar participation by the circuit staff that assist in complaint processing.

Preparation and maintenance of an online "compendium" with suggested approaches and procedures, as well as guidance as to the Act's terms—The basis of the compendium, like the basis for the in-court program, should be our Standards for Assessing Compliance with the Act.

The online compendium should also include links to

- relevant provisions of the Illustrative Rules and commentary;
- chief judge and judicial council orders made publicly available as provided in our Recommendation 4, below;
- relevant provisions and commentary of the Code of Conduct for United States Judges and advisory opinions of the Codes of Conduct Committee; and
- scholarly commentary on the Act and its administration.

We see this orientation program and the compendium as projects for the Judicial Conference Review Committee, and the Federal Judicial Center can provide valuable assistance because of its experience in designing education programs for judges. Creating an online resource is of little value unless it is kept current, which requires some investment of time. We believe for this project that the potential payoff is clearly worth the time investment.

***Matters that the orientation program and compendium should cover*—**The items below are not an exhaustive list of topics; they are the matters most associated with the problematic dispositions we encountered in our review of the two samples of terminations and the terminations of high-visibility cases.

Limited inquiries—The main cause of the problematic dispositions in our 593-case sample and the high-visibility complaints was the failure of chief judges to conduct adequate inquiries before dismissing the complaint. And one of the two terminations found problematic in the 100-case sample was for that reason. Chief judges are often understandably reluctant to ask judges to respond to complaints that, while not inherently incredible, have an extremely low probability of being true, especially when the record in the underlying case reveals no problems. Seeking a response not only invades the time of a busy judge, but also may make the judge feel demeaned and disrespected. Having the circuit-level staff find and question witnesses or review transcripts is also time-consuming. Nevertheless, the costs in time and effort of preliminarily examining allegations in complaints that are not inherently incredible is offset by the benefits of demonstrating that the judicial system responds to complaints. And a judge who understands that the chief judge's purpose is to reassure interested observers about the integrity of the process will be less likely to feel insulted. The orientation program and compendium should counsel chief judges in such situations to make clear to the subject judge his or her purpose in requesting a response to a complaint.

The meaning of statutory terms—The orientation program and compendium should explain the settled meaning of such statutory terms as "directly related to the merits of a decision or procedural ruling," "not in conformity with section 351(a)," and "appropriate corrective action." Confusion over these three concepts, and others,

was particularly evident in the problematic terminations of high-visibility cases we examined.

These terms do not explain themselves. As one chief judge told us:

> Some of the statutory terms can be misleading. At the outset of my term as chief judge, I made a time investment to learn this. Some chief judges don't have that time. We desperately need back-up materials. For example, there is the "merits-related" language. You have to think about what it means, it isn't clear. If the allegation is that a judge issued a ruling in exchange for a bribe, is that allegation really "related" to the merits of the judge's ruling? You have to educate judges about that. They're not going to pick it up by osmosis.

Appointing special committees—The orientation program and compendium should stress two points about the special investigative committees authorized by 28 U.S.C. § 353:

- Chief judges and special committees have distinct roles. The chief judge's role is to determine whether there is any support—usually witnesses or information in the record—for the allegations in the complaint. A special committee's role is to explore fully the evidence that supports and that refutes the allegations, to resolve conflicts of evidence and credibility of witnesses, and to propose findings of fact and recommend conclusions to the judicial council.
- Judicial councils' authority to "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit"[45] includes ordering chief judges to appoint special committees.

When to identify a complaint—Section 351(b)'s authorizing chief judges to identify complaints was at issue in three matters reviewed in Chapter 5:

- in case A-15, the chief judge identified a complaint about ex parte contact with an attorney, a matter that received no press coverage;
- in case C-15, the chief judge identified a complaint based on "extensive newspaper coverage" about a judge who tried to influence a colleague's sentencing decision; and
- in case C-8, staff for legislators whose criticism of a judge had received national publicity asked the chief judge to identify a complaint against the judge. The chief judge apparently declined to do so because he thought he would dismiss the allegations that would form the complaint. We concluded that in this instance, the better course would have been to identify the complaint and then, if a limited inquiry indicated dismissal, to state the reasons for the dismissal in a public order.

If chief judges receive information that appears to contain some potential evidentiary support of misconduct or disability, no doubt the preferred course in almost all situations is to pursue informal resolution. The more public and high-visibility the unfiled allegations are, however, the more desirable it will be for the chief judge to identify a complaint in order to assure the public that the judicial branch has not ignored the allegations and, more broadly, that it is prepared to deal with substantive allegations. And a public resolution of publicly aired allegations is also in the subject judge's interest if the allegations are untrue.

Identifying complaints based on non-public information is also appropriate in some circumstances, e.g., the matter at issue in case A-15, or a complaint that calls for rigorous fact-finding.

Transferring a case to a judge or judges in another circuit or to the Judicial Conference—Our staff has identified eight instances since 1980 in which the Chief Justice designated a circuit judge to handle a complaint in another circuit pursuant to the intercircuit assignment statute.[46] Those eight include two of Chapter 4's high-visibility cases (case C-2 and one of the cases labeled C-12-13-14); in at least one of those two, all the home circuit judges disqualified themselves from serving as acting chief judge. None of the eight involved intercircuit transfers of judges to serve as special committee or council members.

Transfers should not be a regular occurrence, but some complaints might be better handled by judges outside the circuit. We can see reasons for and against doing so.

Complaints that a circuit might wish to transfer to another circuit include:

- a supported, nonfrivolous complaint against all the active judges of the court of appeals or against the chief judge alone, if all other active judges have recused themselves—in either case, no appellate judge would be available to perform the chief judge's duties under the Act (we say "a supported, nonfrivolous" complaint because, as commentary in the Illustrative Rules recognizes, many multiple-judge complaints are meritless; for those, it is proper for judges to invoke a rule of necessity and dismiss the complaint[47]);
- a complaint, especially a high-visibility complaint, whose local disposition might create a threat to public confidence in the process—the view that judges will go easy on colleagues with whom they dine or socialize;
- a complaint filed in a circuit beset by internal tension tied to the alleged conduct that prompted the complaint; and
- a complaint that challenges the conduct of a judge but also calls into question the policies or governance of the entire court of appeals.

Factors counseling against transfer include:

- outside judges' relative ignorance of local circumstances and personalities might make them less able to gauge what corrective action would be effective and appropriate;

- judges in other circuits may be in a poor position to persuade a judge whom they do not know well to take the action they believe is necessary and will be less able than judges of the home circuit to monitor a resolution they have imposed (the Act's concept of local judges dealing with their colleagues apparently motivated the Judicial Conference's 1997 disapproval of a bill to require that *all* complaints be referred to another circuit[48]);
- judges from another circuit may not produce the tougher outcomes that transfer proponents anticipate because such judges may be disinclined to go through the emotionally draining work of imposing tough sanctions on judges not of their own circuit; and
- transfers may increase time and expense if there is the need to ship files, arrange witnesses, and handle other matters from a distance.

We leave to others the mechanics of how to effect transfers. Illustrative Rule 18(g) ("Judicial council action where multiple judges are disqualified"), adopted by eight circuit councils, says nothing about intercircuit assignments, but the commentary says "the council might ask the judicial council of another circuit to consider the petition *or* might ask the Chief Justice to assign the matter to either the judicial council of another circuit or the Judicial Conference Review Committee"[49] (emphasis added). Under this view, if a circuit council concluded that it could not handle a serious complaint, it could simply ask the chief judge and council of another circuit to handle the matter.

Finally, the compendium should remind councils that 28 U.S.C. § 354(b)(1) authorizes them to refer any complaint to the Judicial Conference for resolution; the Conference would then refer the complaint to its Committee to Review Circuit Council Conduct and Disability Orders.

4. The Judicial Conference should ask its Review Committee to make available on www.uscourts.gov illustrative past and future chief judge dismissal orders and judicial council orders, appropriately redacted, in order to inform chief judges, judicial council members, and interested members of the media and the public of how chief judges and councils have terminated complaints and why. Circuit staff should be encouraged to send orders promptly to be considered for public availability.

The Act requires the circuits to make available in the respective court of appeals clerk's office any written order of a judicial council or the Judicial Conference imposing some form of sanction. Illustrative Rule 17 ("Public Availability of Decisions"), adopted by 11 circuit councils and in substantial form by another, recommends that each circuit make those orders, as well as chief judge and council dismissal orders, available for public inspection in its clerk's office and by deposit at the Federal Judi-

cial Center. The rule specifies the limited circumstances in which the orders should disclose the name of the subject judge.

Physical availability of hard copies of the orders in these two sites, however, is different from general accessibility of orders in published form. This problem has been recognized for some time.

- In 1993, the National Commission on Judicial Discipline and Removal recommended that the "Judicial Conference devise and monitor a system for the dissemination of information about complaint dispositions to judges and others, with the goals of developing a body of interpretive precedents and enhancing judicial and public education about judicial discipline and judicial ethics."[50]
- In 1994, the Conference "[a]greed to urge all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in *Federal Reporter 3d*, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act."[51]
- The 2000 revision of the Illustrative Rules' commentary said that without access to other judges' public orders, judges applying the Act will be "making decisions about issues under the statute quite unaware of how the same or similar issues have been treated in other circuits and without the benefit that flows from scholarly critique."[52]
- In 2002, the Conference voted to "[e]ncourage chief judges and judicial councils to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services," a recommendation that came at the suggestion of two members of Congress.[53]

Posting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders.

The federal judiciary's main website (www.uscourts.gov) already contains public advisory opinions of the Codes of Conduct Committee. Like the public advisory opinions, the public orders can be edited to delete or sanitize information that might reveal the identity of the subject judge or that is not essential to understanding an order's holding. The orders' helpfulness will be enhanced if they are published in broad categories keyed to the Act's provisions, and even more so with brief headnotes. (To be clear, we are not recommending publication of special investigative committee reports to judicial councils, which are confidential under the statute and often contain sensitive information.)

For this publication program to work, those responsible for it—we assume the Conference's Review Committee and its Administrative Office staff—need to receive

all orders promptly from the circuits, designating as appropriate those that the Conference calls "non-routine public orders" for possible posting. Illustrative Rule 17 and almost all circuit council rules recommend that those orders be sent to a central repository (now the Federal Judicial Center). We understand that not all circuits do so promptly, and we recommend that circuit councils take steps to encourage them to do so.

The Administrative Office and the Federal Judicial Center might consider whether the better repository for such orders is the Office of the General Counsel in the Administrative Office, which staffs the Review Committee. If appropriate, those two agencies might suggest a change to the Illustrative Rules.

Recommendations to encourage public and bar knowledge of the Act and its appropriate use

Here we recommend that the judicial councils take steps to promote implementation of two long-standing Judicial Conference recommendations:

- courts should consider local bar committees that could serve as conduits between members of the bar and chief judges concerning potential complaints; and
- each federal court website should prominently display links to its circuit rules and its approved form for filing complaints under the Act.

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

As discussed in Chapter 5, the National Commission on Judicial Discipline and Removal suggested such committees as a means of encouraging attorneys to come forward with allegations about judicial behavior that they may be reluctant to raise in formal complaints—or even present informally to the chief judge—for fear of retaliation from the subject judge if their identity were revealed.[54] The Judicial Conference endorsed this suggestion in general in 1994—urging circuits and courts covered by the Act 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"[55]—but, as far as we can determine, the suggestion has been implemented in any form in only one circuit. We recommend all circuits reconsider the idea.

The National Commission recommended the appointment of nonlawyers to such committees, which may provide additional perspectives and avoid having the committees appear to those outside the legal system as mechanisms established principally to protect those inside the system.

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As noted in Chapter 5, there may be other ways to establish intermediaries between the bar and the court, such as the ombudsman created by one district court.

6. Judicial councils should require all courts covered by the Act to provide information about filing a complaint on the homepage of the court website and take other steps to publicize the Act.

Concern over public awareness of the Act is long-standing. The National Commission reported in 1993 that its surveys "demonstrate both widespread ignorance about the Act in virtually every respondent group and a widely shared perception that some meritorious complaints are never filed."[56] The Commission recommended what the technology of the time would allow, including circuit councils' putting their rules for filing judicial complaints in United States Code Annotated and district courts' referencing the council rules in their local rules. In 1994, the Judicial Conference endorsed those recommendations.[57] It also endorsed the Commission recommendation that councils consider other ways to educate the bar and the public about the Act.[58]

The Internet has become an educational medium since the mid-1990s, and in 2002 the Conference urged each court to "include a prominent link on its website to the circuit's form for filing complaints . . . and its circuit's rules governing the complaint procedure."[59]

As discussed in Chapter 3, at the time our staff surveyed court websites, all 13 courts of appeals websites included this information, but only three websites had the information on the homepage. Our research staff could find no information about the complaint procedure on 53 of the 94 district court websites they examined in 2005. Of the 41 sites that had some information, only four had it on the homepage. On many of these 41 websites, the information was buried in the local rules and the information provided was sometimes simply an instruction on where to obtain a physical copy of the rules and form. The situation is apparently similar in the bankruptcy courts. (One might also learn about the Act from a notice in the clerk's office, if the person had convenient access to that office, or might ask personnel in the office. Clerk's office personnel, however, are very busy, and might not have consistent and accurate information to provide in response to such inquiries.)

We believe every court covered by the Act should comply with the Conference's 2002 recommendation to display the form and circuit rules "prominently" on its website—that is, with a link on the homepage (see Appendix H). We suggest the website include a plain-language explanation of the Act, emphasizing that it is not available to challenge judicial decisions. For example:

> Congress has created a procedure that permits any person to file a complaint in the courts about the behavior of federal judges—but not about the decisions federal judges make in deciding cases. Below is a link to the rules that explain what may be complained about, who may be complained about, where to file a complaint, and how the complaint will be processed.

> There is also a link to the form you must use.
>
> Almost all complaints in recent years have been dismissed because they do not follow the law about such complaints. The law says that complaints about judges' decisions and complaints with no evidence to support them must be dismissed.
>
> If you are a litigant in a case and believe the judge made a wrong decision—even a very wrong decision—you may not use this procedure to complain about the decision. An attorney can explain the rights you have as a litigant to seek review of a judicial decision.

This admonition may discourage at least some improper complaints.

We appreciate the concern that advertising the Act's availability may burden chief judges and their staffs with more merits-related and frivolous filings than they receive now. However, as noted in Chapter 3, we found no statistically significant relationship between the level of filings and the absence or obscurity of website information about the Act. One might thus ask, if available information does not encourage filings, why post it? The response is that the judicial branch has a responsibility to inform the public about its operations, including the availability of this complaint procedure. Furthermore, greater availability of information may indeed cause the filing of some meritorious complaints that today go unfiled because would-be complainants are unaware that the complaint mechanism exists or are unable to learn how to use it.

Finally, the Administrative Office should place on www.uscourts.gov a notice of the Act's existence and direct users to the individual court websites.

Recommendations to promote accurate understanding by legislators, press, public, and judges of how the Act is (and should be) administered

Recommendations here deal with two related needs:

- the need, by legislators, the press, the public, and judges, for accurate quantitative information about the Act's administration; and
- the need for information about the Act on the part of judges not engaged in its administration.

7. Circuit councils, through their circuit executives or the clerks of court, should take steps to ensure the submission of timely and accurate information about complaint filings and terminations.

Chapter 2 listed the errors that our staff uncovered in the data that circuit personnel reported to the Administrative Office. Circuits must improve the accuracy and precision of this information so the AO can provide to Congress, the courts, and the public generally an accurate picture of activity under the Act. A key indicator of Act

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implementation is special committee appointments. As noted, data reported to the AO for 2001–2003 show one such appointment, while in fact there were apparently at least five. Table 11 of *Judicial Business of the United States Courts* (2003) reports the circuits' actions[60] only because AO staff telephoned the circuits to check.

8. The Administrative Office should refine two aspects of its annual report on the Act's administration.

Judicial Business of the United States Courts includes two tables in response to the Act's mandate to the Administrative Office to include in its annual report a summary of complaints filed each year, the nature of the complaints, and their disposition.[61] Tables 11 and S-22 (see Appendix G) respond to this mandate, by and large very effectively. We have two suggestions:

- The annual report should tally the number of special committees appointed each year. Table 11 reports, among other things, council actions for the three most recent years in response to special committee reports, but the table does not report the number of committees appointed each year. The number of committees is important information by itself, indicating as it does the number of times each year that chief judges did not simply terminate the process on their own. Furthermore, reporting the number of complaints councils acted on without indicating the number of committees can be misleading. Reporting, as does Table 11 for 2005 (see Appendix G), that councils dismissed five complaints "After Report of Special Investigative Committee" could mean that committees were appointed to investigate five allegations filed against one judge, or against five judges, or some number in between.
- *Judicial Business* should also conform its reports of council actions in the two tables. Table 11 distinguishes between the council denials of petitions to review chief judge dismissal orders (262 in the 2005 report) and council dismissals of complaints after receiving the report of a special committee (five in the 2005 report). Table S-22 lumps these two types of dismissals together under "Action by the Judicial Council," *viz.*, "Dismissed the Complaint—267" (see Appendix G). That could lead one unfamiliar with the Act who consulted only the detailed table to believe that the councils take substantive action on many more complaints than they do.

9. The Judicial Conference Review Committee should consider periodic monitoring of the Act's administration.

Chief Justice Rehnquist appointed our Committee because, as he put it, "[t]here has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented, and I decided that the

best way to see if there are any real problems is to have a committee look into it." We believe the public and judicial branch would be well-served if the judicial branch monitored the Act's administration on a regular basis. We are not prepared to specify how frequently the monitoring should occur, but we doubt that a full-blown replication of our research would be necessary each time. This was a labor-intensive process for us, for our staff, and for the judges and supporting personnel in the circuits. More modest periodic samplings of dispositions to detect problematic areas would suffice, absent well-founded suspicion of serious problems in the Act's administration.

10. The Federal Judicial Center should seek to ensure that all judges understand the Act and how it operates.

Our first set of recommendations concerned assistance for chief circuit judges and judicial council members, those mainly responsible for administering the Act. We suspect, however, that most federal judges are unfamiliar with the Act and learn of it only if they become the object of a complaint.

The Federal Judicial Center should include a brief overview of the Act's provisions in its orientation materials for new judges. The compendium proposed in our first recommendation can provide additional information for judges who wish to learn more.

Clarifying the authority of the Conference vis-à-vis its Review Committee

11. The Judicial Conference should make clear that it has authority to review its Review Committee's decisions on appeals by complainants and judges from judicial council orders.

This question arose in connection with the Review Committee's decision described in case C-7, and it would be well to settle it. The Act is not clear on this point, and there is no guidance in the legislative history. Also unclear are the Conference's rules for processing petitions to review council actions and certificates of possible impeachable offenses,[62] issued pursuant to 28 U.S.C. §§ 331 & 360. Rule 9 of the rules for processing review of council orders provides that the Committee, "[u]nless otherwise directed by the Executive Committee of the Judicial Conference . . . shall assume the consideration and disposition of all petitions for review." The rules for processing council certificates of possible impeachable conduct, by contrast, clearly anticipate that the Review Committee or an ad hoc committee will file a report and recommendations with the Conference.

Programs to make counseling available to all judges in all circuits

12. The councils and the Judicial Conference should consider programs, as discussed in Chapter 5, to make help available by phone (or otherwise) for chief judges confronting problematic behavior and judges who may be disabled or have other problems affecting their work.

We described in Chapter 5 the Ninth Circuit program whereby an independent contractor with experience in assisting judges and lawyers is available by phone to speak with judges of the circuit who may be suffering the debilitations of advanced years or physical or emotional problems and to chief judges and others who must deal with such situations. This program can benefit not only chief circuit judges, but also chief trial judges, who, more than other trial judges, must deal with colleagues with difficulties.

Such a service is not a substitute for the remedial measures that may be imposed under the Act, but rather means to foster informal resolution of problems. Furthermore, counseling with persons skilled in recognizing and dealing with behavioral problems is likely to get to the genuine sources of problematic behavior rather than deal only with its symptoms. Judges ordinarily do not have the training to recognize and deal with psychological and physical causes of problematic behavior, and, in fact, some judges who attempt to do so beyond their expertise may make things worse. The service provided by the Ninth Circuit, as we understand it, is a promising additional means of assisting judges and thus, ultimately, those who use the courts.

The Conference might consider making a national service available to assist judges in circuits that decline to create one of their own.

Additional commentary

This report's "Foreword and Executive Summary" referred to other matters of judicial ethics that do not fall within our charge to examine how the judicial branch has administered the Judicial Conduct and Disability Act. Committees of the Judicial Conference are considering some of these matters, including the importance of judges' maintaining up-to-date lists of their financial holdings to help them know when they must recuse in cases to avoid conflicts of interest, as statutes mandate. We have commented also in Chapter 5 on steps chief circuit judges may take in such matters.

Our Committee Standards reflect the well-established view that a decision whether to recuse is ordinarily merits-related. Standard 2 says:

> A mere allegation that a judge should have recused is merits-related; the proper recourse is for a party to file a motion to recuse. The very different allegation that the judge failed to recuse for illicit reasons—i.e., not that the judge erred in not recusing, but that the judge knew he should recuse but

deliberately failed to do so for illicit purposes—is not merits-related. Such allegations are almost always dismissed for lack of factual substantiation.

Although recusal decisions are almost always merits-related and thus not covered by the Act, litigants (and sometimes others) nevertheless file complaints alleging improper failure to recuse, and chief judges must act on the complaints even if only to dismiss them. Two of the high-visibility complaints discussed in Chapter 4 sought judges' recusals, one for alleged ex parte contacts and the other because some of the judge's investments allegedly would be affected by his ruling in a case. The chief judge dismissed the complaint in case C-6 for nonconformity but could have instead, or as well, dismissed it as merits-related. The chief judge properly dismissed the complaint in case C-10 as merits-related. Those dismissals were consistent with our Standards (although in case C-6, further investigation of the alleged ex parte contacts was probably warranted).

To reduce this unnecessary burden, we encourage the Judicial Conference to consider mandating use of conflict-avoidance software and other steps to reduce potential conflicts of interest and complaints over failures to recuse.

The body of our report notes other steps courts have taken to try to reduce other judicial behavior that produces either complaints under the Act or are presented to chief circuit judges informally, such as local rules designed to avoid circuit judges' delay in producing opinions assigned to them.

Summary of recommendations concerning the administration of the Act

Table 18, on the following page, summarizes our recommendations, sorted by the object of the recommendation.

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Table 18. Summary of Committee Recommendations

Enhancing chief judges' and council members' ability to apply the Act. Recommendations to:

Judicial Conference	Judicial Councils	AO and FJC
Authorize the chair of the Review Committee to discuss with chief judges the possibility of identifying complaints for public allegations of misconduct; and to respond to requests for advice from chief judges and councils on whether to appoint special committees (pp. 110–11).		
Direct the Review Committee to develop (1) an in-court orientation program for new chief judges and (2) a compendium on the Act (pp. 112–17).		FJC education design assistance to Review Committee and AO staff (p. 113).
Direct the Review Committee to post selected chief judge and judicial council orders on www.uscourts.gov (pp. 117–18).	Encourage prompt submission of "non-routine" orders (pp. 118–19).	Consider if AO should become national repository for submitted orders (p. 119).

Encourage public and bar knowledge of the Act and its appropriate use. Recommendations to:

Judicial Conference	Judicial Councils	AO and FJC
	Suggest consideration of local committees of senior lawyers to serve as conduits between the bar and chief judges concerning possible misconduct or disability matters (p. 119).	AO should add notice on www.uscourts.gov about individual court website information (p. 121).
	Suggest and order if necessary compliance with 2002 Judicial Conference recommendation that each court website prominently provide circuit rules and forms (pp. 120–21).	

Provide accurate information about the Act's administration. Recommendations to:

Judicial Conference	Judicial Councils	AO and FJC
Consider ordering periodic replications of this study (pp. 122–23).	Insist that circuit personnel submit accurate information to the AO about complaints (pp. 121–22).	AO should consider a revision to Tables 11 & S-22 (p. 122).
Make the compendium proposed in Recommendation 1 available to all judges online (p. 123).		FJC should provide information about the Act in its judicial orientations (p. 123).

Clarify the Conference's authority vis-à-vis its Review Committee. Recommendations to:

Judicial Conference	Judicial Councils	AO and FJC
Clarify the Conference's authority to review decisions of its Review Committee (p. 123).		

Make a "private assistance" telephone line available to all judges. Recommendations to:

Judicial Conference	Judicial Councils	AO and FJC
Consider establishing a national service similar to that established in the Ninth Circuit for judges in circuits that do not replicate the program (p. 124).	Consider adopting and adapting the Ninth Circuit's program to provide ready availability of "private assistance" advice to judges (p. 124).	

Endnotes

1. P.L. 96-458, 94 Stat. 2035 (1980), originally codified at 28 U.S.C. §§ 372(c) et seq., recodified in 2002, P.L. 107-273, Justice Department Reauthorization Act of 2002, Title I, Subtitle C, 116 Stat. 1758 at 1848 (2000), as Chapter 16 of 28 U.S.C. §§ 351 et seq. (see Appendix D).

2. P.L. 101-650, 104 Stat. 5122 (1990).

3. Report of the National Commission on Judicial Discipline and Removal (1993).

4. *Id.* at 124.

5. Barr and Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 43 (1993) (published in substantially similar form as *Administration of the Federal Judicial Conduct and Disability Act of 1980*, *in* 1 Research Papers of the National Commission on Judicial Discipline and Removal 477 (1993)).

6. Geyh, *Informal Methods of Judicial Discipline*, 142 U. Pa. L. Rev. 243, 313 (1994) (published in substantially similar form as *Means of Judicial Discipline Other than Those Prescribed by the Judicial Discipline Statute, 28 U.S.C. Section 372(c)*, *in* 1 Research Papers of the National Commission on Judicial Discipline and Removal 713 (1993)).

7. Marcus, *Who Should Regulate Federal Judges, and How?*, 1 Research Papers of the National Commission on Judicial Discipline and Removal 363 (1993).

8. Barr and Willging, Statement of Allegations and Reasons in Chief Judge Dismissal Orders Under the Judicial Conduct and Disability Act of 1980, 1 (Federal Judicial Center 2002).

9. *E.g.*, Reiger, *The Judicial Council Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 Emory L. J. 45 (1988); Comment, *Judicial Misconduct and Politics in the Federal System: A Proposal for Revising the Judicial Councils Act*, 75 Cal. L. Rev. 1071 (1987); M. Volcansek, Judicial Impeachment, None Called for Justice (1993) (especially at 83–87).

10. Fitzpatrick, *Misconduct and Disability of Federal Judges: The Unreported Informal Responses*, 71(5) Judicature 282 (1986); Fitzpatrick, *Building a Better Bench: Informally Addressing Instances of Judicial Misconduct*, 44(1) Judges' Journal 16 (Winter 2005).

11. *See* Burbank, *The Act's History*, *in* Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, 131 U. Pa. L. Rev. 283, at 291–309 (1982).

12. P.L. 101-650, Judicial Improvements Act of 1990, Title V, 104 Stat. 5089 at 5122 (1990).

13. The Act had been codified at 28 U.S.C. 372(c) and is now 28 U.S.C. §§ 351–364.

14. Codified at 28 U.S.C. § 604(h)(2).

15. *See* Barr and Willging, *Decentralized Self-Regulation*, *supra* note 5, at 43.

16. P.L. 104-134, 110 Stat. 1321, April 26, 1996.

17. *See* 28 U.S.C. § 1915(b)(1).

18. *See* Barr and Willging, *Decentralized Self-Regulation*, *supra* note 5, at 50.

19. Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58.

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

21. Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58.

22. Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 30.

23. Barr and Willging, *Statement of Allegations, supra* note 8, at 1–2.

24. Barr and Willging, *Decentralized Self-Regulation*, *supra* note 5, at 31 & 79.

25. Table 16, *supra* p. 95, rows 1 & 4.

26. Administrative Office of the U.S. Courts, 1980 Annual Report of the Director, at 124; Judicial Business of the United States Courts (1991) at 81; Judicial Business of the United States Courts (2003), at 14 (excludes Court of Appeals for the Federal Circuit).

27. Barr and Willging, *Decentralized Self-Regulation*, *supra* note 5, at 43.

28. "Impeachments of Judges" found under "Judges of the U.S. Courts" at www.fjc.gov/history/home.nsf.

29. *Symposium on the Future of the Federal Courts*, 46 Am. U. L. Rev. 263, 273 (1996) (keynote address of Chief Justice William H. Rehnquist).

30. "Enhancement of judicial information dissemination," 28 U.S.C. § 476.

31. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. Pa. L. Rev. 1639, 1665 (2003).

32. 126 Cong. Rec. 28,092 (1980) (as quoted in Illustrative Rules Governing Complaints of Judicial Misconduct and Disability 61–62 (Administrative Office of the U.S. Courts, 2000)).

33. Report of the National Commission on Judicial Discipline and Removal (1993), at 113.

34. *Quoted in* Barr and Willging, *Decentralized Self-Regulation, supra* note 5, at n.293.

35. Report of the National Commission on Judicial Discipline and Removal (1993), at 113.

36. Geyh, *Informal Methods, supra* note 6, at 313.

37. Fitzpatrick, *Misconduct and Disability, supra* note 10, at 283.

38. Barr and Willging, *Decentralized Self-Regulation*, *supra* note 5, at 139–40.

39. *Id.* at 140–43.

40. Report of the National Commission on Judicial Discipline and Removal (1993), at 101.

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

42. Fitzpatrick, *Building a Better Bench, supra* note 10, at 44(1).

43. Graber, *Judicial Wellness Committee Focuses on Judges Health and Well Being*, Ninth Circuit Annual Report, Apr. 2002.

44. Fogel, *Confidential Hotline Addresses Unique Needs of Federal Judges*, *in* GOOD HEALTH (publication of the Judicial Wellness Committee of the Ninth Circuit Judicial Council), Spring 2004.

45. 28 U.S.C. § 332(d)(1).

46. 28 U.S.C. § 291(a).

47. Rule 18 ("Disqualification"), Illustrative Rules Governing Complaints of Judicial Misconduct and Disability, commentary at 59 (Administrative Office of the U.S. Courts, 2000).

48. Report of the Proceedings of the Judicial Conference of the United States, Sept. 1997, at 81–82.

49. Rule 18 ("Disqualification"), Illustrative Rules Governing Complaints of Judicial Misconduct and Disability, commentary at 75–78 (Administrative Office of the U.S. Courts, 2000).

50. Report of the National Commission on Judicial Discipline and Removal 109 (1993).

51. Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28.

52. Rule 17 ("Public Availability of Decisions"), Illustrative Rules Governing Complaints of Judicial Misconduct and Disability, commentary at 30–33 (Administrative Office of the U.S. Courts, 2000).

53. Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58.

54. Report of the National Commission on Judicial Discipline and Removal (1993), at 101.

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

56. Report of the National Commission on Judicial Discipline and Removal (1993), at 99–100.

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

58. *Id*.

59. Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58.

60. Judicial Business of the United States Courts (2003), at 29.

61. As codified at 28 U.S.C. § 604(h)(2).

62. "Rules of the Judicial Conference . . . for the Processing of Petitions for Review of Circuit Council Orders, . . ." (as revised, Sept. 20, 1989) and "Rules . . .for the Processing of Certificates from Judicial Councils that a Judicial Officer Might Have Engaged in Impeachable Conduct," (as revised, Sept. 23–24, 1991), in Guide to Judicial Policies and Procedures, vol. III, sec. C, Ch. 2.

Appendix A

Announcement of Committee Appointment

Chief Justice Appoints Committee to Evaluate Judicial Discipline System

[May 25, 2004]

Chief Justice William H. Rehnquist has appointed Justice Stephen Breyer to chair a committee that will evaluate how the federal judicial system is dealing with judicial misbehavior and disability. "There has been some recent criticism from Congress about the way in which the Judicial Conduct and Disability Act of 1980 is being implemented, and I decided that the best way to see if there are any real problems is to have a committee look into it," the Chief Justice explained. In addition to Justice Breyer, Judge J. Harvie Wilkinson, former chief judge of the U.S. Court of Appeals for the Fourth Circuit, Judge Pasco M. Bowman, former chief judge of the U.S. Court of Appeals for the Eighth Circuit, Judge D. Brock Hornby, former chief judge of the U.S. District Court for the District of Maine, Judge Sarah Evans Barker, former chief judge of the U.S. District Court for the Southern District of Indiana, and Sally M. Rider, the administrative assistant to the Chief Justice, will serve on the committee.

The committee will report directly to the Chief Justice and will be assisted by staff from the Administrative Office of the U.S. Courts and the Federal Judicial Center. The committee's first meeting will be in June in Washington. The last comprehensive look into the judicial discipline system was performed by the National Commission on Judicial Discipline and Removal, which issued its report in 1993.

Appendix B

Committee Members

Stephen G. Breyer has been an associate justice on the United States Supreme Court since 1994. He served on the U.S. Court of Appeals for the First Circuit from 1980 until his appointment to the Supreme Court and from 1990 until then was chief judge of the circuit, and thus a member of the U.S. Judicial Conference and chairman of the circuit judicial council.

Justice Breyer clerked for Justice Arthur Goldberg during the October Term, 1964, was on the Harvard Law School faculty from 1967 until 1994, was special counsel to the Senate Judiciary Committee's Administrative Practices Subcommittee and chief counsel to the full committee, and was one of the initial members of the United States Sentencing Commission. He is a graduate of Stanford University, Magdalen College, Oxford, and the Harvard Law School.

Sarah E. Barker has been a U.S. district judge for the Southern District of Indiana since 1984, and was chief judge from 1994 until 2000. She was a member of the Judicial Conference of the United States from 1988 to 1991 and during that time served on the Conference's Executive Committee. She also served on the circuit's judicial council.

She served previously as a legislative assistant to U.S. Representative Gilbert Gude and then to Senator Charles Percy, and then as special counsel to the Senate Government Operations Committee's permanent subcommittee on investigations. She was U.S. attorney for the Southern District of Indiana from 1981 until 1984, having served previously as assistant U.S. attorney in that office. She also practiced law in Indianapolis. She is a graduate of Indiana University and American University's Washington College of Law.

Pasco M. Bowman is a senior judge on the U.S. Court of Appeals for the Eighth Circuit, to which he was appointed in 1983. He served as chief judge and thus as chairman of the circuit judicial council and as a member of the Judicial Conference of the United States in 1998 and 1999.

Judge Bowman practiced law in New York City from 1958 until 1964, when he joined the faculty of the University of Georgia Law School. Subsequently, he was dean and professor of law at Wake Forest University, a visiting professor at the University of Virginia Law School, and dean and professor of law at the University of Missouri, Kansas City School of Law. He is a graduate of Bridgewater College, the New York University School of Law, and holds an LL.M. from the law school of the University of Virginia.

D. Brock Hornby has been a U.S. district judge for the District of Maine since 1990 and was chief district judge from 1996 to 2003. He was a member of the Judicial Conference of the United States from 2001 to 2004 and during that time served on the Conference's Executive Committee. He also served on the circuit's judicial council.

He was a U.S. magistrate judge in the District of Maine and then an associate justice of the Maine Supreme Judicial Court. Judge Hornby clerked for Judge John Minor Wisdom on the U.S. Court of Appeals for the Fifth Circuit, was an associate professor of law at the University of Virginia, and practiced law in Portland, Maine. He is a graduate of the University of Western Ontario and the Harvard Law School.

Sally M. Rider is the administrative assistant to Chief Justice John G. Roberts, Jr., and served in that position for Chief Justice William H. Rehnquist from 2000 to his death in 2005.

She was staff counsel to the House Committee on Interior and Insular Affairs from 1986 to 1987. She then was a trial attorney in the Justice Department's Civil Division, an assistant U.S. attorney in the District of Columbia and later deputy chief of that U.S. attorney office's civil division, and an attorney at the State Department. Later this year she will become director of the William H. Rehnquist Center on the Constitutional Structures of Government, a nonpartisan national research center being established in Tucson by the University of Arizona to honor the Chief Justice's legacy. Rider is a graduate of the University of Arizona and its College of Law.

J. Harvie Wilkinson III has been a judge on the U.S. Court of Appeals for the Fourth Circuit since 1984. He served as chief judge, and thus as chairman of the circuit judicial council and a member of the Judicial Conference of the United States from 1996 to 2003.

Judge Wilkinson was a law clerk for Justice Lewis F. Powell from 1972 to 1973 and was then an associate professor at the University of Virginia Law School. He was the editorial page editor for the *Norfolk Virginian-Pilot* from 1978 to 1981, then served as deputy assistant attorney general for the U.S. Justice Department's Civil Rights Division. Immediately prior to his judicial appointment, he was a professor at the University of Virginia Law School. He is a graduate of Yale University and the University of Virginia Law School.

Appendix C

Key Staff

Jeffrey N. Barr, **Joe S. Cecil**, and **Thomas E. Willging** were the project's field investigators and prepared the initial descriptions of the terminations that form the basis of Chapter 4. They conducted the preliminary assessments of complaint files in the circuit headquarters for the stratified sample's 593 terminations, and Barr and Willging later conducted the preliminary assessments of the terminations of the post-2003 "high-visibility" complaints. The Committee's independent review of these preliminary assessments constitute a major portion of the report's findings. While in the circuits, they also conducted extensive interviews with current and former chief circuit judges and circuit executives and other staff who assist in processing complaints. Those interviews, along with Committee members' interviews of chief circuit judges, provide the basis for Chapters 3 and 5. In addition to the field work on the 593-case sample, Cecil was principally responsible for drawing the samples and for the quantitative analysis of all activity under the Act reported in Chapter 2.

Barr has been an attorney at the Administrative Office of the U.S. Courts since 1995. From 1995 to 2004, he was principal staff to the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders. From 1985 to 1995 he was a staff attorney for the U.S. Court of Appeals for the First Circuit, where judicial conduct matters was one of his principal responsibilities. He attended Yale College and Harvard Law School.

Barr and Willging coauthored *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980* (1993), based on their research for the National Commission on Judicial Discipline and Removal, and *Statement of Allegations and Reasons in Chief Judge Dismissal Orders Under the Judicial Conduct and Disability Act of 1980* (2002), a follow-up study requested by the House Judiciary Subcommittee on Courts, the Internet, and Intellectual Property (full citations for both reports are in notes 5 and 8 of our report).

Cecil and Willging have been senior research associates at the Federal Judicial Center since the 1980s. Cecil directs the Center's Program on Scientific and Technical Evidence and is principal editor of the *Reference Manual on Scientific Evidence*. His other major research areas include civil and appellate procedure, jury competence in complex civil litigation, and claim construction in patent litigation. He received his J.D. and a Ph.D. in psychology from Northwestern University.

Willging's other principal research area is complex civil litigation, especially class actions, as reflected in his major contributions to the Center's *Manual for Complex Litigation, Fourth* (2004). He holds B.A. and J.D. degrees from Catholic University in Washington, D.C., and an LL.M. from Harvard University Law School.

Angelia N. Levy, a Federal Judicial Center research assistant, was principally responsible for the management of the confidential complaint files and other project materials provided to Committee members for the assessments reported in Chapter 4. She has provided re-

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search and editorial assistance on other Center research and was the project coordinator for the *Manual for Complex Litigation, Fourth*. She holds a B.A. in Communications from the University of Pittsburgh.

Russell R. Wheeler served as overall staff coordinator and oversaw the preparation of various Committee documents. He left the Center in 2005 but has continued his work in support of the Committee. He was a reporter for the Judicial Conference's Federal Courts Study Committee, a consultant to its Long Range Planning Committee, and provided research for the statutory Commission on Structural Alternatives for the Federal Courts of Appeals. He is a graduate of Augustana College and the University of Chicago (Ph.D., political science).

George Cort, **David Guth**, and **Nicholle Stahl-Reisdorff** of the Center provided additional research support for aspects of the Committee's work. **Geoff Erwin** of the Center edited and formatted several internal Committee reports as well as this final report.

Appendix D

Judicial Conduct and Disability Act

(Chapter 16, Title 28, United States Code)

CHAPTER 16—COMPLAINTS AGAINST JUDGES AND JUDICIAL DISCIPLINE

Sec.
351. Complaints; judge defined.
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364. Effect of felony conviction.

§ 351. Complaints; judge defined

(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.

(b) Identifying Complaint by Chief Judge.—In the interests of the effective and expeditious administration of the business of the courts and on the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this chapter and thereby dispense with filing of a written complaint.

(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, or, if the conduct complained of is that of the chief judge, to that circuit judge in regular active service next senior in date of commission (hereafter, for purposes of this chapter only, included in the term "chief judge"). The clerk shall simultaneously transmit a copy of the

complaint to the judge whose conduct is the subject of the complaint. The clerk shall also transmit a copy of any complaint identified under subsection (b) to the judge whose conduct is the subject of the complaint.

(d) Definitions.—In this chapter—

(1) the term "judge" means a circuit judge, district judge, bankruptcy judge, or magistrate judge; and

(2) the term "complainant" means the person filing a complaint under subsection (a) of this section.

§ 352. Review of complaint by chief judge

(a) Expeditious Review; Limited Inquiry.—The chief judge shall expeditiously review any complaint received under section 351(a) or identified under section 351(b). 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 are incapable of being established through investigation.

For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. Such response shall not be made available to the complainant unless authorized by the judge filing the response. The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and any other person who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute.

(b) Action by Chief Judge Following Review.—After expeditiously reviewing a complaint under subsection (a), the chief judge, by written order stating his or her reasons, may—

(1) dismiss the complaint—

(A) if the chief judge finds the complaint to be—

(i) not in conformity with section 351(a);

(ii) directly related to the merits of a decision or procedural ruling; or

(iii) frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation; or

(B) when a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence; or

(2) conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events.

The chief judge shall transmit copies of the written order to the complainant and to the judge whose conduct is the subject of the complaint.

(c) Review of Orders of Chief Judge.—A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof. The denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

(d) Referral of Petitions for Review to Panels of the Judicial Council.—Each judicial council may, pursuant to rules prescribed under section 358, refer a petition for review filed under subsection (c) to a panel of no fewer than 5 members of the council, at least 2 of whom shall be district judges.

§ 353. Special committees

(a) Appointment.—If the chief judge does not enter an order under section 352(b), the chief judge shall promptly—

(1) appoint himself or herself and equal numbers of circuit and district judges of the circuit to a special committee to investigate the facts and allegations contained in the complaint;

(2) certify the complaint and any other documents pertaining thereto to each member of such committee; and

(3) provide written notice to the complainant and the judge whose conduct is the subject of the complaint of the action taken under this subsection.

(b) Change in Status or Death of Judges.—A judge appointed to a special committee under subsection (a) may continue to serve on that committee after becoming a senior judge or, in the case of the chief judge of the circuit, after his or her term as chief judge terminates under subsection (a)(3) or (c) of section 45. If a judge appointed to a committee under subsection (a) dies, or retires from office under section 371(a), while serving on the committee, the chief judge of the circuit may appoint another circuit or district judge, as the case may be, to the committee.

(c) Investigation by Special Committee.—Each committee appointed under subsection (a) shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit.

§ 354. Action by judicial council

(a) Actions Upon Receipt of Report.—

(1) Actions.—The judicial council of a circuit, upon receipt of a report filed under section 353(c)—

(A) may conduct any additional investigation which it considers to be necessary;

(B) may dismiss the complaint; and

(C) if the complaint is not dismissed, shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit.

(2) Description of possible actions if complaint not dismissed.—

(A) In general.—Action by the judicial council under paragraph (1)(C) may include—

(i) ordering that, on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint;

(ii) censuring or reprimanding such judge by means of private communication; and

(iii) censuring or reprimanding such judge by means of public announcement.

(B) For article iii judges.—If the conduct of a judge appointed to hold office during good behavior is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include—

(i) certifying disability of the judge pursuant to the procedures and standards provided under section 372(b); and

(ii) requesting that the judge voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply.

(C) For magistrate judges.—If the conduct of a magistrate judge is the subject of the complaint, action by the judicial council under paragraph (1)(C) may include directing the chief judge of the district of the magistrate judge to take such action as the judicial council considers appropriate.

(3) Limitations on judicial council regarding removals.—

(A) Article iii judges.—Under no circumstances may the judicial council order removal from office of any judge appointed to hold office during good behavior.

(B) Magistrate and bankruptcy judges.—Any removal of a magistrate judge under this subsection shall be in accordance with section 631 and any removal of a bankruptcy judge shall be in accordance with section 152.

(4) Notice of action to judge.—The judicial council shall immediately provide written notice to the complainant and to the judge whose conduct is the subject of the complaint of the action taken under this subsection.

(b) Referral to Judicial Conference.—

(1) In general.—In addition to the authority granted under subsection (a), the judicial council may, in its discretion, refer any complaint under section 351, together with the record of any associated proceedings and its recommendations for appropriate action, to the Judicial Conference of the United States.

(2) Special circumstances.—In any case in which the judicial council determines, on the basis of a complaint and an investigation under this chapter, or on the basis of information otherwise available to the judicial council, that a judge appointed to hold office during good behavior may have engaged in conduct—

(A) which might constitute one or more grounds for impeachment under article II of the Constitution, or

(B) which, in the interest of justice, is not amenable to resolution by the judicial council,

the judicial council shall promptly certify such determination, together with any complaint and a record of any associated proceedings, to the Judicial Conference of the United States.

(3) NOTICE TO COMPLAINANT AND JUDGE.—A judicial council acting under authority of this subsection shall, unless contrary to the interests of justice, immediately submit written notice to the complainant and to the judge whose conduct is the subject of the action taken under this subsection.

§ 355. Action by Judicial Conference

(a) IN GENERAL.—Upon referral or certification of any matter under section 354(b), the Judicial Conference, after consideration of the prior proceedings and such additional investigation as it considers appropriate, shall by majority vote take such action, as described in section 354(a)(1)(C) and (2), as it considers appropriate.

(b) IF IMPEACHMENT WARRANTED.—

(1) IN GENERAL.—If the Judicial Conference concurs in the determination of the judicial council, or makes its own determination, that consideration of impeachment may be warranted, it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination.

(2) IN CASE OF FELONY CONVICTION.—If a judge has been convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under section 354 (b), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary.

§ 356. Subpoena power

(a) JUDICIAL COUNCILS AND SPECIAL COMMITTEES.—In conducting any investigation under this chapter, the judicial council, or a special committee appointed under section 353, shall have full subpoena powers as provided in section 332(d).

(b) JUDICIAL CONFERENCE AND STANDING COMMITTEES.—In conducting any investigation under this chapter, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331, shall have full subpoena powers as provided in that section.

§ 357. Review of orders and actions

(a) Review of Action of Judicial Council.—A complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof.

(b) Action of Judicial Conference.—The Judicial Conference, or the standing committee established under section 331, may grant a petition filed by a complainant or judge under subsection (a).

(c) No Judicial Review.—Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

§ 358. Rules

(a) In General.—Each judicial council and the Judicial Conference may prescribe such rules for the conduct of proceedings under this chapter, including the processing of petitions for review, as each considers to be appropriate.

(b) Required Provisions.—Rules prescribed under subsection (a) shall contain provisions requiring that—

(1) adequate prior notice of any investigation be given in writing to the judge whose conduct is the subject of a complaint under this chapter;

(2) the judge whose conduct is the subject of a complaint under this chapter be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing; and

(3) the complainant be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information.

(c) Procedures.—Any rule prescribed under this section shall be made or amended only after giving appropriate public notice and an opportunity for comment. Any such rule shall be a matter of public record, and any such rule promulgated by a judicial council may be modified by the Judicial Conference. No rule promulgated under this section may limit the period of time within which a person may file a complaint under this chapter.

§ 359. Restrictions

(a) Restriction on Individuals Who Are Subject of Investigation.—No judge whose conduct is the subject of an investigation under this chapter shall serve upon a special committee appointed under section 353, upon a judicial council, upon the Judicial Conference, or upon the standing committee established under section 331, until all proceedings under this chapter relating to such investigation have been finally terminated.

(b) Amicus Curiae.—No person shall be granted the right to intervene or to appear as amicus curiae in any proceeding before a judicial council or the Judicial Conference under this chapter.

§ 360. Disclosure of information

(a) CONFIDENTIALITY OF PROCEEDINGS.—Except as provided in section 355, all papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that—

(1) the judicial council of the circuit in its discretion releases a copy of a report of a special investigative committee under section 353(c) to the complainant whose complaint initiated the investigation by that special committee and to the judge whose conduct is the subject of the complaint;

(2) the judicial council of the circuit, the Judicial Conference of the United States, or the Senate or the House of Representatives by resolution, releases any such material which is believed necessary to an impeachment investigation or trial of a judge under article I of the Constitution; or

(3) such disclosure is authorized in writing by the judge who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331.

(b) PUBLIC AVAILABILITY OF WRITTEN ORDERS.—Each written order to implement any action under section 354(a)(1)(C), which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order shall be accompanied by written reasons therefor.

§ 361. Reimbursement of expenses

Upon the request of a judge whose conduct is the subject of a complaint under this chapter, the judicial council may, if the complaint has been finally dismissed under section 354(a)(1)(B), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation which would not have been incurred but for the requirements of this chapter.

§ 362. Other provisions and rules not affected

Except as expressly provided in this chapter, nothing in this chapter shall be construed to affect any other provision of this title, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Appellate Procedure, or the Federal Rules of Evidence.

§ 363. Court of Federal Claims, Court of International Trade, Court of Appeals for the Federal Circuit

The United States Court of Federal Claims, the Court of International Trade, and the Court of Appeals for the Federal Circuit shall each prescribe rules, consistent with the provisions of this chapter, establishing procedures for the filing of complaints with respect to the conduct of any judge of such court and for the investigation and resolution of such

complaints. In investigating and taking action with respect to any such complaint, each such court shall have the powers granted to a judicial council under this chapter.

§ 364. Effect of felony conviction

In the case of any judge or judge of a court referred to in section 363 who is convicted of a felony under State or Federal law and has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the following shall apply:

(1) The judge shall not hear or decide cases unless the judicial council of the circuit (or, in the case of a judge of a court referred to in section 363, that court) determines otherwise.

(2) Any service as such judge or judge of a court referred to in section 363, after the conviction is final and all time for filing appeals thereof has expired, shall not be included for purposes of determining years of service under section 371(c), 377, or 178 of this title or creditable service under subchapter III of chapter 83, or chapter 84, of title 5.

Appendix E

Committee Standards for Assessing Compliance with the Act

(as approved by the Committee in August 2004,
with revisions approved June 2005 and March 2006)

1. "Expeditious review." Section 352(a).

The commentary to Illustrative Rule 4 defines this standard as follows: "In our view, it would be a rare case in which more than sixty days is permitted to elapse from the filing of the complaint to the chief judge's action on it." The researchers will demarcate sixty days as the outer limit of expeditious review and report to the Committee what percentage of complaints do not result in a ruling by the chief judge within sixty days. The researchers will be able to report to the Committee the time taken for chief judge disposition on a circuit-by-circuit basis. (Evaluating expeditious review may be possible only for complaints in which there is no petition for judicial council review of a chief judge's action, because the AO data files contain only one termination date, which is keyed to the overall disposition of the complaint.)

2. "Directly related to the merits of a decision or procedural ruling." Section 352(b)(1)(A)(ii).

The core policy reflected here is that the complaint procedure cannot be a means for collateral attack on the substance of a judge's rulings. The interest protected is the independence of the judge in the course of deciding Article III cases and controversies. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits related.

This constitutes a broad reading of the phrase "decision or procedural ruling." It is not limited to rulings issued in deciding cases per se. Thus, a complaint challenging the correctness of a judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits related—i.e., as challenging the substance of the judge's administrative determination to dismiss the complaint—even though it does not concern the judge's rulings in any case. A petition for review can be filed with the circuit council. Similarly, an allegation that a chief judge had incorrectly declined to approve a Criminal Justice Act voucher is merits related under this standard.

Thus, an allegation—however unsupported—that a judge conspired with a prosecutor in order to reach a particular ruling is not merits related, even though it "relates" to a ruling in a colloquial sense. What that allegation attacks is the propriety of conspiring with the prosecutor. The allegation thus goes beyond a mere attack on the correctness ("the merits") of the ruling itself.

Similarly, an allegation—however unsupported—that a judge ruled against the complainant because the complainant was Asian, or because the judge doesn't like the complainant personally, is not merits related. What the allegation attacks is the propriety of

arriving at rulings with an illicit or improper motive. The allegation thus goes beyond a mere attack on the correctness of the ruling itself.

Most such complaints are more properly dismissed as frivolous—i.e., lacking in factual substantiation. If a judge did in fact conspire with a prosecutor, or rule on the basis of a party's ethnicity, that is fodder for the complaint process because it is not merits related.

The same standard applies to allegations concerning a judge's failure to recuse. A mere allegation that a judge should have recused is indeed merits related; the proper recourse is for a party to file a motion to recuse. The very different allegation that the judge failed to recuse for illicit reasons—i.e., not that the judge erred in not recusing, but that the judge knew he should recuse but deliberately failed to do so for illicit purposes—is not merits related. Such allegations are almost always dismissed for lack of factual substantiation.

In the same spirit, an allegation that a judge used an inappropriate term to refer to a class of people is not merits related merely because the judge used it on the bench or in an opinion. The correctness of the judge's rulings is not at stake. An allegation that a judge was rude to counsel or others while on the bench is not merits related.

As the 1993 Barr-Willging study noted at 65ff, whether or not an allegation is merits-related has nothing to do with whether or not the complainant has an adequate appellate remedy. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging incorrect rulings is merits related even though the complainant—a non-party—has no judicial recourse. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (e.g., vacating a ruling that resulted from an improper ex parte communication).

A complaint of delay in a single case is properly dismissed as merits related. Such an allegation may be said to challenge the correctness of an official action of the judge, i.e., the official action of assigning a low priority to deciding the particular case in question. A judicial remedy exists in the form of a mandamus petition. But, by the same token, an allegation of an habitual pattern of delay in a number of cases, or an allegation of deliberate delay arising out of an illicit motive, is not merits related.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a nonfrivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand, then the chief judge may presume the judge's choice of language was merits-related. Thus a chief judge may properly dismiss an allegation that a judge's language that is relevant to a ruling was inserted out of an illicit motive, absent evidence aside from the ruling itself to suggest improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then the chief judge should ordinarily inquire of the judge complained against. If such an inquiry demonstrates that the challenged language was indeed relevant to the case at hand, then the chief judge may properly dismiss the allegation.

3. "Not in conformity with section 351(a)." Section 352(b)(1)(A)(i).

This language permits dismissal of an allegation that, even if true, does not constitute misconduct under the statutory standard.

This standard does not appear susceptible to precise definition outside the context of particular fact-situations. Presumably that was the intent of the Act's drafters.

The standard is given such coherence as it has by the Code of Conduct for U.S. Judges and the accumulated precedent of the circuits under the Act, insofar as those precedents have been revealed. One can assess dismissals under this standard by asking whether a reasonable observer would see a significant possibility that the allegation did meet the statutory standard. This is essentially the approach of the 1993 study (see, e.g., fn. 60 at 57).

Allegations of discourteous behavior by a judge may raise this problem. It cannot always be clear what degree of alleged discourtesy transcends the expected rough-and-tumble of litigation and moves into the sphere of cognizable misconduct. These appraisals have an "I know it when I see it" quality. Again, when in doubt—when a reasonable observer would think it possible (not 50+%, but 20%) that the alleged discourtesy was serious enough—the researchers should treat the allegation as cognizable.

Needless to say, the fact that a judge's alleged conduct occurred off the bench and had nothing to do with the performance of official duties, absolutely does not mean that the allegation cannot meet the statutory standard. The Code of Conduct for U.S. Judges expressly covers a wide range of extra-official activities. Allegations that a judge personally participated in fundraising for a charity or attended a partisan political event—conduct having nothing to do with official duties—are certainly cognizable.

Nevertheless, many might argue that judges are entitled to some zone of privacy in extra-official activities into which their colleagues ought not venture. Perhaps the statutory standard of misconduct could be construed in an appropriate case to have such a concept implicitly built-in. Thus, for example, a chief judge might decline to investigate an allegation that a judge habitually was nasty to her husband, yelling and making a scene in public (as long as there was no allegation of criminal conduct such as physical abuse), even though this might embarrass the judiciary, on the ground that such matters do not constitute misconduct. Complaints raising such issues are so rare as to obviate the need for ground rules for them in advance.

More common are complaints alleging conduct that occurred before the judge went on the federal bench. Whether such an allegation can constitute misconduct under the statutory standard is a question that the judiciary does not appear to have resolved conclusively. It would seem that at least some chief judges believe that the Act simply does not extend to pre-judicial conduct. A contrary view is that pre-judicial conduct can be prejudicial to the current administration of the business of the courts (e.g., the extreme case of a well-publicized allegation with some factual support that a judge had committed a felony while in private practice), so the statutory standard does not preclude allegations concerning pre-judicial conduct.

Rather than have the researchers try to resolve such an important question that the circuit councils themselves have not settled, the researchers will place any such cases (probably two to five) in a separate category and identify them for Committee review.

4. "Frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred." Section 352(b)(1)(A)(iii).

These two clauses both set out the same standard: "frivolous" means "lacking sufficient evidence to raise an inference that misconduct has occurred."

This second clause was added in the 2002 amendments, and it seems clear that it was added in order to define "frivolous." Without that definition, a layperson's colloquial understanding would translate "frivolous" as unimportant. Thus, readers of a public order dismissing as frivolous groundless claims of racial bias might mistakenly conclude that the judiciary did not consider racial bias an important concern.

Accordingly, these are not two separate standards that need to be analyzed separately. The second clause is simply a helpful elaboration of what is meant by "frivolous."

The key question for the review of complaints dismissed under this standard will be, "When does a complaint allege enough to call for a limited inquiry by the chief judge under section 352(b)(1)(B), rather than a simple dismissal as frivolous?" There can be no hard and fast rule, but generally all a complaint (i.e., a complaint that is not inherently incredible and is not subject to dismissal on other grounds) need do is assert that the complaint's allegation is supported by the transcript or by a named witness. Then it should be incumbent on the chief judge (through staff as the chief judge deems appropriate, of course) to consult the transcript or question the alleged witness. Indeed, a complaint need not itself identify a particular transcript or witness, if the complaint sets forth allegations that are capable of being verified by looking at identifiable transcripts or questioning identifiable witnesses. Depending on what the transcript or the witnesses reveal, it may be appropriate for the chief judge to question the judge complained against.

In the situation where a complaint raises an allegation not inherently incredible as to which only the judge complained against is a practicable source, then it should be incumbent on the chief judge to question the judge complained against. An example is an allegation by a court employee that on occasions when she was alone with the judge, he touched her inappropriately. There are no witnesses and no transcript. Even if the chief judge, from personal knowledge of the judge complained against, is morally certain that this allegation is false, the Act requires that the chief judge at least make a limited inquiry of the judge complained against.

An allegation may be dismissed as inherently incredible even if it is not literally impossible for the allegation to be true. An allegation is "inherently incredible" if no reasonable person would believe that the allegation, either on its face or in the light of other available evidence, could be true. For example, an allegation that a judge accepted a bribe in return for permitting the filing of a timely response to a civil complaint that the defendant had a legal right to file, may not be literally impossible, but is sufficiently incredible that, even if the complaint named witness to the transaction, the chief judge has no obligation to inquire of the named witness before dismissing the complaint.

5. "When a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." Section 352(b)(1)(B). But—"The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." Section 352(a).

These two statutory standards should be read to dovetail. In other words, a matter is not "reasonably" in dispute if a limited inquiry shows the allegations to lack any factual foundation or to be conclusively refuted by objective evidence.

The fundamental principle here is that an allegation is not "conclusively refuted by objective evidence" simply because the judge complained against denies it. The limited in-

quiry has to produce something more than that in the way of "refutation" before it will be appropriate to dismiss a complaint (that is not inherently incredible) without a special committee investigation. If it is literally the complainant's word against the judge's—there is simply no other significant evidence—then there must be a special committee investigation. This is because who is telling the truth is a matter reasonably in dispute (even if the chief judge is morally certain that the judge complained against is no liar). A straight-up credibility determination, in the absence of other significant evidence, is ordinarily for the circuit council, not the chief judge.

Dismissal following a limited inquiry typically occurs where the complaint refers to transcripts or to witnesses, and when the chief judge consults the transcripts and questions the witnesses, and they all support the judge.

The researchers may find dismissals following limited chief judge inquiry in which it appears that the chief judge may have given excessive weight to the denial of the judge complained against. These should be coded as problematic. For example, the complaint alleges that the judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. The chief judge is told by the judge complained against and one witness that the judge did not say X, and the chief judge (who in private never believed for one second that the complaint had any validity) dismisses the complaint without ever questioning the other four possible witnesses.

If all five witnesses say the judge did not say X, dismissal is called for. If potential witnesses, reasonably accessible, have not been questioned, then the matter remains reasonably in dispute.

6. "Incapable of being established through investigation." Section 352(b)(1)(A)(iii).

Arguably, the only situation in which dismissal on this basis is appropriate is the situation of the unidentified or unavailable source. For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. The judge complained against denies it. The chief judge requests that the complainant (who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can evaluate the unnamed witness's account. The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. The allegation is then properly dismissed as incapable of being established through investigation. If the only witness to alleged misconduct refuses to submit to examination and cross-examination, and there is no other significant evidence, the matter cannot proceed.

Very few complaints are resolved on this basis, so the researchers can treat the few that they find on an ad hoc basis without the aid of a preset standard. Perhaps the research will suggest a standard.

7. "Appropriate corrective action." Section 352(b)(2).

The statute authorizes the chief judge to conclude the proceedings on a finding that "appropriate corrective action has been taken." Action taken is appropriate when it serves to "remedy the problem raised by the complaint" (Illustrative Rule 4(d)). Because the statute deals with the conduct of judges, the emphasis is on correction of the judicial conduct that

was the subject of the complaint. Accordingly, changing a procedural or court rule a judge has allegedly violated will not ordinarily be sufficient to remedy judicial conduct that was alleged to be in violation of a preexisting rule.

Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction of misconduct is preferable to sanctions imposed from without. The chief judge might facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. In the end, however, "corrective action" as the term is used in sec. 352(b)(2) means voluntary action taken by the judge complained against. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or by agreeing to comply with it does not constitute corrective action under the statute. Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction (sec. 354(a)(2)). Compliance with a previous council order may serve as corrective action to conclude a later complaint about the same behavior.

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. While the Act is generally forward-looking, any corrective action should to the extent possible serve to correct a specific harm to an individual, if such a harm can reasonably be remedied. Ordinarily corrective action will not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the judge complained against, or otherwise.

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might impose after investigation (see Illustrative Rule 14(f)), such as a private or public reprimand or a change in case assignments. In other words, a slight correction will not suffice to dispose of a weighty allegation.

8. "Action no longer necessary because of intervening events." Section 352(b)(2).

The statute does not expressly call for dismissal of complaints that are untimely or moot, except that section 352(b)(2) permits the chief judge to "conclude the proceeding" if "action on the complaint is no longer necessary because of intervening events." Illustrative Rule 4(c)(4) fills that gap by calling for "dismissal" if "the complaint is otherwise not appropriate for consideration." The commentary to Illustrative Rule 4 explains that this ground for dismissal "is intended to accommodate dismissals of complaints for reasons such as untimeliness . . . or mootness."

The 1993 study found no significant issues surrounding untimeliness or mootness, and it is unlikely that any significant issue has arisen since then. There have been complaints challenging actions taken twenty years earlier, but it has always been a simple matter to dismiss these as merits related or frivolous. Occasionally a complaint is dismissed as moot—because the judge complained against is no longer a judge—but this has yet to raise

controversy. Ordinarily stepping down from an administrative post such as chief judge or judicial council member or court committee chair does not constitute an event that would render unnecessary any further action on a complaint alleging judicial misconduct. As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct should be treated on its merits.

The complaint screening form will note the few complaints dismissed because intervening events have made action unnecessary, which can be further analyzed as appropriate.

9. "On the basis of information available to the chief judge of the circuit, the chief judge may, by written order stating reasons therefor, identify a complaint for purposes of this chapter and thereby dispense with filing of a written complaint." Section 351(b).

The commentary to Illustrative Rule 1 recognizes that this statutory language places the question of identifying a complaint "within the discretion of the chief judge."

Illustrative Rule 1(j) provides that a chief judge who has identified a complaint "will not be considered a complainant" and need not automatically recuse from further proceedings on the complaint. The commentary to Illustrative Rule 1 elaborates that "the identification of a complaint . . . will advance the process no further than would the filing of a complaint by a complainant. . . . [T]he chief judge has the same options in the investigation and determination of an identified complaint that the chief judge would have had if the complaint had been filed."

The chief judge should therefore keep in mind that the determination whether to identify a complaint is fundamentally different than the ultimate determination whether to appoint a special committee. The threshold is much lower. If an identified complaint is ultimately dismissed without appointment of a special committee, that does not mean that the complaint should not have been identified in the first place.

To be sure, a chief judge may determine not to identify a complaint under circumstances in which information available to the chief judge makes it clear that unfiled allegations against a judge are merits-related, do not constitute misconduct under the statute, or are unsupported or incapable of being established through investigation, or under circumstances in which the subject judge has undertaken appropriate corrective action. A chief judge should not, however, decline to identify a complaint solely on the basis that allegations that appear cognizable under the statute, for which there appears to be some potential evidentiary support, are not deemed by the chief judge to be credible. Nor should a chief judge decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

A chief judge may properly treat identifying a complaint as a last resort to be considered only after all informal approaches at a resolution have failed. However, the more public and high-visibility the unfiled allegations are, the more desirable it will be for the chief judge —absent an informal resolution of the matter—to identify a complaint (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

Appendix F

AO Form 372

Statistics Electronic Forms

Report on Complaint Under Title 28, U.S.C. Section 372(c)

Help SD Home

1 Date Filed (mm/dd/yyyy)

2 Circuit	**3** Complaint Number (yyyynnnnn)	**4** Complaint Type ○ Written ○ On order of the Chief Judge (Go to Item 9)
5 Person Completing Form (Last, First MI)	**6** Telephone Number (999-999-9999 x9999)	

FILING INFORMATION

7 Complaint(s) (Enter appropriate number of complainants)

____ Prison Inmate	____ Officer of the Court
____ Attorney	____ Public Official
____ Litigant	____ Other (specify) ____

8 ☐ Check if any complainant has previously filed a complaint.

9 Number and type of judicial officers complained about. (Enter appropriate number of officers)

____ Circuit Judges	____ Claims Court Judges
____ District Judges	____ Bankruptcy Judges
____ Court of International Trade Judges	____ Magistrate Judges

TERMINATION INFORMATION

10 Date Terminated ____

11 Nature of Complaint (Check as many boxes as apply.)

a. ☐ Mental disability	g. ☐ Bribery or corruption
b. ☐ Physical disability	h. ☐ Undue decisional delay
c. ☐ Demeanor	i. ☐ Incompetence/neglect
d. ☐ Abuse of judicial power	j. ☐ Other (specify): ____
e. ☐ Prejudice/bias	
f. ☐ Conflict of interest	

12 Disposition (Check all appropriate boxes.)

A. By Complainant:

☐ Complaint withdrawn before Chief Judge acts (Check only if this terminates the entire complaint)

B. By Chief Judge (Check as many boxes as apply for each complaint.)

Dismissal Under 372(c)(3)(A)	1. ☐ Not in conformance with statute 2. ☐ Directly related to the merits of the case or procedural ruling 3. ☐ Frivolous
Other Termination by Chief Judge	4. ☐ Appropriate corrective action taken under 372(c)(3)(B) 5. ☐ Action no longer necessary because of intervening events 372(c)(3)(B) 6. ☐ Appointed special investigative committee under 372(c)(4)(A). Indicate allegation(s) from item 11 above)

C. By Judicial Council after

☐ Referral by investigative committee

☐ Petition for review under (372(c)(10)) - Granted

☐ Petition for review under (372(c)(10)) - Denied (When denied, submit report as completed)

Unless petition for review was denied, check as many of the following boxes (1-12) as apply.

No disciplinary action taken

1. ☐ Dismissed by Judicial Council
2. ☐ Complaint withdrawn (Check only if this terminates the entire complaint.)

Disciplinary action

3. ☐ Directed Chief District Judge to take action (Magistrate Judges only)
4. ☐ Certified disability
5. ☐ Requested voluntary retirement
6. ☐ Suspended assignment of new cases
7. ☐ Privately censured
8. ☐ Publicly censured
9. ☐ Other (specify) [ ]

Referral to Judicial Conference under 372(c)(7)(A) and (B)

10. ☐ Discretionary
11. ☐ Mandatory (possibility of impeachment)
12. ☐ Mandatory (not resolvable by council)

Verify Reset

E-mail all data questions to:
Courtforms/DCA/AO/USCOURTS@USCOURTS (Lotus Notes J-Net Address)
CourtForms@AO.USCOURTS.GOV (Internet Address)
For technical questions, call the
Systems Deployment and Support Division (SDSD)
(210) 301-6323 (Appeals and District Courts)
(210) 301-6321 (Bankruptcy Courts)

Appendix G

Tables 11 and S-22
(*Judicial Business of the United States Courts* (2005))

Table 11
Judicial Complaints Filed, Concluded, and Pending
Fiscal Years 2003, 2004, and 2005

	2003*	2004*	2005
Filed	859	784	642
Concluded	752	820	667
By Chief Judges	430	486	400
Dismissed	401	471	381
Corrective Action Taken	13	12	13
Withdrawn	8	3	6
By Judicial Councils	322	334	267
After Review of Chief Judge's Dismissal[1]			
Dismissed	321	332	262
Withdrawn	—	—	—
Action Taken	—	—	—
Referred to Judicial Conference	—	—	—
After Report of Investigative Committee			
Dismissed	—	2	5
Withdrawn	—	—	—
Action Taken	1	—	—
Referred to Judicial Conference	—	—	—
Pending	248	212	187

* Revised.
[1] Petition for review of a chief judge's dismissal of a complaint.

Table S-22.
Report of Complaints Filed and Action Taken Under Authority of 28 U.S.C. 351-364 During the 12-Month Period Ending September 30, 2005

Summary of Activity	Circuits														National Courts	
	Total	Fed	DC	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	CC[1]	CIT[2]
Complaints Pending on September 30, 2004*	212	0	4	9	57	9	8	16	30	1	13	30	8	25	2	0
Complaints Filed	642	1	33	19	36	58	43	99	55	15	38	122	36	85	2	0
Complaint Type																
Written by Complainant	642	1	33	19	36	58	43	99	55	15	38	122	36	85	2	0
On Order of Chief Judges	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Officials Complained About**																
Judges																
Circuit	177	1	18	1	7	4	28	10	7	6	2	80	7	6	0	0
District	456	0	21	15	23	41	32	52	51	11	22	102	27	59	0	0
National Courts	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Bankruptcy Judges	31	0	0	4	0	5	1	2	3	1	2	9	2	2	0	0
Magistrate Judges	135	0	1	4	6	8	9	35	5	2	13	27	7	18	0	0
Nature of Allegations**																
Mental Disability	22	0	1	2	3	2	2	3	0	0	0	6	0	1	2	0
Physical Disability	9	0	0	2	0	0	0	0	0	0	0	4	0	2	1	0
Demeanor	20	0	0	3	0	2	0	2	0	1	2	8	1	1	0	0
Abuse of Judicial Power	206	1	7	13	3	5	26	6	3	4	28	57	0	52	1	0
Prejudice/Bias	275	1	12	19	43	21	9	16	40	5	15	57	15	20	2	0
Conflict of Interest	49	0	2	5	5	11	2	1	3	1	2	13	3	1	0	0
Bribery/Corruption	51	0	0	3	2	1	2	2	1	0	4	32	0	4	0	0
Undue Decisional Delay	65	0	0	6	8	8	2	9	2	0	4	14	7	5	0	0
Incompetence/Neglect	52	0	2	4	4	3	2	3	0	1	8	22	1	1	1	0
Other	260	0	2	1	80	40	11	80	0	7	1	19	18	0	1	0
Complaints Concluded	667	1	22	23	91	47	48	90	47	16	45	120	33	81	3	0
Action by Chief Judges																
Complaint Dismissed																
Not in Conformity With Statute	21	0	1	0	5	0	1	0	2	0	3	5	3	1	0	0
Directly Related to Decision or Procedural Ruling	319	1	8	8	46	18	20	30	12	6	29	57	16	65	3	0
Frivolous	41	0	1	3	1	0	4	6	3	8	5	10	0	0	0	0

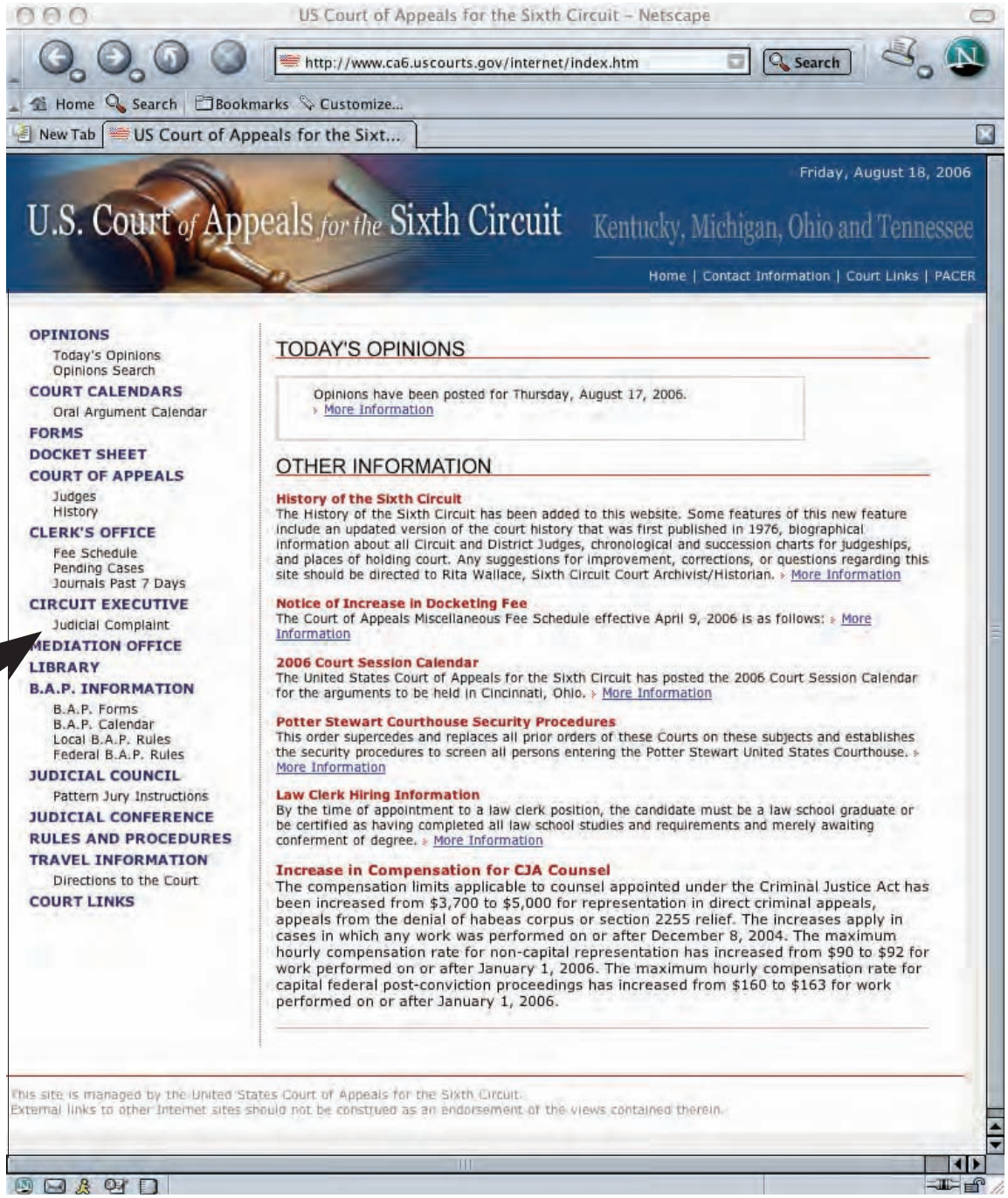
Table S-22. (September 30, 2005—Continued)

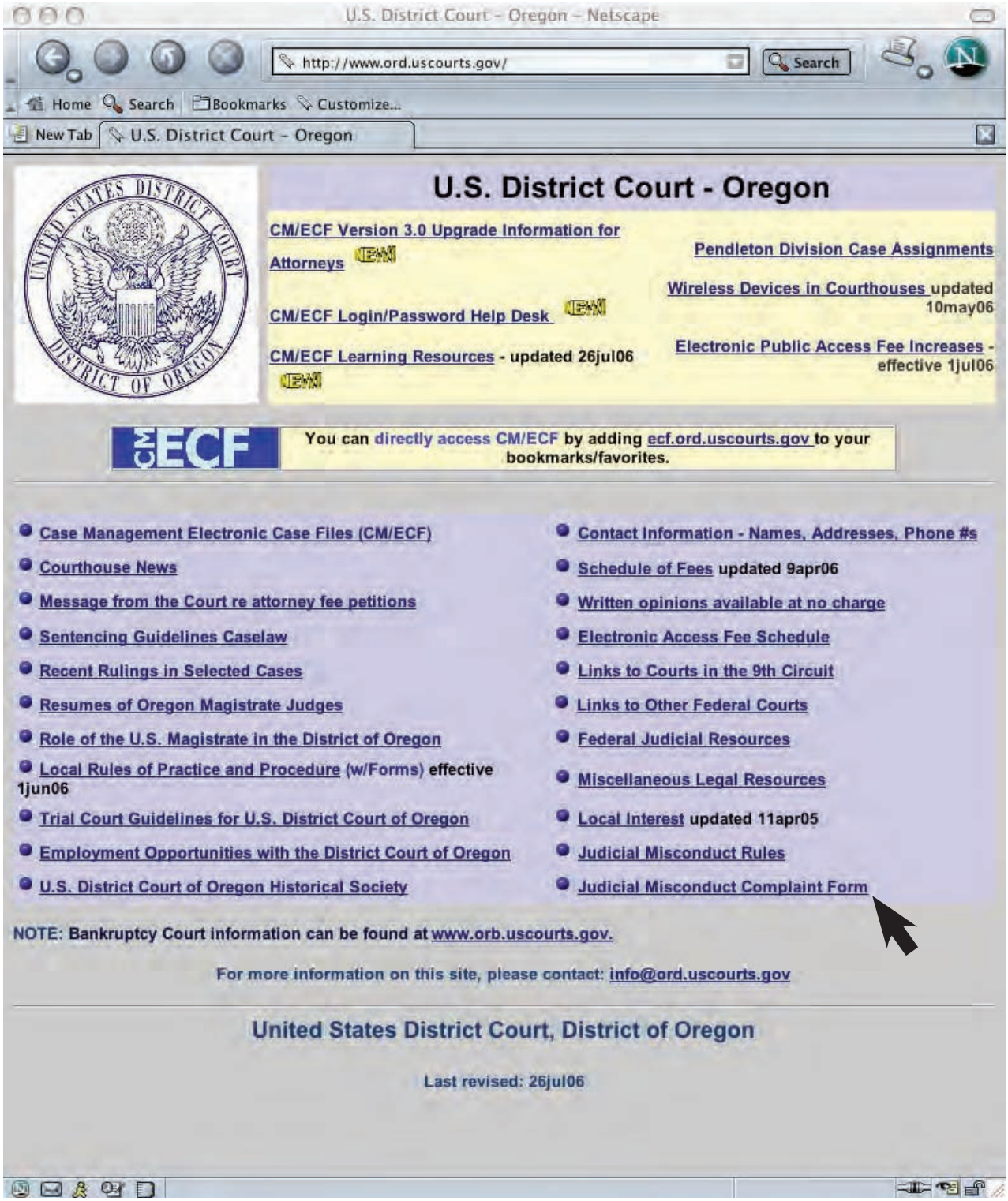
Summary of Activity	Circuits														National Courts	
	Total	Fed	DC	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	CC[1]	CIT[2]
Appropriate Action Already Taken	5	0	0	0	0	1	0	1	0	0	0	2	0	1	0	0
Action No Longer Necessary Because of Intervening Events	8	0	1	0	0	1	1	0	0	0	1	0	0	4	0	0
Complaint Withdrawn	6	0	0	0	2	0	0	2	0	0	0	2	0	0	0	0
Subtotal	400	1	11	11	54	20	26	39	17	14	38	76	19	71	3	0
Action by Judicial Councils																
Directed Chief District Judge to Take Action (Magistrate Judges only)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Certified Disability	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Requested Voluntary Retirement	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Ordered Temporary Suspension of Case Assignments	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Privately Censured	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Publicly Censured	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Ordered Other Appropriate Action	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Dismissed the Complaint	267	0	11	12	37	27	22	51	30	2	7	44	14	10	0	0
Withdrawn	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Referred Complaint to Judicial Conference	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Subtotal	267	0	11	12	37	27	22	51	30	2	7	44	14	10	0	0
Complaints Pending on September 30, 2005	187	0	15	5	2	20	3	25	38	0	6	32	11	29	1	0

NOTE: EXCLUDES COMPLAINTS NOT ACCEPTED BY THE CIRCUITS BECAUSE THEY DUPLICATED PREVIOUS FILINGS OR WERE OTHERWISE INVALID FILINGS.
[1] CC = U.S. COURT OF FEDERAL CLAIMS.
[2] CIT = U.S. COURT OF INTERNATIONAL TRADE.
* REVISED.
** EACH COMPLAINT MAY INVOLVE MULTIPLE ALLEGATIONS AGAINST NUMEROUS JUDGES. NATURE OF ALLEGATIONS IS COUNTED WHEN A COMPLAINT IS CONCLUDED.

Appendix H

Selected Court of Appeals and District Court Website Homepages




U.S. District Court - Oregon - Netscape
http://www.ord.uscourts.gov/
Search
Home
Search
Bookmarks
Customize...
New Tab
U.S. District Court - Oregon
U.S. District Court - Oregon
CM/ECF Version 3.0 Upgrade Information for Attorneys
CM/ECF Login/Password Help Desk
CM/ECF Learning Resources - updated 26jul06
Pendleton Division Case Assignments
Wireless Devices in Courthouses updated 10may06
Electronic Public Access Fee Increases - effective 1jul06
CM/ECF
You can directly access CM/ECF by adding ecf.ord.uscourts.gov to your bookmarks/favorites.
Case Management Electronic Case Files (CM/ECF)
Courthouse News
Message from the Court re attorney fee petitions
Sentencing Guidelines Caselaw
Recent Rulings in Selected Cases
Resumes of Oregon Magistrate Judges
Role of the U.S. Magistrate in the District of Oregon
Local Rules of Practice and Procedure (w/Forms) effective 1jun06
Trial Court Guidelines for U.S. District Court of Oregon
Employment Opportunities with the District Court of Oregon
U.S. District Court of Oregon Historical Society
Contact Information - Names, Addresses, Phone #s
Schedule of Fees updated 9apr06
Written opinions available at no charge
Electronic Access Fee Schedule
Links to Courts in the 9th Circuit
Links to Other Federal Courts
Federal Judicial Resources
Miscellaneous Legal Resources
Local Interest updated 11apr05
Judicial Misconduct Rules
Judicial Misconduct Complaint Form
NOTE: Bankruptcy Court information can be found at www.orb.uscourts.gov.
For more information on this site, please contact: info@ord.uscourts.gov
United States District Court, District of Oregon
Last revised: 26jul06

Appendix I

Forms Used for Committee Review of Terminations

The Committee undertook four separate assessments of chief judge terminations of complaints. This appendix includes samples of the forms used in those assessments.

Forms 1 and 2 were used for our early 2005 review of a portion of the researchers' assessment of 593 terminations (drawn from all terminations in 2001–2003), described at pages 43–44 of the report. We undertook this assessment to be sure the researchers were applying our Standards as we expected. (These forms copied certain questions from the researchers' coding sheets for the termination in question.)

Form 3 was used for our October 2005 review of the 25 terminations, from the 593-termination stratified sample, that the researchers believed were problematic, described at pages 44–65 of the report.

Form 4 was used for our separate, January 2005, review of 100 terminations drawn at random from all terminations in 2001–2003, described at pages 66–67 of the report.

Form 5 was used for our January 2006 review of the researchers' assessment of 17 "high-visibility" terminations in 2001–2005, described at pages 67–95 of the report.

FORM 1

JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE
Committee Assessment Document

This document involves a complaint that the chief judge dismissed and that the researchers agree should have been dismissed.
Case number: 00-41
Committee reviewer: _____

Italics indicates language from the research coding form. Researcher responses, pasted from the filled-out coding form, are in this different typeface.

Q 3 *Did the chief judge make a limited factual inquiry into the validity of the complaint?*
N *Y=Yes N=No U=Unknown NA=Not Applicable*

Q 4 *If so did the chief judge or a representative (mark as many as apply)*
(a) Ask the judge for a written response
(b) Talk to the judge on the telephone
(c) Talk to the judge in person
(d) Examine the record in the related proceeding
(e) No information available
(f) Other (specify)
(g) Not applicable

Analysis of researcher-chief judge agreement—After reviewing the complaint, please review the researcher's responses to Question 15 (if any) and to Question 17 and determine whether you agree with the researcher that the complaint merited dismissal and why it merited dismissal.

Please use p. 2 to comment.

Question 15 is a catchall question. You may wish to comment on what the researcher perceived, or did not perceive, as worthy of additional comment regarding the case before you.

Q15 *Additional comments. Include here any comments regarding the complaint or the process of responding to it that may be of interest. For example, if the complaint was dismissed for the wrong reason (even though it might have been properly dismissed for another reason, indicate that here).*

Q17 Directs the researcher, if he concluded that the claim merited dismissal--to *quote or paraphrase the allegation that best characterizes the nature of the primary complaint, omitting all details that might identify the judge, the complainant, or a witness. Include any allegation of serious misconduct that is not covered by the Act (e.g. conduct not related the administration of the business of the courts that may be relevant to fitness for office, such as failure to file tax returns)*

Jan. 2005

C alleged that a DJ took improper actions to have C's prisoner petition assigned to DJ so that DJ could dismiss it in retaliation for two prior complaints of misconduct that C filed against DJ.

Jan. 2005

COMMITTEE MEMBER ASSESSMENT

Case number 00-41

Please respond to the items below concerning Questions 15 and 17.

After doing so, please add any additional comments you wish to make about any other aspect of how the researcher answered any other question on the complaint. (Write "Additional comments" to distinguish them from your earlier responses.)

- ☐ I concur in the researcher's analyses in Questions 15 (if any) and 17.
- ☐ I disagree with all or part of the researcher's analyses in Questions 15 (if any) and 17. Please explain.

FORM 2

JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE
Committee Assessment Document

This document involves a complaint that the chief judge dismissed but that the researchers believe arguably should not have been dismissed.

Case number: 00-14
Committee reviewer: _____

Analysis of researcher-chief judge disagreement. Please review the complaint file and the researcher's responses on the committee assessment documents to assess the researcher's disagreement with the action of the chief judge or judicial council.

Please use pp. 7ff to indicate your concurrence or disagreement with the researcher's answers. With respect to Questions 21-23, please keep in mind that the researcher turns to those questions only if the chief judge dismissed the complaint but the researcher believes that at least one allegation in the complaint was arguably not frivolous and arguably described conduct covered by the Act and arguably was not merits related. Assume, for example, that the researcher answered only Question 21, finding problematic the chief judge's dismissal of the complaint on the grounds that it was frivolous. You may believe that, frivolousness or not, the complaint alleged conduct not covered by the Act or conduct that was merits related. If so, you may wish to express your disagreement with the researcher on those matters.

There is also space for comments on any other aspects of the coding form for the case under assessment.

Italics indicate language from the research coding form. Researcher responses, pasted from the filled-out coding form, are in this different typeface.

Q 3 *Did the chief judge make a limited factual inquiry into the validity of the complaint?*
N *Y=Yes N=No U=Unknown NA=Not Applicable*

Q 4 *If so did the chief judge or a representative (mark as many as apply)*
(a) Ask the judge for a written response
(b) Talk to the judge on the telephone
(c) Talk to the judge in person
(d) Examine the record in the related proceeding
(e) No information available
(f) Other (specify)
(g) Not applicable

Question 15 is a catchall question. You may wish to comment on what the researcher perceived, or did not perceive, as worthy of additional comment regarding the case before you.

3A Jan. 2005

3B Jan. 2005

Q 21 ***Frivolity.*** *In response to . . . screening question [16a] on the screening form you indicated that at least one allegation in the complaint presented an arguably nonfrivolous claim of judicial misconduct or disability that was not inherently incredible. If [the, or a, reason that] the chief judge [gave for] dismiss[ing] the complaint [was that it was] frivolous,*

restate each allegation you find to be arguably nonfrivolous, using the words of the complaint wherever possible to present the most specific facts asserted. Do not identify the judge who is the subject of the complaint.

(a) State the reasons given in the order for dismissal on the grounds of frivolousness and the reasons why you conclude that the allegation arguably should not have been dismissed on that ground. State as clearly as possible the factual basis for the allegation and the source of information by which it might have been verified through a limited inquiry.

4B Jan. 2005

Q22 *Relation to merits. In response to . . . screening question[16C] on the screening form you indicated that at least one allegation in the complaint presented a claim that was arguably nonfrivolous and that did not concern a judge's legal reasoning regarding the merits of a decision or procedural ruling. If [the, or a, reason that] the chief judge or judicial council [gave for] dismiss[ing] the complaint [was] on the grounds of its relationship to the merits,*

(a) state the reasons given in the order for this conclusion and the reasons why you conclude that the allegation arguably should not be dismissed on that ground. State the relationship between the judge's conduct and the chief judge's decision as clearly as possible.

The order concluded that the allegation that the subject judges "had themselves assigned out of rotation" was meritless because there exist "well-established case processing arrangements at the Court of Appeals to ensure against judges picking their cases." The complaint alleged specific conduct that, if true, might amount to judicial misconduct. The complainant pointed to a similar published opinion by the same panel, implying that this case may have been assigned to that panel because of its similarity (which, of course, might be an acceptable practice). The Chief Judge's response simply asserted that procedures exist to guard against judicial assignment of cases to themselves out of rotation. The court did not inquire into whether the case was assigned to the panel through the normal process or whether some other procedure was used. The matter of assignment might be raised on appeal, but, if true, it would relate to an administrative act, not a judicial decision. Note that in two later orders (01-06 and 01-07), the same CJ took the additional step of checking the record and finding that "the record reflects that complainant's cases were assigned according to the district court's normal procedures."

(b) Indicate what, if any, remedy might address the allegation of misconduct. Be as specific as possible (e.g., remand for a new trial after appeal, mandamus, prohibition, recusal).

An appeal might consider the matter under the rubric of due process, but is not a judicial decision that calls for protection under the directly-related-to-the-merits standard in the Act.

5B Jan. 2005

Q23 *Nonconformity of complaint with statute. In response to . . . screening question [16b]on the screening form you indicated that at least one allegation in the complaint presented a claim that was arguably subject to the Act because it concerned conduct prejudicial to the effective and expeditious administration of the business of the courts. If [the, or a, reason that] the chief judge or judicial council [gave for] dismiss[ing] the complaint [was] on the grounds that it did not concern conduct covered by the Act, respond to [all of] the following [items] that apply*

(a) [If the dismissal was on the grounds that the] complaint did not refer to conduct of a sitting circuit, district, bankruptcy, or magistrate judge[, s]pecify the allegation and discuss the reason for the chief judge's [or judicial council's] conclusion and the reasons you think that conclusion is arguable.

(b) [If the dismissal was on the grounds that the] complaint did not refer to conduct related to the administration of the business of the courts or to the physical or mental ability of a judge to discharge the duties of the office[, s]pecify the allegation and indicate the reason for the chief judge's conclusion and the reasons you think that conclusion is arguable.

The order concluded that the allegation that the subject judges "had themselves assigned out of rotation" was meritless because there exist "well-established case processing arrangements at the Court of Appeals to ensure against judges picking their cases." The complaint alleged specific conduct that, if true, might amount to judicial misconduct. The complainant pointed to a similar published opinion by the same panel, implying that this case may have been assigned to that panel because of its similarity (which, of course, might be an acceptable practice). The Chief Judge's response simply asserted that procedures exist to guard against judicial assignment of cases to themselves out of rotation. The court did not inquire into whether the case was assigned to the panel through the normal process or whether some other procedure was used. There might be good reasons for assigning similar cases to the same panel of judges, but there might also be reasons that evidence misconduct. The chief judge concluded without inquiry that the court's procedures were applied without inquiring into the specifics of the assignment of the case at hand.

(c) [If the dismissal was on other grounds, s]pecify the allegation and indicate the reason for the chief judge's [or judicial council's] conclusion and the reasons you think that conclusion is arguable.

Jan. 2005

Jan. 2005

COMMITTEE MEMBER ASSESSMENT

Case number 00-14

Please respond to the items below concerning Questions 15 and 21-23.

After doing so, please add any additional comments you wish to make about any other aspect of how the researcher answered any other question on the complaint. (Write "Additional comments" to distinguish them from your earlier responses.)

Repeated from cover page: With respect to Questions 21-23, please keep in mind that the researcher turns to those questions only if the chief judge dismissed the complaint but the researcher believes that at least one allegation in the complaint was arguably not frivolous and arguably described conduct covered by the Act and arguably was not merits related. Assume the researcher answered only Question 21, finding problematic the chief judge's dismissal of the complaint on the grounds that it was frivolous. You may believe that, frivolousness or not, the complaint alleged conduct not covered by the Act or conduct that was merits related. If so, you may wish to express your disagreement with the researcher on those matters.

☐ I concur in the researcher's analyses in Questions 15 and 21-23.

☐ I disagree with all or part of the researcher's analyses in Questions 15 and 21-23. Please explain.

Jan. 2005

FORM 3

JUDICIAL CONDUCT AND DISABILITY ACT COMMITTEE

Committee Assessment Document

Committee Member: [SAMPLE]

Limited Inquiry Matter 2—See Report at Page 25 and Files at Tab 2

Researcher Assessment: The dismissal is inconsistent with Standard 4, which calls for an inquiry if "a complaint . . . that is not inherently incredible and is not subject to dismissal on other grounds . . . sets forth allegations that are capable of being verified by looking at identifiable transcripts or questioning identifiable witnesses." The complaint identified a witness, the FBI agent, but the chief judge did not contact him.

___ I agree with this assessment.

___ I disagree with this assessment (please explain briefly below).

___ I agree that the dismissal is inconsistent with the Committee Standards but believe that the dismissal was nevertheless correct (please explain briefly below).

___ I abstain because I was the chief judge or a member of the judicial council or was otherwise involved in, or have inside information relevant to, the disposition of this complaint.

_____

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Oct. 2005

Oct. 2005

FORM 4

COMMITTEE MEMBER ASSESSMENT

Case number

Committee reviewer:_____

- ☐ I agree with the disposition of this complaint and with the reasons given for the disposition.
- ☐ I agree with the disposition of this complaint <u>but I disagree</u> with the reasons given for the disposition. Please explain.
- ☐ I disagree with all or part of the disposition of this complaint. Please explain.

Jan. 2005

FORM 5

JUDICIAL CONDUCT AND DISABILITY ACT STUDY COMMITTEE
Assessment of High Visibility Dispositions

Committee Member: _____[SAMPLE]_____

Disposition A-3 Complaint against two district judges dismissed by the chief judge, August 2003; review petition dismissed, May 2004)—Report page 11, Tab 3

Assessment: Nothing in the Committee Standards calls into question the dismissal or the council's affirmance of that dismissal. The council's reason—non-conformity under the statute—while questionable, was not essential to the outcome.

____ 1. I agree with this assessment.

____ 2. I disagree with this assessment (please explain briefly).

____ 3. I agree that the chief judge dismissal was consistent with Committee Standards but find it problematic nevertheless (please explain briefly).

____ 4. I abstain because I was the chief judge or a member of the judicial council or was otherwise involved in, or have inside information relevant to, the disposition of this complaint.

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Jan. 2006

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For Public Comment: Draft *Rules Governing Judicial Conduct and Disability Proceedings*

On July 16, 2007, the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States released its draft *Rules Governing Judicial Conduct and Disability Proceedings* for 90 days of public comment, **to conclude on October 15, 2007**. From this web page, you may review those rules and submit your comments by e-mail.

- Review Draft *Rules Governing Judicial Conduct and Disability Proceedings* (pdf)

- E-mail your comments to JudicialConductRules@ao.uscourts.gov

With any comments you submit, please specify your:

- Name,
- Mailing address,
- Organization, if any, and
- Occupation (federal judge, state judge, lawyer in private practice, government lawyer, professor, or non-lawyer).

Although submissions will not receive a response, those that are timely will be considered by the Judicial Conduct and Disability Committee as it prepares the draft rules for Judicial Conference consideration.

The draft rules were developed at the direction of the Judicial Conference as a means of ensuring that the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, operates consistently throughout the federal court system. If adopted

abr:245

by the Conference, they will constitute binding guidance for chief judges, circuit judicial councils, and circuit staff on the full spectrum of issues noted in *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, 239 F.R.D. 116 (September 2006) ("Breyer Committee Report"). Those issues, and the historical and policy context of these rules, are discussed fully in that report.

You may also comment on these rules at a public hearing being planned for that purpose, to commence at 10:00 a.m. on September 27, 2007, in the U.S. Courthouse at 225 Cadman Plaza East, Brooklyn, New York. Requests to appear and testify at the hearing must be e-mailed by August 27 to the Office of the General Counsel, Administrative Office of the U.S. Courts, at JudicialConductRules@ao.uscourts.gov. Those who submit such requests will be asked to give a written indication of the testimony they intend to provide.

This web page and its links are for use only in reviewing, and commenting upon, the draft Rules Governing Judicial Conduct and Disability Proceedings. No complaints and no communication on any other topic will be accepted here.

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abr:246

DRAFT FOR PUBLIC COMMENT - 6/13/07

RULES GOVERNING JUDICIAL CONDUCT AND DISABILITY PROCEEDINGS UNDERTAKEN PURSUANT TO 28 U.S.C. §§ 351-364

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DRAFT FOR PUBLIC COMMENT - 6/13/07

RULES GOVERNING COMPLAINTS OF JUDICIAL CONDUCT AND DISABILITY

Preface

These Rules and accompanying Commentaries were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed, or identified by chief circuit judges, under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

ARTICLE I. GENERAL PROVISIONS

Rule 1. Scope.

These Rules govern the conduct of proceedings undertaken pursuant to 28 U.S.C. §§ 351-364 regarding whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office by reason of mental or physical disability.

Commentary to Rule 1

In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief Justice Rehnquist and known as the "Breyer Committee," presented a report, known as the "Breyer Report," 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980 (hereinafter "the Act") 28 U.S.C. §§ 351-364. The Committee had been formed in response to criticism from the public and the Congress regarding the effectiveness of the Act's implementation. The Executive Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Report, 239 F.R.D. at 132, and that a major problem faced by chief circuit judges in implementing the Act was the lack of authoritative interpretive standards. See id. at 212-15. The Breyer Committee then established standards to guide its evaluations, some of which were new formulations and some of which were taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. Id. at 238.

Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under the Act to fashion standards to provide guidance to the various officers and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment, the present Rules were promulgated by the Judicial Conference on .

Rule 2. Effect and Construction.

Notwithstanding any rule of a circuit to the contrary, these Rules are to be deemed mandatory, and the accompanying Commentaries are to be deemed authoritative interpretations of the Rules, unless a chief circuit judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or Judicial Conference of the United States, in the performance of acts authorized by 28 U.S.C. §§ 351-364 and these Rules, deems and expressly finds that exceptional circumstances render the application of a Rule in a particular proceeding manifestly unjust or manifestly contrary to the purposes of 28 U.S.C. §§ 351-364 or these Rules.

Commentary to Rule 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. However, the final sentence of Rule 2 recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

Rule 3. Definitions.

(a) Complaint.
A complaint is:
(1) a document filed by any person pursuant to Rule 6; or
(2) information from any source, including a document described in (a)(1), known to a chief circuit judge, constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge whether or not the information is framed as, or intended to be, an allegation of misconduct or disability.
(b) Misconduct.
(1) Misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to, use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, gifts, or other personal favors related to the judicial office, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, treating litigants or attorneys in an unnecessarily hostile manner, engaging in partisan political activity or statements, participating in organizational fundraising, and other violations of the standards of judicial conduct, regulation of gifts, restrictions on outside income, 8financial disclosure obligations, or abuses of judicial office.

Conduct occurring outside the performance of official duties is not excluded if it might have a prejudicial effect on the administration of the business of the courts, including, but not limited to, a lowering of public confidence in the courts among reasonable persons.

(A) Exclusions.

(i) Allegations that are directly related to the merits of a decision or procedural ruling are excluded from the definition of misconduct. Any allegation that calls into question the correctness of a ruling of a judge, including a failure to recuse, without more, is merits related. However, a complaint that involves both the merits and an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, is excluded only to the extent it attacks the merits.

(ii) A complaint about delay in rendering a decision or ruling is excluded. However, a complaint involving habitual delay in a number of unrelated cases or an improper motive in delaying a particular decision is not excluded.

(c) Disability.

Disability is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include, but are not limited to, substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

(d) Subject Judge.

The term "subject judge" means any judge described in Rule 4 who is the subject of a complaint.

(e) Chief Circuit Judge.

The term "chief circuit judge" includes the chief judges of the United States Court of Appeals for the Federal Circuit, United States Court of International Trade, and United States Court of Federal Claims.

(f) Judicial Council and Circuit.

The terms "judicial council" and "circuit," where appropriate, includes the courts mentioned in 28 U.S.C. § 363.

Commentary on Rule 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief circuit judge under Rule 5 and to complaints filed by complainants under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief circuit judge . See 28 U.S.C. § 351(a) and (b). Generally, the word **"**complaint**"** brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process in which, even absent a complaint under Rule 6, chief circuit judges are often expected to trigger the process -- "identify a complaint," see Rule 5 -- and conduct an investigation without becoming a party. See Breyer Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief circuit judge, the complainant lacks many rights that a party to litigation would have, and the chief circuit judge, instead of being limited to the "four corners of the complaint," must "identify a complaint" under Rule 5 where the complainant reveals information of misconduct or disability but does not claim it as such. See Breyer Report, 239 F.R.D. at 183-84.

An allegation of misconduct or disability filed under Rule 6 is most assuredly a "complaint," and the Rule so provides in (a)(1). But both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief circuit judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as concluding -- "identifying" -- that information known to a chief circuit judge constitutes reasonable grounds for an inquiry into possible misconduct or disability -- a "complaint" -- whether or not the information is framed as, or intended to be an accusation. This definition is codified in (a)(2).

The term "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and the Rule therefore provides some specific examples. The Code of Conduct for United States Judges may provide standards of conduct applicable to proceedings under the Act, although it is not intended that disciplinary action be appropriate for every violation of the Code's provisions. As noted in the Introduction to the Code:

> "Whether disciplinary action is appropriate, and the degree of discipline to be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed. Furthermore, the Code is not designed or intended as a basis for civil liability or criminal prosecution. Finally, the purpose of the Code would be subverted if the Code

> were invoked by lawyers for mere tactical advantage in a proceeding."

Similarly, the regulations governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations provide guidance in proceedings under the Act, although disciplinary action may not be appropriate for every violation of the regulations.

An allegation can meet the statutory standard even though the judge's alleged conduct did not occur in the course of the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge participated in fundraising for a charity or a partisan political event are cognizable under the Act.

On the other hand, judges are entitled to some leeway in extra-official activities. For example, misconduct may not include a judge being repeatedly and publicly discourteous to a spouse (not including physical abuse) even though this might be an embarrassment to other judges.

Rule 3(b)(1)(A)(i) tracks the Act in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." The complaint procedure is not a means for a collateral attack on the substance of a judge's rulings. This exclusion also preserves the independence of judges in the exercise of judicial power. Any allegation that calls into question the correctness of an official action of a judge -- without more -- is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief circuit judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related -- i.e., as challenging the substance of the judge's administrative determination to dismiss the complaint -- even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation -- however unsupported -- that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness -- "the merits" -- of the ruling itself. Similarly, an allegation that a judge ruled against the complainant because the complainant was a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive.

The same standard applies to allegations concerning a judge's failure to recuse. An allegation that a judge should have recused is merits-related. The very different allegation that the

judge failed to recuse for improper reasons is not merits-related. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion. The correctness of the judge's rulings is not at stake. An allegation that a judge was rude to counsel or others while on the bench is also not merits-related.

The existence of an appellate remedy is irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (e.g., vacating a ruling that resulted from an improper ex parte communication).

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand -- for example a statement that a claim is legally or factually "frivolous" -- then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11 is necessary.

With regard to Rule 3(b)(1)(A)(ii), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, i.e., assigning a low priority to deciding the particular case. But, by the same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.

Rule 3(c) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available.

Rule 4. Covered Judges.

A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

Commentary on Rule 4

This Rule tracks the statute. Rule 8(c) and (d) contain provisions as to the handling of

complaints against persons not covered by the Act, such as other court personnel, or against both covered judges and non-covered persons.

ARTICLE II. INITIATION OF A COMPLAINT

Rule 5. Identification of a Complaint.

(a) Identifying a Complaint.

(1) Subject to Rule 7, where information known to a chief circuit judge meets the standard of Rule 3(a)(2) and no complaint containing such information has been filed under Rule 6, a chief circuit judge must identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. Where a complaint filed under Rule 6 contains information constituting an identifiable complaint of misconduct or disability but the complainant does not claim it as such, the chief circuit judge must identify a complaint.

(2) A chief circuit judge:

(A) may not decline to identify a complaint:

(i) because the chief circuit judge deems otherwise cognizable allegations not to be credible, unless the sole source of information has been unreliable in the past; or

(ii) because the person or persons making such allegations have not filed a complaint under Rule 6.

(B) need not identify a complaint if it is clear on the basis of the total mix of information available to the chief circuit judge that the review provided in Rule 11 will result in a dismissal under Rule 11(c), (d), or (e). However, a chief circuit judge may identify a complaint in such circumstances in order to assure the public that highly visible allegations have been investigated. In such a case, appointment of a special committee under Rule 11(f) may not be necessary.

(C) may decline to identify a complaint if the matter has been resolved by informal means.

(3) Complaints filed under Rule 6 that do not comply with Rule 6(d) must be considered under this Rule.

Commentary to Rule 5

This Rule is adapted from the Breyer Report. See Breyer Report, 239 F.R.D. at 245-46.

The phrase "Subject to Rule 7" in (a)(1) is intended to establish that only: (i) the chief circuit judge of the home circuit of a potential subject judge, or (ii) the chief circuit judge of a circuit in which misconduct is alleged to have occurred in the course of official business while

the potential subject judge was sitting by designation, shall have power or a duty under this Rule to identify a complaint.

The Act authorizes the chief circuit judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. A chief circuit judge who has identified a complaint will not be considered a complainant and need not automatically recuse from further proceedings on the complaint. The identification of a complaint merely begins the process described in Rule 11, leaving the chief circuit judge with the same options available in the case of a complaint filed under Rule 6. Where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply, and a chief circuit judge must identify as a complaint any misconduct or disability issues implicitly presented even if the complainant makes no claim with regard to those issues. For example, a claim limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be identified as a complaint regarding disability. The identification may occur as a new complaint under Rule 5 or as a formal expansion by written order of an inquiry under Rule 11, but some formal order giving notice of the expanded scope of the proceeding to the subject judge and reviewing tribunal is necessary.

The chief circuit judge's decision whether to identify a complaint under Rule 5 is fundamentally different from the decision whether to appoint a special committee under Rule 11. The threshold under Rule 5 is much lower. If an identified complaint is ultimately dismissed without appointment of a special committee, this does not mean that the complaint should not have been identified. However, a chief circuit judge may determine not to identify a complaint under circumstances in which the total mix of information available to the chief circuit judge makes it clear that such a complaint would be dismissed under Rule 11(c), (d), or (e). For example, when the sole source of information's identity or even existence is unknown, a chief circuit judge may, depending on the entire circumstances and the seriousness of the issues, decline to identify a complaint.

A chief circuit judge should not decline to identify a complaint solely on the basis that allegations that appear cognizable under the statute, for which there appears to be some potential evidentiary support, are not deemed by the chief circuit judge to be credible. However, when allegations are based solely on the word of one who has been unreliable in prior misconduct or disability proceedings, a chief circuit judge may decline to act without more. Nor should a chief circuit judge decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

A chief circuit judge may properly treat identifying a complaint as a resort to be considered after informal approaches at a resolution, if feasible, have failed. However, in high-visibility situations, it may be particularly desirable for the chief circuit judge to identify a complaint (and then, if the circumstances warrant, dismiss or conclude the identified complaint

without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

Rule 11 provides that once the chief circuit judge has identified a complaint, the chief circuit judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief circuit judge for the determination of complaints filed by a complainant.

Rule 6. Filing a Complaint.

(a) Brief Statement of Facts.

A complaint must contain a concise statement setting forth with particularity the facts on which the claim of misconduct or disability is based. The statement should not be longer than five standard pages. The statement of facts should include:

(1) a statement of what occurred;

(2) the time and place of the occurrence or occurrences;

(3) all available information that would assist an investigator in checking the facts, including, but not limited to, relevant documents and the names and addresses of witnesses. If documents are submitted, the statement of facts should refer to the specific pages in the documents on which relevant material appears; and

(4) in the case of an allegation of disability, any facts forming the basis of that allegation not included in the above.

(b) Form.

(1) Complaints may be filed on a form reproduced in the appendix to these rules or a form designated by the rules of the circuit in which the complaint is filed. The complaint form is to be made available on each court of appeals website, and may be obtained from the clerk of the court of appeals, district court, or bankruptcy court within the circuit. Failure to use the complaint form is not grounds for rejecting or dismissing the complaint so long as the information described in (a) is provided.

(c) Legibility; Number of Copies.

Complaints should be typewritten if possible. If not typewritten, they must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form, failing which the complaint will not be considered. If the complaint is about a single judge of the court of appeals, the complainant must provide three copies of the complaint, the statement of facts, and any documents submitted. If it is about a single district judge or magistrate judge, four copies must be provided; if about a single bankruptcy judge, five copies. If the complaint is about more than one judge, copies must be provided for the clerk of the court, the chief judge of the circuit, each subject judge, and each judge to whom the clerk must send a copy under Rule 8(b). Complaints under this Rule should be in an envelope marked "Complaint of Misconduct" or

"Complaint of Disability." The name of the subject judge should not appear on the envelope.

(d) Signature.

The form must be signed and the truth of the statements verified in writing under penalty of perjury. The complainant's address must also be provided. Failure to comply with this subsection will not be grounds for rejecting a complaint, but no further review shall take place unless the chief circuit judge identifies a complaint under Rule 5.

Commentary to Rule 6

The Rule is adapted from the Illustrative Rules and is self-explanatory.

Rule 7. Where to Initiate Complaints.

(a) Where to File.

Complaints against judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, or United States magistrate judges must be filed with the clerk of the United States Court of Appeals for the judicial circuit in which the subject judge holds office. Complaints against judges of the United States Court of International Trade or United States Court of Claims must be filed with the respective clerks of those courts. Complaints against judges of the United States Court of Appeals for the Federal Circuit must be filed with the Circuit Executive of that court. Where appropriate, the term "clerk of the court of appeals" or "clerk," as used in these Rules, includes all the officers mentioned.

(b) Transfer; Misconduct in Another Circuit.

If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291-93 and 294(d), the complaint may be filed or identified with the clerk of the court of appeals of that circuit or the subject judge's home circuit. The proceeding will continue in the circuit of the first filed or identified complaint. However, the judicial council of the circuit in which the complaint was first filed or identified may transfer the complaint to the subject judge's home circuit or circuit where the alleged misconduct occurred, as the case may be.

Commentary to Rule 7

Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge's future

behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar -- ex parte contact between an attorney and a judge, for example -- it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

Rule 8. Action by Clerk.

(a) Receipt of Complaint.

On receipt of a complaint against a judge filed under Rules 5 or 6, the clerk of the court of appeals must open a file, assign a docket number, and acknowledge receipt.

(b) Distribution of Copies.

The clerk must promptly send copies of a complaint filed under Rule 6 to the chief circuit judge of the circuit or the judge authorized to act as chief circuit judge under Rule 25(f), and complaints filed under Rules 5 or 6 to each subject judge. Such complaints must also be sent to the Judicial Conference Committee on Judicial Conduct and Disability. The original complaint must be retained by the clerk. If a district judge or magistrate judge is the subject of a complaint, the clerk must also send a copy of the complaint to the chief judge of the district court in which the judge or magistrate judge holds his or her appointment. If a bankruptcy judge is the subject of a complaint, the clerk must send copies to the chief judges of the district court and the bankruptcy court. However, if the chief judge of a district court or bankruptcy court is a subject of the complaint, the chief judge's copy must be sent to the judge of such court in regular active service who is most senior in date of commission among those who are not subjects of the complaint.

(c) Complaints Against Non-Covered Persons.

If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under these Rules.

(d) Receipt of Complaint about a Judge and Another Non-Covered Person.

If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint for filing under these Rules only with regard to the judge and must advise the complainant accordingly.

Commentary to Rule 8

This Rule is adapted from the Illustrative Rules and is largely self-explanatory. Complaints against non-covered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

The provision requiring clerks to send copies of all complaints to the Judicial Conference Committee on Judicial Conduct and Disability is new. It is necessary to enable the Committee to monitor administration of the Act, to anticipate upcoming issues, and to carry out its new jurisdictional responsibilities under Article VI.

Rule 9. Time for Filing or Identifying a Complaint.

(a) No Time Limitations.

A complaint may be filed or identified at any time. However, where the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(3).

Commentary to Rule 9

This Rule is adapted from the Act and the Illustrative Rules.

Rule 10. Abuse of the Complaint Procedure.

(a) Abusive Complaints.

A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her ability to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. On written request of the complainant, the judicial council may revise or withdraw any prohibitions, restrictions or conditions imposed.

(b) Orchestrated Complaints.

Where large numbers of essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the judicial council may, on the recommendation of the chief circuit judge, issue a written order instructing the clerk of the court of appeals to accept only one or more of such complaints for filing and to refuse to accept subsequent complaints. A copy of the order shall be sent to the complainants whose complaints were not accepted.

Commentary on Rule 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a different manner, for which the remedy provided in Rule 10(a) may not be appropriate. Some circuits have been inundated with

submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances**,** persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A circuit may respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. Where the first complaint or complaints have been dismissed on the merits, when further, essentially identical, submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the clerk not to accept these complaints or any further such complaints for filing, and directing the clerk or the circuit executive to send each putative complainant copies of both orders.

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF CIRCUIT JUDGE

Rule 11. Review by the Chief Circuit Judge.

(a) Purpose of Chief Circuit Judge's Review.

When a complaint is filed or is identified by the chief circuit judge, the chief circuit judge, subject to Rule 25, must review the complaint and determine whether it should be:

(1) dismissed;

(2) concluded on the ground that corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

(b) Inquiry by Chief Circuit Judge.

In determining what action to take under Rule 11(a), the chief circuit judge may conduct a limited inquiry. In conducting such an inquiry, the chief circuit judge may not make findings of fact about any matter that is reasonably in dispute or determinations concerning the credibility of the complainant or putative witnesses. The chief circuit judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter and review transcripts or other relevant documents. The chief circuit judge may make findings of fact to the extent that the limited inquiry shows that the factual allegations are frivolous under (c)(3) of this Rule.

(c) Dismissal.

A complaint must be dismissed in whole or in part to the extent that the chief circuit judge concludes that the complaint:

(1) alleges conduct that, even if true, is not 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 judicial office;

(2) is directly related to the merits of a decision or procedural ruling;

(3) is frivolous because it is based on allegations that are wholly unsupported, plainly untrue, refuted by objective evidence, or incapable of being established through investigation;

(4) has been filed in the wrong circuit under Rule 7; or

(5) is otherwise not appropriate for consideration under the Act.

A complaint may not be dismissed solely because it repeats allegations of a previously dismissed complaint if it contains material information not previously considered and does not constitute harassment of the subject judge.

(d) Corrective Action.

The chief circuit judge may conclude the complaint proceeding in whole or in part if the chief circuit judge determines that appropriate corrective action that acknowledges and remedies the problems raised by the complaint has been voluntarily taken by the subject judge.

(e) Intervening Events.

The chief circuit judge may conclude the complaint proceeding in whole or in part if the chief circuit judge determines that intervening events render some or all allegations of the complaint moot or remedial action impossible.

(f) Appointment of Special Committee.

If some or all of the complaint is not dismissed or concluded, the chief circuit judge must promptly appoint a special committee to investigate the complaint or relevant portion thereof and to make recommendations to the judicial council. Before appointing a special committee, the chief circuit judge must invite the subject judge to respond to the complaint either orally or in writing if such an opportunity was not given during the limited inquiry. In the discretion of the chief circuit judge, separate complaints may be joined and assigned to a single special committee; similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) Notice of Chief Circuit Judge's Action; Petitions for Review.

(1) If the complaint is disposed of under Rule 11(c), (d), or (e), the chief circuit judge must prepare a supporting memorandum that sets forth the reasons for the disposition. The memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum must be provided to the complainant, the subject judge, any judge entitled to receive a copy of the complaint pursuant to Rule 8(b), and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and subject judge must be notified of the right to petition the judicial council for review of the decision under (g)(2) of this Rule. If a petition for review is filed as provided in Rule 18(a), the chief circuit judge must

promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the clerk of the court of appeals for transmittal to the judicial council.

(2) If the chief circuit judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant or subject judge may petition the judicial council of the circuit for review of that disposition, as provided in Rule 18.

(3) If a special committee is appointed, the chief circuit judge must notify the complainant, the subject judge, and any judge entitled to receive a copy of the complaint pursuant to Rule 8(b) that the matter has been referred to a special committee, and must inform them of the membership of the committee.

(h) Public Availability of Chief Circuit Judge's Decision.

The chief circuit judge's decision must be made public at the time and in the manner provided in Rule 24.

(i) Report to the Judicial Council.

The chief circuit judge must report to the judicial council of the circuit on all actions taken under this Rule.

Commentary to Rule 11

Subsection (a) lists the actions available to a chief circuit judge in reviewing a complaint.

Subsection (b) describes the nature of the chief circuit judge's inquiry. It is based largely on the Breyer Committee Report. See Breyer Report, 239 F.R.D. at 243-45. The Act states that dismissal is appropriate "when a limited inquiry … demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." Section 352(b)(1)(B). At the same time, however, section 352(a) states that "[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." These two statutory standards should be read together, so that a matter is not "reasonably" in dispute if a limited inquiry shows the allegations to lack any factual foundation or to be conclusively refuted by objective evidence.

In conducting a limited inquiry, the chief circuit judge must avoid credibility determinations, which are ordinarily left to a special committee and the judicial council. An allegation is not "conclusively refuted by objective evidence" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is not inherently incredible. If it is literally the complainant's word against the subject judge's -- there is simply no other significant evidence -- then there must be a special committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

However, dismissal following a limited inquiry may occur where the complaint refers to transcripts or to witnesses and when the chief circuit judge determines that the transcripts and

witnesses all support the subject judge. For example, consider a complaint alleging that the subject judge said X, where the complaint mentions, or it is independently clear, that five people may have heard what the judge said. The chief circuit judge is told by the judge complained against and one witness that the judge did not say X, and the chief circuit judge dismisses the complaint without questioning the other four possible witnesses. In this example, the matter remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is called for. But if potential witnesses, reasonably accessible, have not been questioned, then the matter remains reasonably in dispute.

The chief circuit judge is not required to act solely on the face of the complaint. The power to conclude a complaint proceeding on the basis that corrective action has been taken implies some power to determine whether the facts alleged are true. But the boundary line of that power -- the point at which a chief circuit judge invades the territory reserved for special committees -- is unclear. Rule 11(b) allows the chief circuit judge to determine whether the facts alleged in a complaint are "frivolous" as the term is used in Subsection (c)(3), but also states that the chief circuit judge will not undertake to make findings of fact about any matter that is reasonably in dispute.

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act and the Breyer Committee Report. 28 U.S.C. § 352(b); Breyer Report, 239 F.R.D. at 239-45. Subsection (c)(1) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 3 and discussed in the Commentary to that Rule. Subsection (c)(2) permits dismissal of complaints related to the merits of a decision by a subject judge, also governed by Rule 3 and accompanying Commentary.

Subsection (c)(3) implements the statutory standard allowing dismissal of complaints that are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred." The standard is intended to cover situations where the only source of evidence is unidentified or unavailable. For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. The subject judge denies it. The chief circuit judge requests that the complainant (who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief circuit judge can learn the unnamed witness's account. The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. The allegation is then properly dismissed as incapable of being established through investigation.

Another example would be a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief circuit judge's proper course of action may well turn on whether the source had any role

in the allegedly improper conduct. If the complaint were based on a lawyer's statement that he or she had had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and the disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint as frivolous because there is no support for the allegation of misconduct.

If, however, the situation involves a simple credibility conflict, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are inherently incredible, it would appear that a special committee must be appointed because there is a factual question that is reasonably in dispute.

Similar situations may arise when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c) also indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should be foregone, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if "appropriate corrective action" has been taken. It is adapted from the Breyer Committee Report. Breyer Report, 239 F.R.D. 244-45. The Act authorizes the chief circuit judge to conclude the proceedings if "appropriate corrective action has been taken." Under Rule 11(d), action taken is "appropriate" when it serves to acknowledge and remedy the problem raised by the complaint. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction of misconduct is preferable to sanctions. The chief circuit judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures.

"Corrective action" means voluntary action taken by the subject judge. A remedial action directed by the chief circuit judge or by an appellate court without the participation of the subject judge in formulating the directive or by the subject judge's subsequent agreeing to such action does not constitute the requisite voluntary corrective action. Neither the chief circuit judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). Compliance with a previous council order may serve as corrective action allowing conclusion of a later complaint about the same behavior.

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, and a pledge to refrain from similar conduct in the future. While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. Ordinarily, corrective action will not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief circuit judge's order, in a direct communication from the judge complained against, or otherwise.

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. In other words, minor corrective action will not suffice to dispose of a serious allegation.

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief circuit judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, however, stepping down from an administrative post such as chief circuit judge, judicial council member, or court committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed.

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge will be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges, of course, receive copies of complaints at the same time that they are referred to the chief circuit judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief circuit judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the judge involved. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When complaints are disposed of by chief circuit judges, the statutory purposes are best

served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. See also the Commentary to Rule 24, dealing with public availability.

Rule 11(g) also provides that the complainant and subject judge must be notified, in the case of a disposition by the chief circuit judge, of the right to petition the judicial council for review. A copy of a chief circuit judge's order and memorandum disposing of a complaint must be sent by the clerk to the Judicial Conference Committee on Judicial Conduct and Disability.

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

Rule 12. Composition of Special Committees.

(a) Membership.

Except as provided in (e), a special committee appointed pursuant to Rule 11(f) must consist of the chief circuit judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee must be from districts other than the district of the subject judge.

(b) Presiding Officer.

At the time of appointing the committee, the chief circuit judge must designate one of its members (who may be the chief circuit judge) as the presiding officer. When designating another member of the committee as the presiding officer, the chief circuit judge may also delegate to such member the authority to direct the clerk of the court of appeals to issue subpoenas related to proceedings of the committee.

(c) Bankruptcy Judge or Magistrate Judge as Adviser.

If the judicial officer complained about is a bankruptcy judge or magistrate judge, the chief circuit judge may designate a bankruptcy judge or magistrate judge, as the case may be, to serve as an adviser to the committee. The chief circuit judge must designate such an adviser if, within ten days of notification of the appointment of the committee, the subject bankruptcy judge or magistrate judge requests that an adviser be designated. The adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser will not vote but will have the other privileges of a member of the committee.

(d) Provision of Documents.

The chief circuit judge must certify to each other member of the committee and to the adviser, if any, copies of the complaint form and statement of facts in whole or relevant part, and any other documents on file pertaining to the complaint or to the relevant part referred to the special committee.

(e) Continuing Qualification of Committee Members.

A member of a special committee who was qualified to serve at the time of

appointment may continue to serve on the committee even though the member relinquishes the position of chief circuit judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States.

(f) Inability of Committee Member to Complete Service.

In the event that a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief circuit judge must determine whether to appoint a replacement member, either a circuit or district judge as needed under (a). However, no special committee appointed under these rules may function with only a single member, and the voting requirements for a two-member committee must be applied as if the committee had three members.

(g) Voting.

All actions by a committee shall be by vote of a majority of all members of the committee.

Commentary on Rule 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question of committee size is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the Act requires that the chief circuit judge be a member of each special committee, it does not require that the chief circuit judge preside.

The Act provides that a special committee will have subpoena powers as provided in 28 U.S.C. § 332(d). This section provides that subpoenas will be issued on behalf of judicial councils by the clerk of the court of appeals "at the direction of the chief judge of the circuit or his designee." Rule 12(b) allows the chief circuit judge, when designating someone else as presiding officer, to make an explicit delegation of the authority to direct the issuance of subpoenas related to committee proceedings.

Rule 12(c) provides that the chief circuit judge may appoint a bankruptcy judge or magistrate judge as an adviser to a special committee, either sua sponte or at the request of the subject judge.

The Rule provides that the adviser will have all the privileges of a member of a committee except a vote. The adviser may therefore participate in all deliberations of the committee, may question witnesses at hearings, and may write a separate statement to accompany the report of the special committee to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a committee that originally consisted of the chief circuit judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The rule would permit the chief circuit judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule preserves the collegial character of the committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee will be by vote of a majority of all the members. All the members of a committee should participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

Rule 13. Conduct of an Investigation.

(a) Extent and Methods of Special Committee Investigation.

Each special committee must determine the extent and methods of the investigation as it deems appropriate in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee must, with written notice to the subject judge, expand the scope of the investigation or refer the new matter to the chief circuit judge for action under Rule 5 or Rule 11.

(b) Criminal Conduct.

In the event the complaint alleges criminal conduct or the committee becomes aware of possible criminal conduct, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by 28 U.S.C. §§ 351-364 in an effort to avoid compromising any criminal investigation. However, the committee has final authority regarding the timing and extent of its investigation and formulation of its recommendations.

(c) Staff.

The committee may arrange for staff assistance in the conduct of the investigation.

It may use existing staff of the judicial branch or may arrange, through the Director of the Administrative Office of the United States Courts, for the hiring of special staff to assist in the investigation.

(d) Delegation.

The authority to exercise the committee's subpoena powers may be delegated to the presiding officer. In the case of failure to comply with such subpoena, the judicial council or special committee may institute a contempt proceeding consistent with 28 U.S.C. § 332(d).

Commentary on Rule 13

This Rule is adapted from the Illustrative Rules.

Rule 13 and the three rules that follow are concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation. First, the committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

One of the difficult questions that can arise under the Act is the relationship between proceedings under this statute and criminal investigations. Rule 13(b) assigns coordinating responsibility to the special committee in cases in which criminal conduct is suspected but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation. A special committee may be barred from disclosing some information to a prosecutor or grand jury under the Act. This provision is discussed in the Commentary to Rule 23.

Rule 13(d) permits the committee, in its discretion, to delegate any of its duties to subcommittees, individual committee members, or staff. This is consistent with the general principle, expressed in Rule 13(a), that each special committee will determine the methods of conducting the investigation that are appropriate in light of the allegations of the complaint. The ultimate duty of adopting a report may not be delegated. Rule 13(d) suggests that, where the chief circuit judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the clerk of the court of appeals to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. Under Rule 13(d), the committee must decide whether to delegate that decision-making authority.

Rule 14. Conduct of Hearings by Special Committee.

(a) Purpose of Hearings.

The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may, in its discretion, hold joint or separate hearings.

(b) Committee Witnesses.

All persons who are believed to have material, non-redundant evidence must be called as witnesses. Such witnesses may include the complainant and the subject judge. In the committee's discretion, the witnesses may be questioned by committee members, staff, or both.

(c) Counsel for Witnesses.

Whether witnesses may have counsel present when they testify is left to the discretion of the special committee.

(d) Witness Fees.

Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) Oath.

All testimony taken at such a hearing must be given under oath or affirmation.

(f) Rules of Evidence.

The Federal Rules of Evidence do not apply to special committee hearings.

(g) Record and Transcript.

A record and transcript must be made of any hearing held.

Commentary on Rule 14

This Rule is adapted from the Act and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, committee members should not regard themselves as prosecutors one day and judges the next. Their duty -- and that of their staff -- is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that all witnesses with material evidence will be called by the committee. Staff or others who are organizing the hearings should regard it as their role to present the entire picture, and not to act as prosecutors. The subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges.

Although Rule 15(b) affords the statutory right of the subject judge to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

Rule 15. Rights of Subject Judge.

(a) Notice.

The subject judge is entitled to written notice of the appointment of a special committee under Rule 11(f) and, written notice of expansion of the scope of an investigation under Rule 13(a). The subject judge must be given notice in writing of any hearing under Rule 14, its purposes, the names of any witnesses whom the committee intends to call, and the text of any statements that have been taken from such witnesses. The subject judge may suggest additional witnesses to the committee. The subject judge must be sent the report of the special committee at the time it is filed with the judicial council.

(b) Presentation of Evidence.

At any hearing held pursuant to Rule 14, the subject judge has the right to present evidence, and to compel the attendance of witnesses and the production of documents. At the request of the subject judge, the chief circuit judge or his designee must direct the clerk of the court of appeals to issue a subpoena to a witness in accordance with 28 U.S.C. § 332(d)(1). The subject judge must be afforded the opportunity to cross-examine committee witnesses, in person or by counsel.

(c) Presentation of Argument.

The subject judge may submit written argument to the special committee, and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(d) Attendance at Hearings.

The subject judge must have the right to attend any hearing held pursuant to Rule 14 and to receive copies of the transcript and any documents introduced, as well as to receive copies of any written arguments submitted by the complainant to the committee.

(e) Representation by Counsel.

The subject judge may choose to be represented by counsel in the exercise of any of the rights enumerated in this Rule. The costs of such representation may be borne by the United States as provided in Rule 20(e).

Commentary on Rule 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To

implement this provision, Rule 15(d) gives the judge the right to attend any hearing for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the rules do not give a right to attend other proceedings, e.g., meetings at which the committee is engaged in investigative activity, such as interviewing a possible witness or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

Rule 16. Rights of Complainant in Investigation.

(a) Notice.

The complainant is entitled to written notice of the investigation as provided in Rule 11(g)(3). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) Opportunity to Provide Evidence.

The complainant must be interviewed by a representative of the committee. If the complainant has material evidence, the complainant must be called as a witness.

(c) Presentation of Argument.

The complainant may submit written argument to the special committee. In the discretion of the special committee, the complainant may be permitted to offer oral argument.

(d) Representation by Counsel.

A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

(e) Cooperation.

In the exercise of discretion under this Rule, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

Commentary on Rule 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed, the complainant will be interviewed by a representative of the committee. Such an interview may, of course, be in person or by telephone, and the representative of the committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. The rules do not accord the complainant the rights of a litigant and do not entitle the complainant to a copy of the report of the special committee**.**

In exercising their discretion regarding the role of the complainant, the special committee and the judicial council should protect the confidentiality of the complaint process. As a consequence, Subsection (e) provides that a special committee may consider the degree to which a complainant has cooperated in preserving the confidentiality of the proceedings in determining what role beyond the minimum required by these Rules should be given to that complainant.

Rule 17. Special Committee Report.

(a) Report.

The committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held pursuant to Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

Commentary to Rule 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special committee report and accompanying statement to the Judicial Conference Committee is new.

ARTICLE V. JUDICIAL COUNCIL REVIEW

Rule 18. Petitions for Review of Chief Circuit Judge Dispositions Under Rule 11(c), (d), or (e).

(a) Petitions for Review.

A complainant or subject judge aggrieved by an order of the chief circuit judge

under Rule 11(c), (d), or (e) may petition the judicial council of the circuit for review of the order. A judicial council may, by rules promulgated under 28 U.S.C. § 358, refer a petition for review filed under this Rule to a panel of no less than 5 members of the council, at least 2 of whom must be district judges.

(b) Time; Form; Where to File.

A petition for review must be filed in the office of the clerk of the court of appeals within 30 days of the date of the clerk's letter to the complainant and subject judge transmitting the chief circuit judge's order. The petition should be in letter form, addressed to the clerk of the court of appeals, and in an envelope marked "Misconduct Petition" or "Disability Petition" but without the name of the subject judge. The letter should begin "I hereby petition the judicial council for review of . . . ," should be typewritten or otherwise legible, and be signed. The letter should state the reasons why the petition should be granted.

(c) Receipt and Distribution of Petition.

On receipt of a petition for review filed within the time allowed and in proper form under these Rules, the clerk of the court of appeals must acknowledge receipt of the petition and send copies to all persons entitled to notice under Rule 8(b). The clerk must promptly send to each member of the judicial council, except for any member disqualified under Rule 25, copies of the complaint, all materials obtained by the chief circuit judge in connection with the chief circuit judge's inquiry, the chief circuit judge's order disposing of the complaint, any memorandum in support of the chief circuit judge's order, the petition for review, and an appropriate ballot. The clerk must send copies of the materials obtained by the chief circuit judge and the petition for review to the Judicial Conference Committee on Judicial Conduct and Disability.

(d) Receipt of Untimely Petition.

The clerk must refuse to accept a petition that is received after the deadline set forth in (b).

(e) Receipt of Timely Petition not in Proper Form.

On receipt of a petition filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council, including a document that is ambiguous about whether a petition for review is intended, the clerk must acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within fifteen days of the date of the clerk's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed in accordance with paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

Rule 18(b) contains a time limit of 30 days to file a petition for review. It is important to establish a time limit on petitions for review of chief circuit judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. See F.R.A.P. 25(a)(2)(A) and 25(a)(2)(C).

Rule 18(e) provides for an automatic extension of the time if a person files a petition that is rejected for failure to comply with formal requirements.

Rule 19. Judicial Council Disposition of Petitions for Review.

(a) Rights of Subject Judge.

(1) At any time after the filing of a petition for review by a complainant, the subject judge may file a written response with the clerk of the court of appeals. The clerk must promptly distribute copies of the response to each member of the judicial council who is not disqualified under Rule 25, to the chief circuit judge, to the complainant, and to the Judicial Conference Committee on Judicial Conduct and Disability. The judge may not otherwise communicate with individual council members about the matter.

(2) The subject judge must be provided with copies of any communications to the judicial council by the complainant.

(b) Judicial Council Action.

Upon consideration of a petition for review and after consideration of the materials before it, a judicial council may:

(1) affirm the chief circuit judge's disposition;

(2) return the matter to the chief circuit judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;

(3) return the matter to the chief circuit judge with directions to appoint a special committee under Rule 11(f); or

(4) in exceptional circumstances, take other appropriate action.

(c) Notice of Council Decision.

The order of the judicial council, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be provided to the complainant, the subject judge, any judge entitled to receive a copy of the complaint pursuant to Rule 8(b), and the Judicial Conference Committee on Judicial Conduct and Disability.

(d) Memorandum of Council Decision.

If the order of the council affirms the chief circuit judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief circuit judge's explanation. A memorandum supporting a council

order must not include the name of the complainant or the subject judge.

(e) Review of Judicial Council Decision.

If the judicial council's decision is adverse to the petitioner and no member of the council dissented on the ground that a special committee should be appointed pursuant to Rule 11(f), the complainant must be notified that there is no right of review of the decision. If there was such a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely of the issue of whether a special committee should be appointed.

(f) Public Availability of Judicial Council Decision.

Materials related to the council's decision must be made public at the time and in the manner set forth in Rule 24.

Commentary to Rule 19

This Rule is largely adapted from the Act and is self-explanatory.

The council should ordinarily review the decision of the chief circuit judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition by affirming the chief circuit judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action. The "exceptional cases" language would, inter alia, permit the council to deny review rather than affirm in a case in which the process was obviously being abused.

Rule 20. Judicial Council Consideration of Reports and Recommendations of Special Committees.

(a) Rights of Subject Judge.

Within twenty-one days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The judge may not otherwise communicate with council members about the matter.

(b) Judicial Council Actions.

Subject to the rights of the subject judge in Subsection (a), the judicial council, acting on the basis of the report and recommendations of, and record before, the special committee, may:

(1) dismiss the complaint because:

(A) 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;

(B) the complaint is directly related to the merits of a decision or procedural

ruling;

(C) the facts on which the complaint is based have not been established; or

(D) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351-364.

(2) conclude the proceeding because appropriate action has already been taken to remedy the problem identified in the complaint, or intervening events make such action unnecessary.

(3) in its discretion, refer the complaint to the Judicial Conference of the United States with the council's recommendations for action. A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct:

(A) that might constitute ground for impeachment; or

(B) that, in the interest of justice, is not amenable to resolution by the judicial council.

(4) take remedial action to ensure the effective and expeditious administration of the business of the courts, including but not limited to:

(A) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(B) ordering that, for a fixed temporary period, no new cases be assigned to the subject judge;

(C) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings pursuant to 28 U.S.C. § 631(i);

(D) in the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152(e);

(E) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(F) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(5) take any combination of actions described in (b)(1)-(4) of this Rule that is within its power.

(c) Inadequate Basis for Decision.

If the judicial council finds that the report, recommendations, and record of a special committee provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report or conduct such further investigation as it deems appropriate. If the judicial council decides to conduct additional investigation, the subject judge must be given adequate prior notice in writing of that proposed decision and of the general scope and purpose of the additional investigation. The conduct of the additional investigation must be generally in accordance with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) Council Vote.

Council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council.

(e) Recommendation for Fee Reimbursement.

On the request of a subject judge, the judicial council may, if the complaint has been finally dismissed or concluded under (b)(1) or (2) of this Rule, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation, including a successful defense or prosecution of a proceeding under Rule 21(a) or (b), which would not have been incurred but for the requirements of the Act and these Rules.

(f) Council Action.

Council action must be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum must be provided to the complainant, the subject judge, any judge entitled to receive a copy of the complaint pursuant to Rule 8(b), and the Judicial Conference Committee on Judicial Conduct and Disability. However, if the complaint has been referred to the Judicial Conference of the United States under (b)(3) of this Rule and the council determines that disclosure would be contrary to the interests of justice, such disclosure need not be made. The complainant and the judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

(g) Public Availability of Council Action.

Materials related to the council's action must be made public at the time and in the manner set forth in Rule 24.

Commentary on Rule 20

This Rule is largely adapted from the Illustrative Rules.

Within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not communicate with individual council members about the matter, either orally or in writing.

If the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in

accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under Subsection (b)(1) or (2) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), i.e., one that results in a Rule 20(b)(1) or (2) dismissal or conclusion.

Rule 20(f) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject judge include notice of any right to petition for review of the council's decision under Rule 21(b).

ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT AND DISABILITY

Rule 21. Committee on Judicial Conduct and Disability.

(a) Review by Committee.

The Committee on Judicial Conduct and Disability will consist of seven members. It will consider and dispose of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. The Committee's disposition of petitions for review will ordinarily be final. However, the Judicial Conference of the United States, in its sole discretion, may review any such Committee decision. The Judicial Conference's authority in this regard does not give a complainant or subject judge a right to such review.

(b) Reviewable Matters.

(1) A complainant or subject judge may petition the Committee for review of an order of a judicial council entered:

(A) pursuant to Rule 20(b)(1), (2), (4) or (5); or

(B) pursuant to Rule 19(b)(1) or (4), if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f). In such a case, the Committee's review will be limited to the issue of whether a special committee should be appointed.

(2) The Committee may, at its initiative and in its sole discretion, review any order of a judicial council entered pursuant to Rule 19(b)(1) or (4), but only as to whether a special committee should be appointed. Before undertaking such a review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) Committee Vote.

Committee decisions under (b) of this Rule shall be by majority vote of the members of the Committee not from the same circuit as the subject judge. If only six members are qualified to vote on a petition for review, the decision shall be made by a majority of a panel of five members drawn from a randomly selected list that rotates after each decision by a panel drawn from the list. If only four members are qualified to vote, the Chief Justice must appoint an ex-member of the Committee, if available, or other United States judge, if not, to consider the petition.

(d) Additional Investigation.

Absent extraordinary circumstances, the Committee will not conduct an additional investigation. However, the Committee may return the matter to the judicial council with directions to undertake an additional investigation. Should the Committee conduct an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) Oral Argument; Personal Appearance.

There will ordinarily be no oral arguments or personal appearances before the Committee. In its discretion, the Committee may permit written submissions from the petitioner, complainant, or subject judge.

(f) Committee Decisions.

Committee decisions under this Rule shall be transmitted promptly to the Judicial Conference of the United States. Other distribution will be by the Administrative Office at the direction of the Committee chair. Such orders must be maintained as public documents by the Administrative Office and by the clerk of the court for the circuit in which the complaint arose.

(g) Finality.

All orders of the Judicial Conference or of the Committee (when the Conference

does not exercise its power of review) are final and conclusive.

Commentary on Rule 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of such dispositions by the Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (2) are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented on the ground that a special committee should have been appointed, the complainant or subject judge has the right to petition for review by the Committee but only as to that issue. Under Rule 21(b)(2), the Judicial Conference Committee on Judicial Conduct and Disability may review such a dismissal or conclusion in its sole discretion, whether or not such a dissent occurred, and only as to appointment of a special committee. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. To avoid tie votes, the Committee will decide petitions for review by rotating panels of five when only six members are qualified. If only four members are qualified, the Chief Justice must appoint an additional judge to consider that petition for review.

Rule 22. Procedures for Review.

(a) Filing a Petition for Review.

A petition for review of a decision of the judicial council may be filed by sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and Disability, addressed to:

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of General Counsel
Administrative Office of the United States Courts
Washington, D.C. 20544

(b) Form and Contents of Petition for Review.

No particular form is required. The petition must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the decision of the judicial council, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the order of the judicial council for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee that the petitioner deems essential or useful to the

prompt disposition of the review petition. A petition should not normally exceed 20 pages, plus necessary attachments.

(c) Time.

A petition must be submitted within 60 days of the date of the order for which review is sought.

(d) Copies.

Five copies of the petition for review must be submitted, at least one of which must be signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office must accept the original petition and must reproduce copies at its expense.

(e) Action on Receipt of Petition for Review.

The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, and must notify the chair of the Judicial Conference Committee on Judicial Conduct and Disability. The Administrative Office must distribute the petition to the members of the Committee for their deliberation.

Commentary on Rule 22

Rule 22 is self-explanatory.

ARTICLE VII. MISCELLANEOUS RULES

Rule 23. Confidentiality.

(a) General Rule.

The consideration of a complaint by the chief circuit judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about such consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except in accordance with these rules.

(b) Files.

All files related to complaints must be separately maintained with appropriate security precautions to ensure confidentiality.

(c) Disclosure in Decisions.

Written decisions of the chief circuit judge, the judicial council, or Judicial Conference Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of the council or Committee, may contain such information and exhibits as the authors deem appropriate, and such information and exhibits may be made public pursuant to Rule 24.

(d) Availability to Judicial Conference.

On request of the Judicial Conference or its Committee on Judicial Conduct and

Disability, the clerk of a court of appeals must furnish any records related to a complaint that are requested.

(e) Availability to District Court.

In the event that the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(4)(C), the clerk of the court of appeals must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f) Impeachment Proceedings.

If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(g) Consent of Subject Judge.

Any materials from the files may be disclosed to any person on the written consent of both the subject judge and the chief circuit judge. In any such disclosure, the chief circuit judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a special committee or the judicial council, not be revealed.

(h) Disclosure in Special Circumstances.

The Judicial Conference, its Committee on Judicial Conduct and Disability, or a judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that such disclosure is justified by special circumstances and is not prohibited by the Act. Such disclosure may be made to Judiciary researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where such study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the judge complained against, the complainant, and witnesses from public disclosure, and other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i) Disclosure of Identity by Subject Judge.

Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public pursuant to Rule 24.

(j) Assistance and Consultation.

Nothing in this Rule precludes the chief circuit judge or judicial council, for purposes of acting on a complaint filed under the Act, from seeking the assistance of qualified staff, or from consulting other judges who may be helpful in the process of complaint disposition.

Commentary on Rule 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(a) provides that judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).

With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief circuit judge, judicial council, the Judicial Conference, and the Judicial Conference Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. It is clear that a district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(e) so provides.

The confidentiality requirement does not prevent the chief circuit judge from "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief circuit judge under Rule 11(b).

In addition, chief circuit judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition. Rule 23(j) provides that the confidentiality requirement does not preclude this. The chief circuit judge, for example, may properly seek the advice and assistance of another judge who the chief circuit judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief circuit judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief circuit judge should disclose information regarding the complaint only to the extent the chief circuit judge deems necessary under the circumstances.

On the other hand, the Act makes it clear that there is a barrier of confidentiality between the judicial branch and the legislative. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge.

The Act provides that confidential materials may be disclosed if authorized in writing by

the subject judge and by the chief circuit judge.

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. Rule 23(c) makes it explicit that memoranda supporting chief circuit judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public.

Section 355(b) of the Act requires the Judicial Conference to transmit the record of the proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(f) implements this requirement.

Rule 23(h) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit a prosecution for perjury based on testimony given before a special committee. Another example might involve evidence of criminal conduct by a judge discovered by a special committee.

Rule 23(h) specifically permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to Judiciary researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline.

The Rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or that constitute purely internal communications. The Rule does not envision any disclosure of purely internal communications between judges and their colleagues and staff.

Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief circuit judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief circuit judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief circuit judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief circuit judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant was delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the

proceedings).

Rule 24. Public Availability of Decisions.

(a) General Rule; Specific Cases.

When final action on a complaint has been taken and is no longer subject to review, all orders entered by the chief circuit judge and judicial council, including any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council, must be made public. However:

(1) If the complaint is finally dismissed under Rule 11(c) without appointment of a special committee, or if it is concluded because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.

(2) If the complaint is concluded because of intervening events, or dismissed at any time after the appointment of a special committee, the judicial council must determine whether the name of the subject judge is to be disclosed.

(3) If the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) If the complaint is finally disposed of by any action other than private censure or reprimand taken pursuant to Rule 20(b)(4), the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) The name of the complainant must not be disclosed in materials made public under this rule unless the chief circuit judge orders such disclosure.

(b) Manner of Making Public.

The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals or by placing such orders on the court's public website. In cases in which such orders appear to have precedential value, the chief circuit judge may cause them to be published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability must make available on the judiciary website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) Orders of Judicial Conference Committee.

To the extent consistent with the policy of the Judicial Conference Committee on Judicial Conduct and Disability, orders of that Committee relating to complaints arising from a particular circuit must also be made available to the public in the office of the clerk of the relevant court of appeals. The Committee also must make its public orders available on the judiciary website, www.uscourts.gov.

(d) Complaints Referred to the Judicial Conference of the United States.

If a complaint is referred to the Judicial Conference pursuant to Rule 20(b)(3),

materials relating to the complaint will be made public only as may be ordered by the Judicial Conference.

Commentary on Rule 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Report further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of the chief circuit judge, the judicial council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the judge must be made public. If the final action is dismissal of the complaint, or a conclusion of the proceeding by the chief circuit judge on the basis of corrective action taken, the name of the subject judge must not be disclosed.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the

judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest -- particularly if a judicial officer resigns in the course of an investigation -- to make the identity of the judge known.

Rule 24(a)(1) provides that where a proceeding is concluded by the chief circuit judge on the basis of voluntary corrective action, the name of the subject judge must not be disclosed. Shielding the name of the subject judge in this circumstance should encourage informal disposition. Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Finally, the Rule provides that the identity of the complainant will be disclosed only if the chief circuit judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

Rule 25. Disqualification.

(a) Complainant.

If the complaint is filed by a judge, that judge will be disqualified from participation in any consideration of the complaint except to the extent that these rules provide for participation by a complainant. A chief circuit judge who has identified a complaint under Rule 5 will not be automatically disqualified from participating in the consideration of the complaint but may consider in his or her discretion whether the circumstances warrant disqualification.

(b) Subject Judge.

A subject judge will be disqualified from participating in any consideration of the complaint except to the extent that these rules provide for participation by a subject judge.

(c) Disqualification of Chief Circuit Judge on Consideration of a Petition for Review of a Chief Circuit Judge's Order.

If a petition for review of a chief circuit judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council pursuant to Rule 18, the chief circuit judge must not participate in the council's consideration of the petition. In such a case, the chief circuit judge may address a written communication to all of the members of the judicial council, with copies provided to the complainant and to the subject judge. The chief circuit judge may not otherwise communicate with council members about the matter.

(d) Member of Special Committee not Disqualified.

A member of the judicial council who serves on a special committee, including the

chief circuit judge, will not be disqualified from participating in council consideration of the committee's report.

(e) Subject Judge Following Appointment of a Special Committee.

On appointment of a special committee, the subject judge will automatically be disqualified from participation in any proceeding arising under the Act or these Rules by serving on any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the Judicial Conference Committee on Judicial Conduct and Disability. The disqualification will continue until all proceedings regarding the complaint against the subject judge are finally terminated, with no further right of review.

(f) Substitute for Disqualified Chief Circuit Judge.

If the chief circuit judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief circuit judge under these rules must be assigned to the circuit judge in regular active service who is the most senior in date of commission of those who are not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or whether, in the interest of sound judicial administration, to permit the chief circuit judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) Judicial Council Action where Multiple Judges are Disqualified.

Notwithstanding any other provision in these rules to the contrary, a member of the judicial council who is a subject of the complaint may participate in the disposition thereof if:

(1) participation by subject judge(s) is necessary to obtain a quorum of the judicial council;

(2) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or judges or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(b)(1)(A); and

(3) the judicial council votes that it is necessary, appropriate and in the interest of sound judicial administration that such subject judges be eligible to act.

Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

Rule 25(e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial council, Judicial Conference, or the Judicial Conference committee. The Illustrative Rule, based on Section 359(a), was ambiguous and could have been read to disqualify a subject judge from any service of any kind on each of the bodies mentioned. This was undoubtedly not the intent of the Act. Such a disqualification would be anomalous in

light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief circuit judge may not decide matters of credibility in his or her review under Rule 11. The subject judge is barred by Rule 25(b) from participating in the disposition of that complaint. Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings, and Rule 25 (e) bars such participation.

Under the Act, a complaint against the chief circuit judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief is to be determined by date of commission, with the result that complaints against the chief circuit judge may be routed to a former chief circuit judge or other judge who was appointed earlier than the chief circuit judge. The rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief circuit judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief circuit judge under the statute. The complainant may then file a complaint against the chief circuit judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint is filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief circuit judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing in banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the

judicial council should be given discretion to determine (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief circuit judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit complained-against members of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council 6/24/92) (same). There is no unfairness in permitting the chief circuit judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of a chief circuit judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 26. Transfer to Another Judicial Council.

(a) Transfer of a Proceeding.

In exceptional circumstances, a chief circuit judge or a judicial council may request the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference pursuant to Rule 20(b)(3) or a petition for review filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

Commentary to Rule 26

Rule 26 is new but implements the Breyer Committee's recommended use of transfers. Breyer Report, 239 F.R.D. at 214-15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council

selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original council; where the issues are highly visible and a local disposition may weaken public confidence in the process; where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee council shall determine the proper stage at which to begin consideration of the complaint, i.e., reference to the transferee chief circuit judge, appointment of a special committee, etc.

Rule 27. Withdrawal of Complaints and Petitions for Review.

(a) Complaint Pending Before Chief Circuit Judge.

A complaint that is before the chief circuit judge for a decision under Rule 11 may be withdrawn by the complainant with the consent of the chief circuit judge. The withdrawal of a complaint will not prevent a chief circuit judge from identifying, or reduce the chief circuit judge's duty to identify, a complaint under Rule 5 based on the withdrawn complaint.

(b) Complaint Pending before Special Committee or Judicial Council.

After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both the subject judge and either the special committee (before its report has been filed) or the judicial council.

(c) Petitions for Review.

A petition for review addressed to a judicial council under Rule 18 or to the Judicial Conference Committee on Judicial Conduct and Disability under Rule 22, pursuant to Rule 21(b)(1), may be withdrawn by the petitioner at any time before action has been taken on the petition.

Commentary on Rule 27

Rule 27 is adapted from the Illustrative Rules.

Rule 27 treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief circuit judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under Rule 27(a), a complaint pending before the chief circuit judge may be withdrawn if

the chief circuit judge consents. Where the complaint clearly lacked merit, the chief circuit judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief circuit judge may, or be obligated under Rule 5 to, identify a complaint based on allegations in a withdrawn complaint.

If the chief circuit judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief circuit judge and often by the judicial council as well in such a case.

Rule 28. Availability of Rules and Forms.

These rules and copies of the complaint form as provided in Rule 6(b) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these rules and the complaint form available on the court's website, or provide an internet link to the rules and complaint form that are available on the judiciary's national website, www.uscourts.gov.

Rule 29. Effective Date.

These rules will become effective 30 days after promulgation by the Judicial Conference of the United States.

Case Number:

Docket numbers of any appeals to the ____th Circuit:

Are (were) you a party or lawyer in the lawsuit?

[ ] Party[ ] Lawyer[ ] Neither

If a party, give the name, address, and telephone number of your lawyer:

_____

_____

_____

4.Have you filed any lawsuits against the judge?

[ ] Yes[ ] No

If "yes," give the following information about each lawsuit:

Court:

Docket Number:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

5.On separate sheets of paper, please provide a statement of the facts that the claim of misconduct or disability is based on. The statement should not be longer than five standard pages. For further information about what to include in your statement of facts, see Rule 6(a).

Declaration and signature:

I declare under penalty of perjury that:

(1) I have reviewed the Rules Governing Judicial Misconduct and Disability Proceedings, and;

(2) The statements made in this complaint are true and correct to the best of my knowledge.

(Signature)_____

(Date)_____

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Draft Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant to 28 U.S.C. §§ 351-364

This is the latest working draft of the Rules Governing Judicial Conduct and Disability Proceedings Undertaken Pursuant To 28 U.S.C. §§ 351-364, adopted by the Committee on Judicial Conduct and Disability. The draft is a substantial revision of the Rules sent out for Public Comment on July 16, 2007. It is the result of the Committee's efforts to respond to the comments received during the public comment period, including testimony and other submissions at the Public Hearing held on September 27, 2007.

The draft is not yet a final product to be recommended to the Judicial Conference for adoption at its March meeting. The draft has been sent for style editing to Bryan Garner, who for many years served as the principal staff in the style project undertaken by the Committee on Rules of Practice and Procedure. The draft does represent this Committee's present position on matters of substance, although the Committee reserves the right to alter the draft further as to substance and style based on any communications received in the near future. The deadline for submitting the Rules for adoption by the United States Judicial Conference is mid-January. Therefore, any communications to the Committee should occur well in advance of that time. Such communications may be addressed to the Office of the General Counsel, Administrative Office of the U.S. Courts, One Columbus Circle NE, Washington, DC 20544.

abr:301

DRAFT - 12/13/07

RULES GOVERNING JUDICIAL CONDUCT AND DISABILITY PROCEEDINGS UNDERTAKEN PURSUANT TO 28 U.S.C. §§ 351-364

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DRAFT - 12/13/07

RULES GOVERNING COMPLAINTS OF JUDICIAL CONDUCT AND DISABILITY

Preface

These Rules and accompanying Commentaries were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed or identified by chief circuit judges, under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

ARTICLE I. GENERAL PROVISIONS

Rule 1. Scope.

These Rules govern the conduct of proceedings undertaken pursuant to 28 U.S.C. §§ 351-364 regarding whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office by reason of mental or physical disability.

Commentary to Rule 1

In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief Justice Rehnquist and known as the "Breyer Committee," presented a report, known as the "Breyer Report," 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980 (hereinafter "the Act") 28 U.S.C. §§ 351-364. The Committee had been formed in response to criticism from the public and the Congress regarding the effectiveness of the Act's implementation. The Executive Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Report, 239 F.R.D. at 132, and that a major problem faced by chief circuit judges in implementing the Act was the lack of authoritative interpretive standards. See id. at 212-15. The Breyer Committee then established standards to guide its evaluations, some of which were new formulations and some of which were taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. Id. at 238.

Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under section 358 of the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the present Rules were promulgated by the Judicial Conference on .

Rule 2. Effect and Construction.

Notwithstanding any rule of a judicial council to the contrary, these Rules are mandatory unless a chief circuit judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States, in the performance of acts authorized by 28 U.S.C. §§ 351-364 and these Rules, expressly finds that exceptional circumstances render the application of a Rule in a particular proceeding manifestly unjust or contrary to the purposes of 28 U.S.C. §§ 351-364 or these Rules. Judicial councils may promulgate additional rules to implement 28 U.S.C. §§ 351-364 that are not inconsistent with these Rules.

Commentary to Rule 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Rule 2, however, recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

Judicial councils retain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 3. Definitions.

(a) Complaint. A complaint is:

(1) a document filed by any person in his or her individual capacity or on behalf of a professional organization pursuant to Rule 6; or

(2) information from any source, other than a document described in (a)(1), known to a chief circuit judge, constituting probable cause to believe that misconduct or disability involving a covered judge exists, whether or not the information is framed as, or intended to be, an allegation of misconduct or disability.

(b) Misconduct. Misconduct is:

(1) conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct may include, but is not limited to, use of the judge's office to obtain special treatment for friends and relatives; acceptance of bribes, gifts, or other personal favors related to the judicial office; improper discussions with parties or counsel for one side in a case; treating litigants or attorneys in an egregiously and demonstrably hostile manner; engaging in partisan political activity or making partisan statements; participating in organizational fundraising; or violating other specific, mandatory standards of judicial conduct, such as those pertaining to the regulation of gifts, restrictions on outside income, financial disclosure, or abuses of judicial office. Conduct occurring outside the performance of official duties is not excluded if it might have a prejudicial effect on the administration of the business of the courts, including, but not limited to, a

substantial and widespread lowering of public confidence in the courts among reasonable persons.

(2) Excluded from the definition of misconduct are:

(A) allegations that are directly related to the merits of a decision or procedural ruling. Any allegation that calls into question the correctness of a ruling of a judge, including a failure to recuse, without more, is merits related. However, a complaint that involves both the merits and an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, is excluded only to the extent it attacks the merits.

(B) allegations about delay in rendering a decision or ruling. However, a complaint involving habitual delay in a significant number of unrelated cases or an improper motive in delaying a particular decision is not excluded.

(c) Disability. "Disability" is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability may include, but are not limited to, substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

(d) Subject Judge. "Subject judge" means any judge described in Rule 4 who is the subject of a complaint.

(e) Chief Circuit Judge. "Chief circuit judge" includes the chief judges of the United States Court of Appeals for the Federal Circuit, United States Court of International Trade, and United States Court of Federal Claims.

(f) Judicial Council and Circuit. "Judicial council" and "circuit," where appropriate, includes the courts mentioned in 28 U.S.C. § 363.

(g) Clerk of the Court of Appeals. "Clerk of the court of appeals," where appropriate, includes clerks of the courts named in 28 U.S.C. § 363.

(h) Court of Appeals, District Court, and District Judge. "Courts of appeals," "district court," and "district judge," where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(i) Magistrate Judge. "Magistrate judge" shall, where appropriate, include special masters appointed by the Court of Federal Claims pursuant to 42 U.S.C. § 300aa-12(c).

Commentary on Rule 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief circuit judge under Rule 5 and to complaints filed by complainants under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief circuit judge. See 28 U.S.C. § 351(a) and (b). Under this Rule, complaints may be submitted by a person, in his or her individual capacity, or by a professional organization. Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role

of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint under Rule 6, chief circuit judges are expected in some circumstances to trigger the process -- "identify a complaint," see 28 U.S.C. § 351(b) and Rule 5 -- and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief circuit judge, the complainant lacks many rights that a litigant would have, and the chief circuit judge, instead of being limited to the "four corners of the complaint," must, under Rule 11, proceed as though misconduct or disability has been alleged where the complainant reveals information of misconduct or disability but does not claim it as such. See Breyer Report, 239 F.R.D. at 183-84.

An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the Rule so provides in (a)(1). But both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief circuit judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as the chief circuit judge's concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be an accusation. This definition is codified in (a)(2).

The term "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (b)(1) therefore provides some specific examples. Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general, the Code is in many potential applications aspirational rather than a set of disciplinary rules, and the numerous interpretative opinions represent only the advisory views of the Committee on Codes of Conduct with which there may be permissible disagreement and noncompliance. See, e.g., In re Literary Works in Elec. Databases Copyright Litig., ___ F.3d ___, No. , 2007 WL 4197418 (2d Cir. 2007) (holding recusal not required despite opinion of Committee to the contrary). Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the Judicial Council of the Circuit subject to such review and limitations as are ordained by the statute and by these rules.

Even where specific, mandatory rules exist -- for example, governing the receipt of gifts by judges, outside earned income and financial disclosure obligations -- the distinction between the misconduct statute and the specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute; by contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

An allegation can meet the statutory standard even though the judge's alleged conduct did not occur in the course of the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge participated in fundraising for a charity or a partisan political event are cognizable under the Act.

On the other hand, judges are entitled to some leeway in extra-official activities. For example, misconduct may not include a judge being repeatedly and publicly discourteous to a

spouse (not including physical abuse) even though this might cause some reasonable people to have diminished confidence in the courts. The Rule states that conduct of this sort is covered only when it might lead to a "substantial and widespread" lowering of such confidence.

Rule 3(b)(2)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an official action of a judge -- without more -- is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief circuit judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related -- in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint -- even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation -- however unsupported -- that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness -- "the merits" -- of the ruling itself. Similarly, an allegation that a judge ruled against the complainant because the complainant was a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge was egregiously and demonstrably hostile to counsel or others while on the bench is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper ex parte communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by a chief circuit judge until the appellate proceedings are concluded in order to avoid, inter alia, inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand -- for example a statement that a claim is legally or factually "frivolous" -- then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an

additional inquiry under Rule 11 is necessary.

With regard to Rule 3(b)(2)(B), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge -- in other words, assigning a low priority to deciding the particular case. But, by the same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.

Rule 3(c) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available.

Subsections (e) through (i) provide technical definitions clarifying the application of the Rules to the various kinds of courts covered.

Rule 4. Covered Judges.

A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

Commentary on Rule 4

This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of complaints against persons not covered by the Act, such as other court personnel, or against both covered judges and non-covered persons.

ARTICLE II. INITIATION OF A COMPLAINT

Rule 5. Identification of a Complaint.

(a) Identifying a Complaint. Subject to Rule 7, where information known to a chief circuit judge constitutes reasonable grounds for inquiry into possible misconduct or disability on the part of a covered judge and no complaint containing such information has been filed under Rule 6, a chief circuit judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of such information. If, after such an inquiry, the chief circuit judge finds that there is probable cause to believe that misconduct has occurred or a disability exists, the chief circuit judge may informally seek a resolution satisfactory to the chief circuit judge, if feasible, and, if failing to obtain such a resolution, may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution has been achieved or is feasible, the chief circuit judge must identify a complaint. A chief circuit judge may not decline to identify a complaint because the person or persons making such allegations have not filed a complaint under Rule 6.

(b) Complaints that Do Not Comply with Rule 6(d). Complaints filed under Rule 6 that do not comply with the requirements of Rule 6(d) must be considered under this Rule.

Commentary to Rule 5

This Rule is adapted from the Breyer Report, 239 F.R.D. at 245-46.

The phrase "Subject to Rule 7" in subsection (a) is intended to establish that only: (i) the chief circuit judge of the home circuit of a potential subject judge, or (ii) the chief circuit judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

The Act authorizes the chief circuit judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief circuit judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief circuit judge has the power in his or her discretion to begin an appropriate inquiry. A chief circuit judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief circuit judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief circuit judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief circuit judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief circuit judge is required to identify a complaint.

Therefore, Rule 5(a) does not require that the evidence be clear and convincing before a complaint may be identified. A chief circuit judge is free to identify a complaint if he or she has knowledge of facts or circumstances strong enough to support a reasonable belief that there are grounds for identifying a complaint. However, where the evidence is clear and weighty, and no informal resolution has been obtained, the identification of a complaint is mandatory.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief circuit judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, see Rule 11(c), the chief circuit judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief circuit judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a complaint is identified, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once the chief circuit judge has identified a complaint, the chief circuit judge, subject to the

disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief circuit judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for the chief circuit judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief circuit judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 3(b)(2)(A), which excludes merits-related complaints from the definition of misconduct.

Subsection (a) concludes by stating that a chief circuit judge may not decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (b) provides that complaints filed under Rule 6 that do not comply with the requirements of Rule 6(d), must be considered under this Rule. For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief circuit judge must nevertheless consider the allegations as known information, and proceed to follow the process described in Rule 5(a).

Rule 6. Filing a Complaint.

(a) Brief Statement of Facts. A complaint must contain a concise statement setting forth with particularity the facts on which the claim of misconduct or disability is based. The statement of facts should include:

(1) a statement of what occurred;

(2) the time and place of the occurrence or occurrences;

(3) any information that would assist an investigator in checking the facts.

(4) in the case of an allegation of disability, any facts forming the basis of that allegation not included in the above.

(b) Form. Complaints may be filed on a form reproduced in the appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. The complaint form is to be made available on each court of appeals website, and may be obtained from the clerk of the court of appeals, district court, or bankruptcy court within the circuit. Failure to use the complaint form is not grounds for rejecting or dismissing the complaint so long as the information described in (a) is provided.

(c) Legibility; Number of Copies. Complaints should be typewritten if possible. If not typewritten, they must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form, failing which the complaint will not be considered. If the complaint is about a single judge of the court of appeals, the complainant must provide three copies of the complaint, the statement of facts, and any documents submitted. If it is about a single district judge or magistrate judge, four copies must be provided; if about a single bankruptcy judge, five copies. If the complaint is about more than one judge, copies must be provided for the clerk of the court, the chief judge of the circuit, and each subject judge. Complaints under this Rule should be in an envelope

marked "Complaint of Misconduct" or "Complaint of Disability." The name of the subject judge must not appear on the envelope.

(d) Signature. The form must be signed and the truth of the statements verified in writing under penalty of perjury. The complainant's address must also be provided. Failure to comply with this subsection will not be grounds for rejecting a complaint, but further review shall occur only under Rule 5(b).

Commentary to Rule 6

The Rule is adapted from the Illustrative Rules and is self-explanatory.

Rule 7. Where to Initiate Complaints.

(a) Where to File. Complaints against judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, or United States magistrate judges must be filed with the clerk of the United States Court of Appeals for the judicial circuit in which the subject judge holds office. Complaints against judges of the United States Court of International Trade or United States Court of Federal Claims must be filed with the respective clerks of those courts. Complaints against judges of the United States Court of Appeals for the Federal Circuit must be filed with the Circuit Executive of that court. Where appropriate, the term "clerk of the court of appeals" or "clerk," as used in these Rules, includes all the officers mentioned.

(b) Transfer; Misconduct in Another Circuit. If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291-293 and 294(d), the complaint may be filed or identified with the clerk of the court of appeals of that circuit or the subject judge's home circuit. The proceeding will continue in the circuit of the first filed or identified complaint. However, the judicial council of the circuit in which the complaint was first filed or identified may transfer the complaint to the subject judge's home circuit or circuit where the alleged misconduct occurred, as the case may be.

Commentary to Rule 7

Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk" of the court of appeals. However, in many circuits, this role is filled by circuit executives. Accordingly, the term "the clerk" as used throughout these Rules applies to circuit executives.

Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge's future behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar -- ex parte contact between an attorney and a judge, for example -- it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit.

Rule 8. Action by Clerk.

(a) Receipt of Complaint. On receipt of a complaint against a judge filed under Rules 5 or 6, the clerk of the court of appeals must open a file, assign a docket number in accordance with a uniform numbering scheme promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and acknowledge receipt.

(b) Distribution of Copies. The clerk must promptly send copies of a complaint filed under Rule 6 to the chief circuit judge or the judge authorized to act as chief circuit judge under Rule 25(f), and complaints filed under Rules 5 or 6 to each subject judge. Such complaints must also be sent to the Judicial Conference Committee on Judicial Conduct and Disability. The original complaint must be retained by the clerk. Any further distribution should be as provided by local rule.

(c) Complaints Against Non-Covered Persons. If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under these Rules.

(d) Receipt of Complaint about a Judge and Another Non-Covered Person. If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint for filing under these Rules only with regard to the judge, and the complainant must be told of the limitation.

Commentary to Rule 8

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

The provision requiring clerks to send copies of all complaints to the Judicial Conference Committee on Judicial Conduct and Disability is new. It is necessary to enable the Committee to monitor administration of the Act, to anticipate upcoming issues, and to carry out its new jurisdictional responsibilities under Article VI.

Complaints against non-covered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

Rule 9. Time for Filing or Identifying a Complaint.

A complaint may be filed or identified at any time. However, where the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(3).

Commentary to Rule 9

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

Rule 10. Abuse of the Complaint Procedure.

(a) Abusive Complaints. A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her ability to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. On written request of the complainant, the judicial council may revise or withdraw any prohibitions, restrictions or conditions imposed.

(b) Orchestrated Complaints. Where large numbers of essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the judicial council may, on the recommendation of the chief circuit judge, issue a written order instructing the clerk of the court of appeals to accept only one or more of such complaints for filing and to refuse to accept subsequent complaints. A copy of the order shall be sent to the complainants whose complaints were not accepted.

Commentary on Rule 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a different manner, for which the remedy provided in Rule 10(a) may not be appropriate. Some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. Where the first complaint or complaints have been dismissed on the merits, when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the clerk not to accept these complaints or any further such complaints for filing, and directing the clerk or the circuit executive to send each putative complainant copies of both orders.

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF CIRCUIT JUDGE

Rule 11. Review by the Chief Circuit Judge.

(a) Purpose of Chief Circuit Judge's Review. When a complaint is filed or is identified by the chief circuit judge, the chief circuit judge, subject to Rule 25, must review the complaint and determine whether it should be:

(1) dismissed;

(2) concluded on the ground that voluntary corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

Where a complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, a chief circuit judge, after notice to the subject judge, must treat the complaint as alleging such misconduct or disability.

(b) Inquiry by Chief Circuit Judge. In determining what action to take under Rule 11(a), the chief circuit judge may conduct a limited inquiry. The chief circuit judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter and review transcripts or other relevant documents. In conducting such an inquiry, the chief circuit judge may not determine any reasonably disputed issue.

(c) Dismissal. A complaint must be dismissed in whole or in part to the extent that the chief circuit judge concludes that the complaint:

(1) alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts or does not indicate a mental or physical disability resulting in inability to discharge the duties of judicial office;

(2) is directly related to the merits of a decision or procedural ruling;

(3) is frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred or a disability exists, or contains allegations that are incapable of being established through investigation;

(4) has been filed in the wrong circuit under Rule 7; or

(5) is otherwise not appropriate for consideration under the Act.

A complaint may not be dismissed solely because it repeats allegations of a previously dismissed complaint if it contains material information not previously considered and does not constitute harassment of the subject judge.

(d) Corrective Action. The chief circuit judge may conclude the complaint proceeding in whole or in part if an informal resolution under Rule 5 satisfactory to the

chief circuit judge was reached before the complaint was filed under Rule 6, or if the chief circuit judge determines that appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint has been voluntarily taken by the subject judge.

(e) Intervening Events. The chief circuit judge may conclude the complaint proceeding in whole or in part if the chief circuit judge determines that intervening events render some or all allegations of the complaint moot or remedial action impossible.

(f) Appointment of Special Committee. If some or all of the complaint is not dismissed or concluded, the chief circuit judge must promptly appoint a special committee to investigate the complaint or relevant portion thereof and to make recommendations to the judicial council. Before appointing a special committee, the chief circuit judge must invite the subject judge to respond to the complaint either orally or in writing if such an opportunity was not given during the limited inquiry. In the discretion of the chief circuit judge, separate complaints may be joined and assigned to a single special committee; similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) Notice of Chief Circuit Judge's Action; Petitions for Review.

(1) If the chief circuit judge disposes of the complaint under Rule 11(c), (d), or (e), the chief circuit judge must prepare a supporting memorandum that sets forth the reasons for the disposition. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum, which may be one document, must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and subject judge must be notified of the right to petition the judicial council for review of the decision under (g)(2) of this Rule. If a petition for review is filed as provided in Rule 18(a), the chief circuit judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the clerk of the court of appeals for transmittal to the judicial council.

(2) If the chief circuit judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant or subject judge may petition the judicial council of the circuit for review of that disposition, as provided in Rule 18.

(3) If a special committee is appointed, the chief circuit judge must notify the complainant and the subject judge that the matter has been referred to a special committee, and must inform them of the membership of the committee. A copy of the order appointing the special committee shall be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

(h) Public Availability of Chief Circuit Judge's Decision. The chief circuit judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

Commentary to Rule 11

Subsection (a) lists the actions available to a chief circuit judge in reviewing a complaint. This subsection provides that where a complaint has been filed under Rule 6, the ordinary

doctrines of waiver do not apply. A chief circuit judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be treated as a complaint regarding disability. Some formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief circuit judge's inquiry. It is based largely on the Breyer Committee Report. See Breyer Report, 239 F.R.D. at 243-45. The Act states that dismissal is appropriate "when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B). At the same time, however, section 352(a) states that "[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." These two statutory standards should be read together, so that a matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief circuit judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to a special committee and the judicial council. An allegation of fact is ordinarily not "refuted" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is literally the complainant's word against the subject judge's -- there is simply no other significant evidence of what happened or of the complainant's unreliability -- then there must be a special committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

However, dismissal following a limited inquiry may occur where the complaint refers to transcripts or to witnesses and when the chief circuit judge determines that the transcripts and witnesses all support the subject judge. For example, consider a complaint alleging that the subject judge said X, where the complaint mentions, or it is independently clear, that five people may have heard what the judge said. The chief circuit judge is told by the judge complained against and one witness that the judge did not say X, and the chief circuit judge dismisses the complaint without questioning the other four possible witnesses. In this example, the matter remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute.

Similarly, under (c)(1), if it is clear that the conduct alleged, even if it did happen, does not constitute misconduct or disability, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under (c)(1) is inappropriate.

The chief circuit judge is not required to act solely on the face of the complaint. Rule 11(b) allows the chief circuit judge to determine whether the facts alleged in the complaint are frivolous, lack sufficient evidence to raise an inference of misconduct or disability, or are

incapable of being established through investigation, but also states that the chief circuit judge may not determine a reasonably disputed issue.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. A summary judgment proceeding does not involve resolving genuine issues of material fact. A material fact is one that "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Similarly, the chief circuit judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239-45. Subsection (c)(1) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 3 and discussed in the Commentary to that Rule. Subsection (c)(2) permits dismissal of complaints related to the merits of a decision by a subject judge, also governed by Rule 3 and accompanying Commentary.

Subsection (c)(3) implements the statutory standard allowing dismissal of complaints that are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred." 28 U.S.C. § 352(b)(1)(A)(iii). The standard is intended, among other things, to cover situations where no evidence is offered or identified, or the only identified source is unavailable. For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. The subject judge denies it. The chief circuit judge requests that the complainant (who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief circuit judge can learn the unnamed witness's account. The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. The allegation is then properly dismissed as incapable of being established through investigation.

Another example would be a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief circuit judge's proper course of action may well turn on whether the source had any role in the allegedly improper conduct. If the complaint were based on a lawyer's statement that he or she had had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and the disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint as frivolous because there is no support for the allegation of misconduct.

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and there were no other witnesses; the subject judge denies that the event occurred.

Unless the complainant's allegations are facially incredible, there is evidence of the complainants unreliability, or the allegations are so improbable or lacking indicia of reliability as to be insufficient to support a finding of misconduct or disability, a special committee must be appointed because there is a factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c) also indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should be foregone, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if "voluntary appropriate corrective action" has been taken. It is largely adapted from the Breyer Report, 239 F.R.D. 244-45. The Act authorizes the chief circuit judge to conclude the proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after the complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability is preferable to sanctions. The chief circuit judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. Moreover, when corrective action is taken under Rule 5 satisfactory to the chief circuit judge before a complaint is filed, that informal resolution will be sufficient to cause the conclusion of a subsequent complaint based on the identical conduct.

"Corrective action" must be voluntary action taken by the subject judge. A remedial action directed by the chief circuit judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. Neither the chief circuit judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). Compliance with a previous council order may serve as corrective action allowing conclusion of a later complaint about the same behavior.

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, and a pledge to refrain from similar conduct in the future. While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied. In some cases, corrective action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief circuit judge's order, in a direct communication from the judge complained against, or otherwise.

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. In other words, minor corrective action will not suffice to dispose of a serious matter.

Rule 11(e) implements section 352(b)(2) of the Act, which permits the chief circuit judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, however, stepping down from an administrative post such as chief circuit judge, judicial council member, or court committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed.

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges, of course, receive copies of complaints at the same time that they are referred to the chief circuit judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief circuit judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the judge involved. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When complaints are disposed of by chief circuit judges, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. See also the Commentary to Rule 24, dealing with public availability.

Rule 11(g) also provides that the complainant and subject judge must be notified, in the case of a disposition by the chief circuit judge, of the right to petition the judicial council for review. A copy of a chief circuit judge's order and memorandum, which may be one document, disposing of a complaint must be sent by the clerk to the Judicial Conference Committee on Judicial Conduct and Disability.

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

Rule 12. Composition of Special Committees.

(a) Membership. Except as provided in (e), a special committee appointed pursuant to Rule 11(f) must consist of the chief circuit judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee must be from districts, where possible, other than the district of the subject judge. In the case of the courts named in 28 U.S.C. § 363, the committee must be selected from the judges serving on the subject judge's court.

(b) Presiding Officer. At the time of appointing the committee, the chief circuit judge must designate one of its members (who may be the chief circuit judge) as the presiding officer. When designating another member of the committee as the presiding officer, the chief circuit judge may also delegate to such member the authority to direct the clerk of the court of appeals to issue subpoenas related to proceedings of the committee.

(c) Bankruptcy Judge or Magistrate Judge as Advisor. If the judicial officer complained about is a bankruptcy judge or magistrate judge, the chief circuit judge may designate a bankruptcy judge or magistrate judge, as the case may be, to serve as an advisor to the committee. The chief circuit judge must designate such an advisor if, within fourteen days of notification of the appointment of the committee, the subject bankruptcy judge or magistrate judge requests that an advisor be designated. Except for the Court of Federal Claims special masters appointed pursuant to 42 U.S.C. § 300aa-12(c), the advisor must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The advisor will not vote but will have the other privileges of a member of the committee.

(d) Provision of Documents. The chief circuit judge must certify to each other member of the committee and to the advisor, if any, copies of the complaint form and statement of facts in whole or relevant part, and any other documents on file pertaining to the complaint or to the relevant part referred to the special committee.

(e) Continuing Qualification of Committee Members. A member of a special committee who was qualified to serve at the time of appointment may continue to serve on the committee even though the member relinquishes the position of chief circuit judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or pursuant to 28 U.S.C. § 171.

(f) Inability of Committee Member to Complete Service. In the event that a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief circuit judge must determine whether to appoint a replacement member, either a circuit or district judge as needed under (a). However, no special committee appointed under these Rules may function with only a single member, and the voting requirements for a two-member committee must be applied as if the committee had three members.

(g) Voting. All actions by a committee shall be by vote of a majority of all members of the committee.

Commentary on Rule 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question of committee size is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the Act requires that the chief circuit judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief circuit judge preside.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of judicial councils by the clerk of the court of appeals "at the direction of the chief judge of the circuit or his designee." Rule 12(b) allows the chief circuit judge, when designating someone else as presiding officer, to make an explicit delegation of the authority to direct the issuance of subpoenas related to committee proceedings.

Rule 12(c) provides that the chief circuit judge may appoint a bankruptcy judge or magistrate judge as an advisor to a special committee, either sua sponte or at the request of the subject judge.

The Rule provides that the advisor will have all the privileges of a member of a committee except a vote. The advisor may therefore participate in all deliberations of the committee, may question witnesses at hearings, and may write a separate statement to accompany the report of the special committee to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a committee that originally consisted of the chief circuit judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule would permit the chief circuit judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule preserves the collegial character of the committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee will be by vote of a majority of all the members. All the members of a committee should participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

Rule 13. Conduct of an Investigation.

(a) Extent and Methods of Special Committee Investigation. Each special committee must determine the extent and methods of the investigation it deems appropriate in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee must refer the new matter to the chief circuit judge for action under Rule 5 or Rule 11.

(b) Criminal Conduct. If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by 28 U.S.C. §§ 351-364 in an effort to avoid compromising any criminal investigation. However, the committee has final authority regarding the timing and extent of its investigation and formulation of its recommendations.

(c) Staff. The committee may arrange for staff assistance in the conduct of the investigation. It may use existing staff of the judicial branch or may arrange, through the Director of the Administrative Office of the United States Courts, for the hiring of special staff to assist in the investigation.

(d) Delegation. The authority to exercise the committee's subpoena powers may be delegated to the presiding officer. In the case of failure to comply with such subpoena, the judicial council or special committee may institute a contempt proceeding consistent with 28 U.S.C. § 332(d).

Commentary on Rule 13

This Rule is adapted from the Illustrative Rules.

Rule 13 and the three Rules that follow are concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation. First, the committee has an investigative role of the kind that is characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. Id. Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation. A special committee may be barred from disclosing some information to a prosecutor or grand jury under the Act. This provision is discussed in the Commentary to Rule 23.

Rule 13(d) permits the committee, in its discretion, to delegate any of its duties to subcommittees, individual committee members, or staff. This is consistent with the general principle, expressed in Rule 13(a), that each special committee will determine the methods of

conducting the investigation that are appropriate in light of the allegations of the particular complaint. The ultimate duty of adopting a report may not be delegated. Rule 13(d) suggests that, where the chief circuit judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the clerk of the court of appeals to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. Under Rule 13(d), the committee must decide whether to delegate that decision-making authority.

Rule 14. Conduct of Hearings by Special Committee.

(a) Purpose of Hearings. The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may, in its discretion, hold joint or separate hearings.

(b) Committee Evidence. Material, non-redundant evidence must be obtained by the committee in the form it deems appropriate, subject to the requirements of Rule 15. In the committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.

(c) Counsel for Witnesses. Whether witnesses, other than the subject judge, who has the right to counsel, may have counsel present when they testify is left to the discretion of the special committee.

(d) Witness Fees. Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) Oath. All testimony taken at such a hearing must be given under oath or affirmation.

(f) Rules of Evidence. The Federal Rules of Evidence do not apply to special committee hearings.

(g) Record and Transcript. A record and transcript must be made of any hearing held.

Commentary on Rule 14

This Rule is adapted from section 353 of the Act and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, committee members should not regard themselves as prosecutors one day and judges the next. Their duty -- and that of their staff -- is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the committee, and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the

hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(b) affords the statutory right of the subject judge to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

Rule 15. Rights of Subject Judge.

(a) Notice. The subject judge is entitled to written notice of the appointment of a special committee under Rule 11(f) and, written notice of expansion of the scope of an investigation under Rule 13(a). The subject judge must be given notice in writing of any hearing under Rule 14, its purposes, the names of any witnesses whom the committee intends to call, and the text of any statements that have been taken from such witnesses. The subject judge may suggest additional witnesses to the committee. The subject judge must be sent the report of the special committee at the time it is filed with the judicial council.

(b) Presentation of Evidence. At any hearing held pursuant to Rule 14, the subject judge has the right to present evidence, and to compel the attendance of witnesses and the production of documents. At the request of the subject judge, the chief circuit judge or the judge's designee must direct the clerk of the court of appeals to issue a subpoena to a witness in accordance with 28 U.S.C. § 332(d)(1). The subject judge must be afforded the opportunity to cross-examine committee witnesses, in person or by counsel.

(c) Presentation of Argument. The subject judge may submit written argument to the special committee, and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(d) Attendance at Hearings. The subject judge must have the right to attend any hearing held pursuant to Rule 14 and to receive copies of the transcript and any documents introduced, as well as to receive copies of any written arguments submitted by the complainant to the committee.

(e) Representation by Counsel. The subject judge may choose to be represented by counsel in the exercise of any of the rights enumerated in this Rule. The costs of such representation may be borne by the United States as provided in Rule 20(e).

Commentary on Rule 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(d) gives the judge the right to attend any hearing for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings -- for example, meetings at which the committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

Rule 16. Rights of Complainant in Investigation.

(a) Notice. The complainant is entitled to written notice of the investigation as provided in Rule 11(g)(3). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) Opportunity to Provide Evidence. A representative of the committee must interview the complainant if the committee determines that the complainant may have evidence that does not already exist in writing.

(c) Presentation of Argument. The complainant may submit written argument to the special committee. In the discretion of the special committee, the complainant may be permitted to offer oral argument.

(d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

(e) Cooperation. In the exercise of discretion under this Rule, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

Commentary on Rule 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed, the complainant will be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

In exercising their discretion regarding the role of the complainant, the special committee and the judicial council should protect the confidentiality of the complaint process. As a consequence, subsection (e) provides that a special committee may consider the degree to which a complainant has cooperated in preserving the confidentiality of the proceedings in determining what role beyond the minimum required by these Rules should be given to that complainant.

Rule 17. Special Committee Report.

The committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held pursuant to Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

Commentary to Rule 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special committee report and accompanying statement to the Judicial Conference Committee is new.

ARTICLE V. JUDICIAL COUNCIL REVIEW

Rule 18. Petitions for Review of Chief Circuit Judge Dispositions Under Rule 11(c), (d), or (e).

(a) Petitions for Review. A complainant or subject judge aggrieved by an order of the chief circuit judge under Rule 11(c), (d), or (e) may petition the judicial council of the circuit for review of the order. A judicial council may, by rules promulgated under 28 U.S.C. § 358, refer a petition for review filed under this Rule to a panel of no less than five members of the council, at least two of whom must be district judges.

(b) Time; Form; Where to File. A petition for review must be filed in the office of the clerk of the court of appeals within thirty-five days of the date of the clerk's letter to the complainant and subject judge transmitting the chief circuit judge's order. The petition should be in letter form, addressed to the clerk of the court of appeals, and in an envelope marked "Misconduct Petition" or "Disability Petition" but without the name of the subject judge. The letter should begin "I hereby petition the judicial council for review of . . . ," should be typewritten or otherwise legible, and be signed. The letter should state the reasons why the petition should be granted.

(c) Receipt and Distribution of Petition. On receipt of a petition for review filed within the time allowed and in proper form under these Rules, the clerk of the court of appeals must acknowledge receipt of the petition and send a copy to the complainant and subject judge, as the case may be. The clerk must promptly distribute to each member of the judicial council, or relevant panel thereof, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, copies of the complaint,

all materials obtained by the chief circuit judge in connection with the chief circuit judge's inquiry, the chief circuit judge's order disposing of the complaint, any memorandum in support of the chief circuit judge's order, the petition for review, and an appropriate ballot. The clerk must send the petition for review to the Judicial Conference Committee on Judicial Conduct and Disability. Copies of the materials obtained by the chief circuit judge are not to be sent to the Judicial Conference Committee unless requested.

(d) Receipt of Untimely Petition. The clerk must refuse to accept a petition that is received after the deadline set forth in (b).

(e) Receipt of Timely Petition not in Proper Form. On receipt of a petition filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council, including a document that is ambiguous about whether a petition for review is intended, the clerk must acknowledge receipt of the petition, call the petitioner's attention to the deficiencies, and give the petitioner the opportunity to correct the deficiencies within twenty-one days of the date of the clerk's letter or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed in accordance with paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits a subject judge, as well as the complainant, to petition for review of a chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although ostensibly vindicated, a chief circuit judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of thirty-five days to file a petition for review. It is important to establish a time limit on petitions for review of chief circuit judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. See Fed. R. App. P. 25(a)(2)(A) and 25(a)(2)(C).

Rule 18(e) provides for an automatic extension of the time if a person files a petition that is rejected for failure to comply with formal requirements.

Rule 19. Judicial Council Disposition of Petitions for Review.

(a) Rights of Subject Judge. At any time after the filing of a petition for review by a complainant, the subject judge may file a written response with the clerk of the court of appeals. The clerk must promptly distribute copies of the response to each member of the judicial council, or relevant panel thereof, who is not disqualified under Rule 25, to the chief circuit judge, to the complainant, and to the Judicial Conference Committee on Judicial Conduct and Disability. The subject judge may not otherwise communicate with individual council members about the matter. The subject judge must be provided with copies of any communications to the judicial council by the complainant.

(b) Judicial Council Action. Upon consideration of a petition for review and after consideration of the materials before it, a judicial council may:

(1) affirm the chief circuit judge's disposition;

(2) return the matter to the chief circuit judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;

(3) return the matter to the chief circuit judge with directions to appoint a special committee under Rule 11(f); or

(4) in exceptional circumstances, take other appropriate action.

(c) Notice of Council Decision. The order of the judicial council, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(d) Memorandum of Council Decision. If the order of the council affirms the chief circuit judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief circuit judge's explanation. A memorandum supporting a council order must not include the name of the complainant or the subject judge.

(e) Review of Judicial Council Decision. If the judicial council's decision is adverse to the petitioner and no member of the council dissented on the ground that a special committee should be appointed pursuant to Rule 11(f), the complainant must be notified that there is no right of review of the decision. If there was such a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely of the issue of whether a special committee should be appointed.

(f) Public Availability of Judicial Council Decision. Materials related to the council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

Commentary to Rule 19

This Rule is largely adapted from the Act and is self-explanatory.

The council should ordinarily review the decision of the chief circuit judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition by affirming the chief circuit judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action. The "exceptional cases" language would, inter alia, permit the council to deny review rather than affirm in a case in which the process was obviously being abused.

Rule 20. Judicial Council Consideration of Reports and Recommendations of Special Committees.

(a) Rights of Subject Judge. Within twenty-one days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present argument through counsel, written or oral as determined by the council. The judge may not otherwise communicate with council members about the matter.

(b) Judicial Council Actions. Subject to the rights of the subject judge in Subsection (a), the judicial council, acting on the basis of the report and recommendations of, and record before, the special committee, may:

(1) dismiss the complaint because:

(A) 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;

(B) the complaint is directly related to the merits of a decision or procedural ruling;

(C) the facts on which the complaint is based have not been established; or

(D) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351-364.

(2) conclude the proceeding because appropriate corrective action has already been taken to remedy the problem identified in the complaint, or intervening events make such action unnecessary.

(3) in its discretion, refer the complaint to the Judicial Conference of the United States with the council's recommendations for action. A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct:

(A) that might constitute ground for impeachment; or

(B) that, in the interest of justice, is not amenable to resolution by the judicial council.

(4) take remedial action to ensure the effective and expeditious administration of the business of the courts, including but not limited to:

(A) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(B) ordering that, for a fixed temporary period, no new cases be assigned to the subject judge;

(C) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings pursuant to 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa-12(c)(2);

(D) in the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152(e);

(E) in the case of a circuit or district judge, requesting the judge to retire

voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(F) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(5) take any combination of actions described in (b)(1)-(4) of this Rule that is within its power.

(c) Inadequate Basis for Decision. If the judicial council finds that the report, recommendations, and record of a special committee provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report or conduct such further investigation as the council deems appropriate. If the judicial council decides to conduct additional investigation, the subject judge must be given adequate prior notice in writing of that proposed decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must be generally in accordance with the procedures and powers set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) Council Vote. Council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority vote of all the members of the council.

(e) Recommendation for Fee Reimbursement. On the request of a subject judge, the judicial council may, if the complaint has been finally dismissed or concluded under (b)(1) or (2) of this Rule, recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation, including a successful defense or prosecution of a proceeding under Rule 21(a) or (b), which would not have been incurred but for the requirements of the Act and these Rules.

(f) Council Action. Council action must be by written order. Unless the council finds that, for extraordinary reasons, it would be contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and the judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

Commentary on Rule 20

This Rule is largely adapted from the Illustrative Rules.

Within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not otherwise communicate with council members about the matter.

If the judicial council decides to conduct an additional investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1) or (2) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1) or (2) dismissal or conclusion.

Rule 20(f) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject judge include notice of any right to petition for review of the council's decision under Rule 21(b).

ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT AND DISABILITY

Rule 21. Committee on Judicial Conduct and Disability.

(a) Review by Committee. The Committee on Judicial Conduct and Disability will consist of seven members. It will consider and dispose of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. The Committee's disposition of petitions for review will ordinarily be final. However, the Judicial Conference of the United States, in its sole discretion, may review any such Committee decision. The Judicial Conference's authority in this regard does not give a complainant or subject judge a right to such review.

(b) Reviewable Matters.

(1) A complainant or subject judge may petition the Committee for review of an order of a judicial council entered:

(A) pursuant to Rule 20(b)(1), (2), (4) or (5); or

(B) pursuant to Rule 19(b)(1) or (4), if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f). In such a case, the Committee's review will be limited to the issue of whether a special committee should be appointed.

(2) The Committee may, at its initiative and in its sole discretion, review any order of a judicial council entered pursuant to Rule 19(b)(1) or (4), but only as to whether a special committee should be appointed. Before undertaking such a review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) Committee Vote. Committee decisions under (b) of this Rule shall be by majority vote of the members of the Committee not from the same circuit as the subject judge. If only six members are qualified to vote on a petition for review, the decision shall be made by a majority of a panel of five members drawn from a randomly selected list that rotates after each decision by a panel drawn from the list. The members who are to determine the petition shall be selected based on the membership of the committee as of the date on which the petition is received. Those members selected to hear the petition should serve in that capacity until final disposition of the petition whether or not their term of committee membership has terminated. If only four members are qualified to vote, the Chief Justice must appoint an ex-member of the Committee, if available, or other United States judge, if not, to consider the petition.

(d) Additional Investigation. Absent extraordinary circumstances, the Committee will not conduct an additional investigation. However, the Committee may return the matter to the judicial council with directions to undertake an additional investigation. Should the Committee conduct an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) Oral Argument; Personal Appearance. There will ordinarily be no oral arguments or personal appearances before the Committee. In its discretion, the Committee may permit written submissions from the complainant or subject judge.

(f) Committee Decisions. Committee decisions under this Rule shall be transmitted promptly to the Judicial Conference of the United States. Other distribution will be by the Administrative Office at the direction of the Committee chair. Such orders must be maintained as public documents by the Administrative Office and by the clerk of the court for the circuit or court named in 28 U.S.C. § 363 in which the complaint arose.

(g) Finality. All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final and conclusive.

Commentary on Rule 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of

such dispositions by the Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (2) are intended to fill a jurisdictional gap as to review of dismissals or conclusions of complaints under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented on the ground that a special committee should have been appointed, the complainant or subject judge has the right to petition for review by the Committee but only as to that issue. Under Rule 21(b)(2), the Judicial Conference Committee on Judicial Conduct and Disability may review such a dismissal or conclusion in its sole discretion, whether or not such a dissent occurred, and only as to appointment of a special committee. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. To avoid tie votes, the Committee will decide petitions for review by rotating panels of five when only six members are qualified. If only four members are qualified, the Chief Justice must appoint an additional judge to consider that petition for review.

Rule 22. Procedures for Review.

(a) Filing a Petition for Review. A petition for review of a decision of the judicial council may be filed by sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and Disability, addressed to:

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

The Administrative Office shall send a copy of the petition to the complainant or subject judge, as the case may be.

(b) Form and Contents of Petition for Review. No particular form is required. The petition must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the decision of the judicial council, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the order of the judicial council for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee that the petitioner deems essential or useful to the prompt disposition of the review petition. A petition should not normally exceed twenty pages, plus necessary attachments.

(c) Time. A petition must be submitted within sixty-three days of the date of the order for which review is sought.

(d) Copies. Five copies of the petition for review must be submitted, at least one of which must be signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office must accept the original petition and must reproduce copies at its expense.

(e) Action on Receipt of Petition for Review. The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, and must notify the chair of the Judicial Conference Committee on Judicial Conduct and Disability. The

Administrative Office must distribute the petition to the members of the Committee for their deliberation.

Commentary on Rule 22

Rule 22 is self-explanatory.

ARTICLE VII. MISCELLANEOUS RULES

Rule 23. Confidentiality.

(a) General Rule. The consideration of a complaint by the chief circuit judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about such consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except in accordance with these Rules. However, in extraordinary circumstances, a chief circuit judge may disclose the existence of a proceeding under these Rules where necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability.

(b) Files. All files related to complaints must be separately maintained with appropriate security precautions to ensure confidentiality.

(c) Disclosure in Decisions. Except where otherwise provided in Rule 24, written decisions of the chief circuit judge, the judicial council, or Judicial Conference Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of the council or Committee, may contain such information and exhibits as the authors deem appropriate, and such information and exhibits may be made public.

(d) Availability to Judicial Conference. On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the clerk of a court of appeals must furnish any records related to a complaint that are requested.

(e) Availability to District Court. In the event that the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(4)(C), the clerk of the court of appeals must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its determination. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f) Impeachment Proceedings. If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(g) Consent of Subject Judge. Any materials from the files may be disclosed to any person on the written consent of both the subject judge and the chief circuit judge. In any such disclosure, the chief circuit judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a special committee or the judicial council, not be revealed.

(h) Disclosure in Special Circumstances. The Judicial Conference, its Committee

on Judicial Conduct and Disability, or a judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that such disclosure is justified by special circumstances and is not prohibited by the Act. Such disclosure may be made to Judiciary researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where such study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the judge complained against, the complainant, and witnesses from public disclosure, and other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i) Disclosure of Identity by Subject Judge. Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public pursuant to Rule 24.

(j) Assistance and Consultation. Nothing in this Rule precludes the chief circuit judge or judicial council, for purposes of acting on a complaint filed under the Act, from seeking the assistance of qualified staff, or from consulting other judges who may be helpful in the process of complaint disposition.

Commentary on Rule 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(a) provides that judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).

With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief circuit judge, judicial council, the Judicial Conference, and the Judicial Conference Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. It is clear that a district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(e) so provides.

In extraordinary circumstances, a chief circuit judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or

controversial cases is to reassure the public that the federal judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent the chief circuit judge from "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief circuit judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that memoranda supporting chief circuit judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (c) is subject to Rule 24(a) which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes it clear that there is a barrier of confidentiality between the judicial branch and the legislative. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, section 355(b) of the Act requires the Judicial Conference to transmit the record of the proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(f) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief circuit judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief circuit judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief circuit judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief circuit judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief circuit judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant was delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(h) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit a prosecution for perjury based on testimony given before a special committee. Another example might involve evidence of criminal conduct by a judge discovered by a special committee.

Subsection (h) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to Judiciary researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately

authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or that constitute purely internal communications. The Rule does not envision any disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(j), chief circuit judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition; the confidentiality requirement does not preclude this. The chief circuit judge, for example, may properly seek the advice and assistance of another judge who the chief circuit judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief circuit judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief circuit judge should disclose information regarding the complaint only to the extent the chief circuit judge deems necessary under the circumstances.

Rule 24. Public Availability of Decisions.

(a) General Rule; Specific Cases. When final action on a complaint has been taken and is no longer subject to review, all orders entered by the chief circuit judge and judicial council, including any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council, must be made public. However:

(1) If the complaint is finally dismissed under Rule 11(c) without appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.

(2) If the complaint is concluded because of intervening events, or dismissed at any time after the appointment of a special committee, the judicial council must determine whether the name of the subject judge is to be disclosed.

(3) If the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) If the complaint is finally disposed of pursuant to Rule 20(b)(4) by any action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) The name of the complainant must not be disclosed in materials made public under this Rule unless the chief circuit judge orders such disclosure.

(b) Manner of Making Public. The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the clerk of the court of appeals or by placing such orders on the court's public website. In cases in which such orders appear to have precedential value, the chief circuit judge may cause them to be published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability must make available on the judiciary website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) Orders of Judicial Conference Committee. To the extent consistent with the policy of the Judicial Conference Committee on Judicial Conduct and Disability, orders of that Committee relating to complaints arising from a particular circuit must also be made available to the public in the office of the clerk of the relevant court of appeals. The Committee also must make its public orders available on the judiciary website, www.uscourts.gov.

(d) Complaints Referred to the Judicial Conference of the United States. If a complaint is referred to the Judicial Conference pursuant to Rule 20(b)(3), materials relating to the complaint will be made public only as may be ordered by the Judicial Conference.

Commentary on Rule 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Report further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of the chief circuit judge, the judicial council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief circuit judge on the basis of voluntary corrective action, the name of the subject judge must

not be disclosed. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest -- particularly if a judicial officer resigns in the course of an investigation -- to make the identity of the judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Finally, the Rule provides that the identity of the complainant will be disclosed only if the chief circuit judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

Rule 25. Disqualification.

(a) General Rule. Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If the complaint is filed by a judge, that judge is disqualified from participation in any consideration of the complaint except to the extent that these Rules provide for participation by a complainant. However, a chief circuit judge who has identified a complaint under Rule 5 is not automatically disqualified from participating in the consideration of the complaint.

(b) Subject Judge. A subject judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for participation by a subject judge.

(c) Chief Circuit Judge not Disqualified from Considering a Petition for Review of a Chief Circuit Judge's Order. If a petition for review of a chief circuit judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council pursuant to Rule 18, the chief circuit judge is not disqualified from participating in the council's consideration of the petition

(d) Member of Special Committee not Disqualified. A member of the judicial council who serves on a special committee, including the chief circuit judge, is not disqualified from participating in council consideration of the committee's report.

(e) Subject Judge Following Appointment of a Special Committee. On appointment of a special committee, the subject judge is automatically disqualified from participation in any proceeding arising under the Act or these Rules by serving on any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the Judicial Conference Committee on Judicial Conduct and Disability. The disqualification

continues until all proceedings regarding the complaint against the subject judge are finally terminated, with no further right of review.

(f) Substitute for Disqualified Chief Circuit Judge. If the chief circuit judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief circuit judge under these Rules must be assigned to the circuit judge in regular active service who is the most senior in date of commission of those who are not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or whether, in the interest of sound judicial administration, to permit the chief circuit judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) Judicial Council Action where Multiple Judges are Disqualified. Notwithstanding any other provision in these Rules to the contrary, a member of the judicial council who is a subject of the complaint may participate in the disposition thereof if:

(1) participation by subject judge(s) is necessary to obtain a quorum of the judicial council;

(2) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(b)(2); and

(3) the judicial council votes that it is necessary, appropriate and in the interest of sound judicial administration that such subject judges be eligible to act.

(4) otherwise disqualified members may participate in votes taken under (2) and (3) of this subsection.

(h) Disqualification of Members of the Judicial Conference Committee. No member of the Judicial Conference Committee on Judicial Conduct and Disability is disqualified from participation in any proceeding under the Act or these Rules because of consultations with a chief circuit judge, member of a special committee, or member of a judicial counsel regarding the interpretation or application of the Act or these Rules, unless the member believes that such consultation would prevent such participation from being fair-minded.

Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial council, Judicial Conference, or the Judicial Conference

Committee. The Illustrative Rule, based on section 359(a) of the Act, was ambiguous and could have been read to disqualify a subject judge from any service of any kind on each of the bodies mentioned. This was undoubtedly not the intent of the Act. Such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief circuit judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings, and Rule 25(e) bars such participation.

Under the Act, a complaint against the chief circuit judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief is to be determined by date of commission, with the result that complaints against the chief circuit judge may be routed to a former chief circuit judge or other judge who was appointed earlier than the chief circuit judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these Rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief circuit judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief circuit judge under the statute. The complainant may then file a complaint against the chief circuit judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint is filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of the court of appeals who can serve as acting chief circuit judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in

the interest of sound judicial administration to permit the chief circuit judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit complained-against members of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief circuit judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of a chief circuit judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Judicial Conference Committee contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

Rule 26. Transfer to Another Judicial Council.

In exceptional circumstances, a chief circuit judge or a judicial council may request the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference pursuant to Rule 20(b)(3) or a petition for review filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

Commentary to Rule 26

Rule 26 is new but implements the Breyer Committee's recommended use of transfers. Breyer Report, 239 F.R.D. at 214-15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a

serious complaint where there are multiple disqualifications among the original council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee council shall determine the proper stage at which to begin consideration of the complaint -- for example, reference to the transferee chief circuit judge, appointment of a special committee, etc.

Rule 27. Withdrawal of Complaints and Petitions for Review.

(a) Complaint Pending Before Chief Circuit Judge. A complaint that is before the chief circuit judge for a decision under Rule 11 may be withdrawn by the complainant with the consent of the chief circuit judge. The withdrawal of a complaint will not prevent a chief circuit judge from identifying, or reduce the chief circuit judge's duty to identify, a complaint under Rule 5 based on the withdrawn complaint.

(b) Complaint Pending before Special Committee or Judicial Council. After a complaint has been referred to a special committee for investigation, the complaint may be withdrawn by the complainant only with the consent of both the subject judge and either the special committee (before its report has been filed) or the judicial council.

(c) Petitions for Review. A petition for review addressed to a judicial council under Rule 18 or to the Judicial Conference Committee on Judicial Conduct and Disability under Rule 22, pursuant to Rule 21(b)(1), may be withdrawn by the petitioner at any time before action has been taken on the petition.

Commentary on Rule 27

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief circuit judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection 27(a), a complaint pending before the chief circuit judge may be withdrawn if the chief circuit judge consents. Where the complaint clearly lacked merit, the chief circuit judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief circuit judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief circuit judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if

the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief circuit judge and often by the judicial council as well in such a case.

Rule 28. Availability of Rules and Forms.

These Rules and copies of the complaint form as provided in Rule 6(b) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules and the complaint form available on the court's website, or provide an internet link to the Rules and complaint form that are available on the appropriate court of appeals' website.

Rule 29. Effective Date.

These Rules will become effective thirty days after promulgation by the Judicial Conference of the United States.

APPENDIX: COMPLAINT FORM

JUDICIAL COUNCIL OF THE _____

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

NOTE: MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE SUBJECT JUDGE(S) ON THE ENVELOPE.

SEE RULE 6 FOR INFORMATION ON WHAT TO INCLUDE IN A COMPLAINT.

SEE RULE 7 FOR INFORMATION ON WHERE TO FILE A COMPLAINT.

SEE RULE 6(c) FOR THE NUMBER OF COPIES REQUIRED.

1. Complainant's name:_____

Address:_____

_____

Daytime telephone:(___) _____

2. Subject Judge(s):

Name:_____

Court:_____

3. Does this complaint concern the behavior of the judge(s) in a particular lawsuit or lawsuits?

[ ] Yes[ ] No

If "yes," give the following information about each lawsuit:

Court:

Case Number:

Docket numbers of any appeals to the ___d/th Circuit:

Are (were) you a party or lawyer in the lawsuit?

[ ] Party[ ] Lawyer[ ] Neither

If a party, give the name, address, and telephone number of your lawyer:

_____

_____

---

4. Have you filed any lawsuits against the judge?

[ ] Yes[ ] No

If "yes," give the following information about each lawsuit:

Court:

Docket Number:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

5. On separate sheets of paper, please provide a statement of the facts on which the claim of misconduct or disability is based. For further information about what to include in your statement of facts, see Rule 6(a).

Declaration and signature:

I declare under penalty of perjury that:

___(1) I have reviewed the Rules Governing Judicial Conduct and Disability Proceedings, and;

___(2) The statements made in this complaint are true and correct to the best of my knowledge.

(Signature)_____

(Date)_____

ADMINISTRATIVE OFFICE
OF THE
U.S. COURTS

John K. Rabiej
Chief, Rules Committee
Support Office

Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

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Draft Rules for Judicial-Conduct and Judicial-Disability Proceedings

The Committee on Judicial Conduct and Disability has recommended for adoption by the Judicial Conference a draft of Rules for Judicial-Conduct and Judicial-Disability Proceedings. This draft reflects not only the revisions made after the Public Comment period but also those resulting from a style edit. The Committee does not contemplate making any further changes to the draft prior to its consideration by the Judicial Conference on March 11, 2008.

abr:353

Draft of 1.23.08
Recommended for Adoption by the Judicial Conference

Judicial Conference Committee on Judicial Conduct and Disability

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Draft of 1.23.08
Recommended for Adoption by the Judicial Conference

Rules for Judicial-Conduct and Judicial-Disability Proceedings

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RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

Preface

These Rules were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed by complainants or identified by chief judges, under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

ARTICLE I. GENERAL PROVISIONS

1. Scope

These Rules govern proceedings under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364 (the Act), to determine whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office because of mental or physical disability.

Commentary on Rule 1

In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed in 2004 by Chief Justice Rehnquist and known as the "Breyer Committee," presented a report, known as the "Breyer Committee Report," 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C. §§ 351-364. The Breyer Committee had been formed in response to criticism from the public and the Congress regarding the effectiveness of the Act's implementation. The Executive Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial Conduct and Disability to consider the recommendations made by the Breyer Committee and to report on their implementation to the Conference.

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and that a major problem faced by chief judges in implementing the Act was the lack of authoritative interpretive standards. Id. at 212-15. The Breyer Committee then established standards to guide its evaluation, some of which were new formulations and some of which were taken from the "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. Id. at 238.

Based on the findings of the Breyer Committee, the Judicial Conference Committee on Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to exercise its power under Section 358 of the Act to fashion standards guiding the various officers and bodies who must exercise responsibility under the Act. To

that end, the Judicial Conference Committee proposed rules that were based largely on Appendix E of the Breyer Committee Report and the Illustrative Rules.

The Illustrative Rules were originally prepared in 1986 by the Special Committee of the Conference of Chief Judges of the United States Courts of Appeals, and were subsequently revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the present Rules were promulgated by the Judicial Conference on .

2. Effect and Construction

(a) Generally. These Rules are mandatory; they supersede any conflicting judicial-council rules. Judicial councils may promulgate additional rules to implement the Act as long as those rules do not conflict with these Rules.

(b) Exception. A Rule will not apply if, when performing duties authorized by the Act, a chief judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States expressly finds that exceptional circumstances render application of that Rule in a particular proceeding manifestly unjust or contrary to the purposes of the Act or these Rules.

Commentary on Rule 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Judicial councils retain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

3. Definitions

(a) Chief Judge. "Chief judge" means the chief judge of a United States Court of Appeals, of the United States Court of International Trade, or of the United States Court of Federal Claims.

(b) Circuit Clerk. "Circuit clerk" means a clerk of a United States court of appeals, the clerk of the United States Court of International Trade, the clerk of the United States Court of Federal Claims, or the circuit executive of the United States Court of Appeals for the Federal Circuit.

(c) Complaint. A complaint is:

(1) a document that, in accordance with Rule 6, is filed by any person in his or her individual capacity or on behalf of a professional organization; or

(2) information from any source, other than a document described in (c)(1), that gives a chief judge probable cause to believe that a covered judge, as defined in Rule 4, has engaged in misconduct or may have a disability, whether or not the information is framed as or is intended to be an allegation of misconduct or disability.

(d) Court of Appeals, District Court, and District Judge. "Courts of appeals," "district court," and "district judge," where appropriate, include the United States Court of Federal Claims, the United States Court of International Trade, and the judges thereof.

(e) Disability. "Disability" is a temporary or permanent condition rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or a severe impairment of cognitive abilities.

(f) Judicial Council and Circuit. "Judicial council" and "circuit," where appropriate, include any courts designated in 28 U.S.C. § 363.

(g) Magistrate Judge. "Magistrate judge," where appropriate, includes a special master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa-12(c).

(h) Misconduct. Cognizable misconduct:

(1) is conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct includes, but is not limited to:

(A) using the judge's office to obtain special treatment for friends or relatives;

(B) accepting bribes, gifts, or other personal favors related to the judicial office;

(C) having improper discussions with parties or counsel for one side in a case;

(D) treating litigants or attorneys in a demonstrably egregious and hostile manner;

(E) engaging in partisan political activity or making inappropriately partisan statements;

(F) soliciting funds for organizations; or

(G) violating other specific, mandatory standards of judicial conduct, such as those pertaining to restrictions on outside income and requirements for financial disclosure.

(2) is conduct occurring outside the performance of official duties if the conduct might have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people.

(3) does not include:

(A) an allegation that is directly related to the merits of a decision or procedural ruling. An allegation that calls into question the correctness of a judge's ruling, including a failure to recuse, without more, is merits-related. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it attacks the merits.

(B) an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases.

(i) Subject Judge. "Subject judge" means any judge described in Rule 4 who is the subject of a complaint.

Commentary on Rule 3

Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative Rules.

Unless otherwise specified or the context otherwise indicates, the term "complaint" is used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to complaints filed by complainants under Rule 6.

Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief judge. See 28 U.S.C. § 351(a) and (b). Under Rule 3(c)(1), complaints may be submitted by a person, in his or her individual capacity, or by a professional organization. Generally, the word "complaint" brings to mind the commencement of an adversary proceeding in which the contending parties are left to present the evidence and legal arguments, and judges play the role of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial process. For example, even absent a complaint under Rule 6, chief judges are expected in some circumstances to trigger the process -- "identify a complaint," see 28 U.S.C. § 351(b) and Rule 5 -- and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone other than the chief judge, the complainant lacks many rights that a litigant would have, and the chief judge, instead of being limited to the "four corners of the complaint," must, under Rule 11, proceed as though misconduct or disability has been alleged where the complainant reveals information of misconduct or disability but does not claim it as such. See Breyer Committee Report, 239 F.R.D. at 183-84.

An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the term "identify" suggest that the word "complaint" covers more than a document formally triggering the process. The process relies on chief judges considering known information and triggering the process when appropriate. "Identifying" a "complaint," therefore, is best understood as the chief judge's concluding that information known to the judge constitutes probable cause to believe that misconduct occurred or a disability exists, whether or not the information is framed as, or intended to be an accusation. This definition is codified in (c)(2).

Rule 3(e) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available.

The phrase "prejudicial to the effective and expeditious administration of the business of the courts" is not subject to precise definition, and subsection (h)(1) therefore provides some specific examples. Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. Ultimately, the responsibility for determining what constitutes misconduct under the statute is the province of the judicial council of the circuit subject to such review and limitations as are ordained by the statute and by these Rules.

Even where specific, mandatory rules exist -- for example, governing the receipt of gifts by judges, outside earned income, and financial disclosure obligations -- the distinction between the misconduct statute and the specific, mandatory rules must be borne in mind. For example, an inadvertent, minor violation of any one of these Rules, promptly remedied when called to the attention of the judge, might still be a violation but might not rise to the level of misconduct under the statute. By contrast, a pattern of such violations of the Code might well rise to the level of misconduct.

An allegation can meet the statutory standard even though the judge's alleged conduct did not occur in the course of the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct. For example, allegations that a judge solicited funds for a charity or participated in a partisan political event are cognizable under the Act.

On the other hand, judges are entitled to some leeway in extra-official activities. For example, misconduct may not include a judge being repeatedly and publicly discourteous to a spouse (not including physical abuse) even though this might cause some reasonable people to have diminished confidence in the courts. Rule 3(h)(2) states that conduct of this sort is covered, for example, when it might lead to a "substantial and widespread" lowering of such confidence.

Rule 3(h)(3)(A) tracks the Act, 28 U.S.C. § 352(b)(1)(A)(ii), in excluding from the definition of misconduct allegations "[d]irectly related to the merits of a decision or procedural ruling." This exclusion preserves the independence of judges in the exercise of judicial power by ensuring that the complaint procedure is not used to collaterally attack the substance of a judge's ruling. Any allegation that calls into question the correctness of an official action of a judge -- without more -- is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related -- in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint -- even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard.

Conversely, an allegation -- however unsupported -- that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness -- "the merits" -- of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is also not merits-related.

The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the

complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper ex parte communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by a chief judge until the appellate proceedings are concluded in order to avoid, inter alia, inconsistent decisions.

Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand -- for example a statement that a claim is legally or factually "frivolous" -- then the judge's choice of language is presumptively merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then an additional inquiry under Rule 11 is necessary.

With regard to Rule 3(h)(3)(B), a complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge -- in other words, assigning a low priority to deciding the particular case. But, by the same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.

The remaining subsections of Rule 3 provide technical definitions clarifying the application of the Rules to the various kinds of courts covered.

4. Covered Judges

A complaint under these Rules may concern the actions or capacity only of judges of United States courts of appeals, judges of United States district courts, judges of United States bankruptcy courts, United States magistrate judges, and judges of the courts specified in 28 U.S.C. § 363.

Commentary on Rule 4

This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of complaints against persons not covered by the Act, such as other court personnel, or against both covered judges and noncovered persons.

ARTICLE II. INITIATION OF A COMPLAINT

5. Identification of a Complaint

(a) Identification. When a chief judge has information constituting reasonable grounds for inquiry into whether a covered judge has engaged in misconduct or has a disability, the chief judge may conduct an inquiry, as he or she deems appropriate, into the accuracy of the information even if no related complaint has been filed. A chief judge who finds probable cause to believe that misconduct has occurred or that a disability exists may seek an informal resolution that he or she finds satisfactory. If no informal resolution is achieved or is feasible, the chief judge may identify a complaint and, by written order stating the reasons, begin the review provided in Rule 11. If the evidence of misconduct is clear and convincing and no informal resolution is achieved or is feasible, the chief judge must identify a complaint. A chief judge must not decline to identify a complaint merely because the person making the allegation has not filed a complaint under Rule 6. This Rule is subject to Rule 7.

(b) Noncompliance with Rule 6(d). Rule 6 complaints that do not comply with the requirements of Rule 6(d) must be considered under this Rule.

Commentary on Rule 5

This Rule is adapted from the Breyer Committee Report, 239 F.R.D. at 245-46.

The Act authorizes the chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed,

the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

An informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. Because an informal resolution under Rule 5 reached before a complaint is filed under Rule 6 will cause a subsequent Rule 6 complaint alleging the identical matter to be concluded, see Rule 11(c), the chief judge must be sure that the resolution is fully appropriate before endorsing it. In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.

When a complaint is identified, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once the chief judge has identified a complaint, the chief judge, subject to the disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions assigned to the chief judge for the determination of complaints filed by a complainant.

In high-visibility situations, it may be desirable for the chief judge to identify a complaint without first seeking an informal resolution (and then, if the circumstances warrant, dismiss or conclude the identified complaint without appointment of a special committee) in order to assure the public that the allegations have not been ignored.

A chief judge's decision not to identify a complaint under Rule 5 is not appealable and is subject to Rule 3(h)(3)(A), which excludes merits-related complaints from the definition of misconduct.

A chief judge may not decline to identify a complaint solely on the basis that the unfiled allegations could be raised by one or more persons in a filed complaint, but none of these persons has opted to do so.

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only: (i) the chief judge of the home circuit of a potential subject judge, or (ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

Subsection (b) provides that complaints filed under Rule 6 that do not comply with the requirements of Rule 6(d), must be considered under this Rule. For instance, if a complaint has been filed but the form submitted is unsigned, or the truth of the statements therein are not verified in writing under penalty of perjury, then a chief judge must nevertheless consider the allegations as known information, and proceed to follow the process described in Rule 5(a).

6. Filing a Complaint

(a) Form. A complainant may use the form reproduced in the appendix to these Rules or a form designated by the rules of the judicial council in the circuit in which the complaint is filed. A complaint form is also available on each court of appeals' website or may be obtained from the circuit clerk or any district court or bankruptcy court within the circuit. A form is not necessary to file a complaint, but the complaint must be written and must include the information described in (b).

(b) Brief Statement of Facts. A complaint must contain a concise statement that details the specific facts on which the claim of misconduct or disability is based. The statement of facts should include a description of:

(1) what happened;

(2) when and where the relevant events happened;

(3) any information that would help an investigator check the facts; and
(4) for an allegation of disability, any additional facts that form the basis of that allegation.

(c) Legibility. A complaint should be typewritten if possible. If not typewritten, it must be legible. An illegible complaint will be returned to the complainant with a request to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not be accepted for filing.

(d) Complainant's Address and Signature; Verification. 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).

(e) Number of Copies; Envelope Marking. The complainant shall provide the number of copies of the complaint required by local rule. Each copy should be in an envelope marked "Complaint of Misconduct" or "Complaint of Disability." The envelope must not show the name of any subject judge.

Commentary on Rule 6

The Rule is adapted from the Illustrative Rules and is self-explanatory.

7. Where to Initiate Complaints

(a) Where to File. Except as provided in (b),
(1) a complaint against a judge of a United States court of appeals, a United States district court, a United States bankruptcy court, or a United States magistrate judge must be filed with the circuit clerk in the jurisdiction in which the subject judge holds office.
(2) a complaint against a judge of the United States Court of International Trade or the United States Court of Federal Claims must be filed with the respective clerk of that court.
(3) a complaint against a judge of the United States Court of Appeals for the Federal Circuit must be filed with the circuit executive of that court.

(b) Misconduct in Another Circuit; Transfer. If a complaint alleges misconduct in the course of official business while the subject judge was sitting on a court by designation under 28 U.S.C. §§ 291-293 and 294(d), the complaint may be filed or identified with the circuit clerk of that circuit or of the subject judge's home circuit. The proceeding will continue in the circuit of the first-filed or first-identified complaint. The judicial council of the circuit where the complaint was first filed or first identified may transfer the complaint to the subject judge's home circuit or to the circuit where the alleged misconduct occurred, as the case may be.

Commentary on Rule 7

Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of appeals for the circuit." However, in many circuits, this role is filled by circuit executives. Accordingly, the term "circuit clerk," as defined in Rule 3(b) and used throughout these Rules, applies to circuit executives.

Section 351 uses the term "the circuit" in a way that suggests that either the home circuit of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper venue for complaints. With an exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based on the administrative perspective of the Act. Given the Act's emphasis on the future conduct of the business of the courts, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able to influence a judge's future behavior in constructive ways.

However, when judges sit by designation, the non-home circuit has a strong interest in redressing misconduct in the course of official business, and where allegations also involve a member of the bar -- ex parte contact between an attorney and a judge, for example -- it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may

be transferred by the judicial council of the filing or identified circuit to the other circuit.

8. Action by Clerk

(a) Receipt of Complaint. Upon receiving a complaint against a judge filed under Rule 5 or 6, the circuit clerk must open a file, assign a docket number according to a uniform numbering scheme promulgated by the Judicial Conference Committee on Judicial Conduct and Disability, and acknowledge the complaint's receipt.

(b) Distribution of Copies. The clerk must promptly send copies of a complaint filed under Rule 6 to the chief judge or the judge authorized to act as chief judge under Rule 25(f), and copies of complaints filed under Rule 5 or 6 to each subject judge. The clerk must also send copies of these complaints to the Judicial Conference Committee on Judicial Conduct and Disability. The clerk must retain the original complaint. Any further distribution should be as provided by local rule.

(c) Complaints Against Noncovered Persons. If the clerk receives a complaint about a person not holding an office described in Rule 4, the clerk must not accept the complaint for filing under these Rules.

(d) Receipt of Complaint about a Judge and Another Noncovered Person. If a complaint is received about a judge described in Rule 4 and a person not holding an office described in Rule 4, the clerk must accept the complaint for filing under these Rules only with regard to the judge and must inform the complainant of the limitation.

Commentary on Rule 8

This Rule is adapted from the Illustrative Rules and is largely self-explanatory.

The uniform docketing scheme described in subsection (a) should take into account potential problems associated with a complaint that names multiple judges. One solution may be to provide separate docket numbers for each subject judge. Separate docket numbers would help avoid difficulties in tracking cases, particularly if a complaint is dismissed with respect to some, but not all of the named judges.

The provision requiring circuit clerks to send copies of all complaints to the Judicial Conference Committee on Judicial Conduct and Disability is new. It is necessary to enable the Committee to monitor administration of the Act, to anticipate upcoming issues, and to carry out its new jurisdictional responsibilities under Article VI.

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

9. Time for Filing or Identifying a Complaint

A complaint may be filed or identified at any time. If the passage of time has made an accurate and fair investigation of a complaint impractical, the complaint must be dismissed under Rule 11(c)(1)(E).

Commentary on Rule 9

This Rule is adapted from the Act, 28 U.S.C. §§ 351, 352(b)(1)(A)(iii), and the Illustrative Rules.

10. Abuse of the Complaint Procedure

(a) Abusive Complaints. A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.

(b) Orchestrated Complaints. When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the chief judge may recommend that the judicial council issue a written order instructing the circuit clerk to accept only a certain number of such complaints for filing and to refuse to accept further

ones. The clerk must send a copy of any such order to anyone whose complaint was not accepted.

Commentary on Rule 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part of such a campaign were accepted for filing and processed according to these Rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits.

A judicial council may, therefore, respond to such mass filings under Rule 10(b) by declining to accept repetitive complaints for filing, regardless of the fact that the complaints are nominally submitted by different complainants. When the first complaint or complaints have been dismissed on the merits, and when further, essentially identical submissions follow, the judicial council may issue a second order noting that these are identical or repetitive complaints, directing the circuit clerk not to accept these complaints or any further such complaints for filing, and directing the clerk to send each putative complainant copies of both orders.

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

11. Review by the Chief Judge

(a) Purpose of Chief Judge's Review. When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is

disqualified under Rule 25. If the complaint contains information constituting evidence of misconduct or disability, but the complainant does not claim it as such, the chief judge must treat the complaint as if it did allege misconduct or disability and give notice to the subject judge. After reviewing the complaint, the chief judge must determine whether it should be:

(1) dismissed;

(2) concluded on the ground that voluntary corrective action has been taken;

(3) concluded because intervening events have made action on the complaint no longer necessary; or

(4) referred to a special committee.

(b) Inquiry by Chief Judge. In determining what action to take under Rule 11(a), the chief judge may conduct a limited inquiry. The chief judge, or a designee, may communicate orally or in writing with the complainant, the subject judge, and any others who may have knowledge of the matter, and may review transcripts or other relevant documents. In conducting the inquiry, the chief judge must not determine any reasonably disputed issue.

(c) Dismissal.

(1) Allowable grounds. A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint:

(A) alleges conduct that, even if true, is not 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 judicial office;

(B) is directly related to the merits of a decision or procedural ruling;

(C) is frivolous;

(D) is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists;

(E) is based on allegations which are incapable of being established through investigation;

(F) has been filed in the wrong circuit under Rule 7; or

(G) is otherwise not appropriate for consideration under the Act.

(2) Disallowed grounds. A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously

considered and does not constitute harassment of the subject judge.

(d) Corrective Action. The chief judge may conclude the complaint proceeding in whole or in part if:

(1) an informal resolution under Rule 5 satisfactory to the chief judge was reached before the complaint was filed under Rule 6, or

(2) the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint.

(e) Intervening Events. The chief judge may conclude the complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible.

(f) Appointment of Special Committee. If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council. Before appointing a special committee, the chief judge must invite the subject judge to respond to the complaint either orally or in writing if the judge was not given an opportunity during the limited inquiry. In the chief judge's discretion, separate complaints may be joined and assigned to a single special committee. Similarly, a single complaint about more than one judge may be severed and more than one special committee appointed.

(g) Notice of Chief Judge's Action; Petitions for Review.

(1) When special committee is appointed. If a special committee is appointed, the chief judge must notify the complainant and the subject judge that the matter has been referred to a special committee and identify the members of the committee. A copy of the order appointing the special committee must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

(2) When chief judge disposes of complaint without appointing special committee. If the chief judge disposes of the complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and the supporting memorandum, which may be one

document, must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(3) Right of petition for review. If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the complainant and subject judge must be notified of the right to petition the judicial council for review of the disposition, as provided in Rule 18. If a petition for review is filed, the chief judge must promptly transmit all materials obtained in connection with the inquiry under Rule 11(b) to the circuit clerk for transmittal to the judicial council.

(h) Public Availability of Chief Judge's Decision. The chief judge's decision must be made public to the extent, at the time, and in the manner provided in Rule 24.

Commentary on Rule 11

Subsection (a) lists the actions available to a chief judge in reviewing a complaint. This subsection provides that where a complaint has been filed under Rule 6, the ordinary doctrines of waiver do not apply. A chief judge must identify as a complaint any misconduct or disability issues raised by the factual allegations of the complaint even if the complainant makes no such claim with regard to those issues. For example, an allegation limited to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must be treated as a complaint regarding disability. Some formal order giving notice of the expanded scope of the proceeding must be given to the subject judge.

Subsection (b) describes the nature of the chief judge's inquiry. It is based largely on the Breyer Committee Report, 239 F.R.D. at 243-45. The Act states that dismissal is appropriate "when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence." 28 U.S.C. § 352(b)(1)(B). At the same time, however, Section 352(a) states that "[t]he chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute." These two statutory standards should be read together, so that a matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that

they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence.

In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to a special committee and the judicial council. An allegation of fact is ordinarily not "refuted" simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant's word against the subject judge's -- in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability -- then there must be a special-committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act.

However, dismissal following a limited inquiry may occur when the complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts and witnesses all support the subject judge. Breyer Committee Report, 239 F.R.D. at 243. For example, consider a complaint alleging that the subject judge said X, and the complaint mentions, or it is independently clear, that five people may have heard what the judge said. Id. The chief judge is told by the subject judge and one witness that the judge did not say X, and the chief judge dismisses the complaint without questioning the other four possible witnesses. Id. In this example, the matter remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is appropriate, but if potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute. Id.

Similarly, under (c)(1)(A), if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under (c)(1)(A) is inappropriate.

Essentially, the standard articulated in subsection (b) is that used to decide motions for summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not resolved at the summary judgment stage. A material fact

is one that "might affect the outcome of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry pursuant to subsection (b).

Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239-45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not constitute misconduct or disability under the statutory standard. The proper standards are set out in Rule 3 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 3 and its accompanying Commentary.

Subsections (c)(1)(C)-(E) implement the statute by allowing dismissal of complaints that are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or containing allegations which are incapable of being established through investigation." 28 U.S.C. § 352(b)(1)(A)(iii).

Dismissal of a complaint as "frivolous," under Rule 11(c)(1)(C), will generally occur without any inquiry beyond the face of the complaint. For instance, when the allegations are facially incredible or so lacking in indicia of reliability that no further inquiry is warranted, dismissal under this subsection is appropriate.

A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer's statement that he or she had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised.

On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).

Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable. Breyer Committee Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the complainant that the judge did X. Id. The subject judge denies it. The chief judge requests that the complainant (who does not purport to have observed the judge do X) identify the unnamed witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed witness's account. Id. The complainant responds that he has spoken with the unnamed witness, that the unnamed witness is an attorney who practices in federal court, and that the unnamed witness is unwilling to be identified or to come forward. Id. at 243-44. The allegation is then properly dismissed as containing allegations that are incapable of being established through investigation. Id.

If, however, the situation involves a reasonable dispute over credibility, the matter should proceed. For example, the complainant alleges an impropriety and alleges that he or she observed it and that there were no other witnesses; the subject judge denies that the event occurred. Unless the complainant's allegations are facially incredible or so lacking indicia of reliability warranting dismissal under Rule 11(c)(1)(C), a special committee must be appointed because there is a material factual question that is reasonably in dispute.

Dismissal is also appropriate when a complaint is filed so long after an alleged event that memory loss, death, or changes to unknown residences prevent a proper investigation.

Subsection (c)(2) indicates that the investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should be foregone, depending of course on the seriousness of the issues and the weight of the new evidence.

Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239 F.R.D. 244-45. The Act authorizes the chief judge to conclude the proceedings if "appropriate corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after the complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. Id. Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability is preferable to sanctions. Id. The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. Id. Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on the identical conduct.

"Corrective action" must be voluntary action taken by the subject judge. Breyer Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an appellate court without the participation of the subject judge in formulating the directive or without the subject judge's subsequent agreement to such action does not constitute the requisite voluntary corrective action. Id. Neither the chief judge nor an appellate court has authority under the Act to impose a formal remedy or sanction; only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2). Id. Compliance with a previous council order may serve as corrective action allowing conclusion of a later complaint about the same behavior. Id.

Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. Id. While the Act is generally forward-looking, any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm

can reasonably be remedied. Id. In some cases, corrective action may not be "appropriate" to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the subject judge, or otherwise. Id.

Voluntary corrective action should be proportionate to any plausible allegations of misconduct in the complaint. The form of corrective action should also be proportionate to any sanctions that a judicial council might impose under Rule 20(b), such as a private or public reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D at 244-45. In other words, minor corrective action will not suffice to dispose of a serious matter. Id.

Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, however, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed. Id.

If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the complaint before a special committee is appointed, if no earlier response was invited.

Subject judges, of course, receive copies of complaints at the same time that they are referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b), the chief judge may request a response if it is thought necessary. However, many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense.

The Act requires that the order dismissing a complaint or concluding the proceeding contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C. § 352(b). Rule 24, dealing with availability of

information to the public, contemplates that the order will be made public, usually without disclosing the names of the complainant or the subject judge. If desired for administrative purposes, more identifying information can be included in a non-public version of the order.

When complaints are disposed of by chief judges, the statutory purposes are best served by providing the complainant with a full, particularized, but concise explanation, giving reasons for the conclusions reached. See also Commentary on Rule 24, dealing with public availability.

Rule 11(g) provides that the complainant and subject judge must be notified, in the case of a disposition by the chief judge, of the right to petition the judicial council for review. A copy of a chief judge's order and memorandum, which may be one document, disposing of a complaint must be sent by the circuit clerk to the Judicial Conference Committee on Judicial Conduct and Disability.

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

12. Composition of Special Committee

(a) Membership. Except as provided in (e), a special committee appointed under Rule 11(f) must consist of the chief judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, then, when possible, the district-judge members of the committee must be from districts other than the district of the subject judge. For the courts named in 28 U.S.C. § 363, the committee must be selected from the judges serving on the subject judge's court.

(b) Presiding Officer. When appointing the committee, the chief judge may serve as the presiding officer or else must designate a committee member as the presiding officer.

(c) Bankruptcy Judge or Magistrate Judge as Adviser. If the subject judge is a bankruptcy judge or magistrate judge, he or she may, within 14 days after being notified of the committee's appointment, ask the chief judge to designate as a committee adviser another bankruptcy judge or magistrate judge, as the case may be. The chief judge must grant such a request but may

otherwise use discretion in naming the adviser. Unless the adviser is a Court of Federal Claims special master appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The adviser cannot vote but has the other privileges of a committee member.

(d) Provision of Documents. The chief judge must certify to each other member of the committee and to any adviser copies of the complaint and statement of facts in whole or relevant part, and any other relevant documents on file.

(e) Continuing Qualification of Committee Members. A member of a special committee who was qualified to serve when appointed may continue to serve on the committee even though the member relinquishes the position of chief judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or under 28 U.S.C. § 171.

(f) Inability of Committee Member to Complete Service. If a member of a special committee can no longer serve because of death, disability, disqualification, resignation, retirement from office, or other reason, the chief judge must decide whether to appoint a replacement member, either a circuit or district judge as needed under (a). No special committee appointed under these Rules may function with only a single member, and the votes of a two-member committee must be unanimous.

(g) Voting. All actions by a committee must be by vote of a majority of all members of the committee.

Commentary on Rule 12

This Rule is adapted from the Act and the Illustrative Rules.

Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-case basis. The question of committee size is one that should be weighed with care in view of the potential for consuming the members' time; a large committee should be appointed only if there is a special reason to do so.

Although the Act requires that the chief judge be a member of each special committee, 28 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b) provides that if the chief judge does not preside, he or she must designate another committee member as the presiding officer.

Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject judge.

Subsection (c) also provides that the adviser will have all the privileges of a committee member except a vote. The adviser, therefore, may participate in all deliberations of the committee, question witnesses at hearings, and write a separate statement to accompany the special committee's report to the judicial council.

Rule 12(e) provides that a member of a special committee who remains an Article III judge may continue to serve on the committee even though the member's status otherwise changes. Thus, a committee that originally consisted of the chief judge and an equal number of circuit and district judges, as required by the law, may continue to function even though changes of status alter that composition. This provision reflects the belief that stability of membership will contribute to the quality of the work of such committees.

Stability of membership is also the principal concern animating Rule 12(f), which deals with the case in which a special committee loses a member before its work is complete. The Rule permits the chief judge to determine whether a replacement member should be appointed. Generally, appointment of a replacement member is desirable in these situations unless the committee has conducted evidentiary hearings before the vacancy occurs. However, cases may arise in which a committee is in the late stages of its work, and in which it would be difficult for a new member to play a meaningful role. The Rule also preserves the collegial character of the committee process by prohibiting a single surviving member from serving as a committee and by providing that a committee of two surviving members will, in essence, operate under a unanimity rule.

Rule 12(g) provides that actions of a special committee must be by vote of a majority of all the members. All the

members of a committee should participate in committee decisions. In that circumstance, it seems reasonable to require that committee decisions be made by a majority of the membership, rather than a majority of some smaller quorum.

13. Conduct of an Investigation

(a) Extent and Methods of Special-Committee Investigation. Each special committee must determine the appropriate extent and methods of the investigation in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee must refer the new matter to the chief judge for action under Rule 5 or Rule 11.

(b) Criminal Conduct. If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The committee has final authority over the timing and extent of its investigation and the formulation of its recommendations.

(c) Staff. The committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judicial branch or may hire special staff through the Director of the Administrative Office of the United States Courts.

(d) Delegation of Subpoena Power; Contempt. The chief judge may delegate the authority to exercise the committee's subpoena powers. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena.

Commentary on Rule 13

This Rule is adapted from the Illustrative Rules.

Rule 13, as well as Rules 14, 15, and 16, are concerned with the way in which a special committee carries out its mission. They reflect the view that a special committee has two roles that are separated in ordinary litigation. First, the committee has an investigative role of the kind that is

characteristically left to executive branch agencies or discovery by civil litigants. 28 U.S.C. § 353(c). Second, it has a formalized fact-finding and recommendation-of-disposition role that is characteristically left to juries, judges, or arbitrators. Id. Rule 13 generally governs the investigative stage. Even though the same body has responsibility for both roles under the Act, it is important to distinguish between them in order to ensure that appropriate rights are afforded at appropriate times to the subject judge.

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation.

Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of judicial councils by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone else as presiding officer of a special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. See Rule 12(g).

14. Conduct of Hearings by Special Committee

(a) Purpose of Hearings. The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may hold joint or separate hearings.

(b) Committee Evidence. Subject to Rule 15, the committee must obtain material, nonredundant evidence in the form it considers appropriate. In the committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge.

(c) Counsel for Witnesses. The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify.
(d) Witness Fees. Witness fees must be paid as provided in 28 U.S.C. § 1821.
(e) Oath. All testimony taken at a hearing must be given under oath or affirmation.
(f) Rules of Evidence. The Federal Rules of Evidence do not apply to special-committee hearings.
(g) Record and Transcript. A record and transcript must be made of all hearings.

Commentary on Rule 14

This Rule is adapted from Section 353 of the Act and the Illustrative Rules.

Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee hearings will normally be held only after the investigative work has been completed and the committee has concluded that there is sufficient evidence to warrant a formal fact-finding proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial. Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing will have something of an adversary character. Nevertheless, that tendency should be moderated to the extent possible. Even though a proceeding will commonly have investigative and hearing stages, committee members should not regard themselves as prosecutors one day and judges the next. Their duty -- and that of their staff -- is at all times to be impartial seekers of the truth.

Rule 14(b) contemplates that material evidence will be obtained by the committee and presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the hearings should regard it as their role to present evidence representing the entire picture. With respect to testimonial evidence, the subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges. Although Rule 15(c) recognizes the subject judge's statutory right to call witnesses on his or her own behalf, exercise of this right should not usually be necessary.

15. Rights of Subject Judge

(a) Notice.

(1) Generally. The subject judge must receive written notice of:

(A) the appointment of a special committee under Rule 11(f);

(B) the expansion of the scope of an investigation under Rule 13(a);

(C) any hearing under Rule 14, including its purposes, the names of any witnesses the committee intends to call, and the text of any statements that have been taken from those witnesses.

(2) Suggestion of additional witnesses. The subject judge may suggest additional witnesses to the committee.

(b) Report of the Special Committee. The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council.

(c) Presentation of Evidence. At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine committee witnesses, in person or by counsel.

(d) Presentation of Argument. The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation.

(e) Attendance at Hearings. The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the committee.

(f) Representation by Counsel. The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.

Commentary on Rule 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(d) gives the judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings -- for example, meetings at which the committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.

16. Rights of Complainant in Investigation

(a) Notice. The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.

(b) Opportunity to Provide Evidence. If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.

(c) Presentation of Argument. The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

(d) Representation by Counsel. A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.

(e) Cooperation. In exercising its discretion under this Rule, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

Commentary on Rule 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed and it determines that the complainant may have additional evidence, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the committee may be either a member or staff.

Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend proceedings of the special committee except when testifying or presenting oral argument. A special committee may exercise its discretion to permit the complainant to be present at its proceedings, or to permit the complainant, individually or through counsel, to participate in the examination or cross-examination of witnesses.

The Act authorizes an exception to the normal confidentiality provisions where the judicial council in its discretion provides a copy of the report of the special committee to the complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle the complainant to a copy of the special committee's report.

In exercising their discretion regarding the role of the complainant, the special committee and the judicial council should protect the confidentiality of the complaint process. As a consequence, subsection (e) provides that a special committee may consider the degree to which a complainant has

cooperated in preserving the confidentiality of the proceedings in determining what role beyond the minimum required by these Rules should be given to that complainant.

17. Special-Committee Report

The committee must file with the judicial council a comprehensive report of its investigation, including findings and recommendations for council action. The report must be accompanied by a statement of the vote by which it was adopted, any separate or dissenting statements of committee members, and the record of any hearings held under Rule 14. A copy of the report and accompanying statement must be sent to the Judicial Conference Committee on Judicial Conduct and Disability.

Commentary on Rule 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statement to the Judicial Conference Committee is new.

ARTICLE V. JUDICIAL-COUNCIL REVIEW

18. Petitions for Review of Chief Judge Dispositions Under Rule 11(c), (d), or (e)

(a) Petitions for Review. After the chief judge issues an order under Rule 11(c), (d), or (e), a complainant or subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.

(b) When to File; Form; Where to File. A petition for review must be filed in the office of the circuit clerk within 35 days of the date on the clerk's letter informing the parties of the chief judge's order. The petition should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial

council for review of . . . " and state the reasons why the petition should be granted. It must be signed.

(c) Receipt and Distribution of Petition. A circuit clerk who receives a petition for review filed within the time allowed and in proper form must:

(1) acknowledge its receipt and send a copy to the complainant or subject judge, as the case may be;

(2) promptly distribute to each member of the judicial council, or its relevant panel, except for any member disqualified under Rule 25, or make available in the manner provided by local rule, the following materials:

(A) copies of the complaint;

(B) all materials obtained by the chief judge in connection with the inquiry;

(C) the chief judge's order disposing of the complaint;

(D) any memorandum in support of the chief judge's order;

(E) the petition for review; and

(F) an appropriate ballot;

(3) send the petition for review to the Judicial Conference Committee on Judicial Conduct and Disability. Unless the Judicial Conference Committee requests them, the clerk will not send copies of the materials obtained by the chief judge.

(d) Untimely Petition. The clerk must refuse to accept a petition that is received after the deadline in (b).

(e) Timely Petition Not in Proper Form. When the clerk receives a petition filed within the time allowed but in a form that is improper to a degree that would substantially impair its consideration by the judicial council — such as a document that is ambiguous about whether it is intended to be a petition for review — the clerk must acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer the opportunity to correct the deficiencies within 21 days of the date of the clerk's letter about the deficiencies or within the original deadline for filing the petition, whichever is later. If the deficiencies are corrected within the time allowed, the clerk will proceed according to paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk must reject the petition.

Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

Subsection (a) permits a subject judge, as well as the complainant, to petition for review of a chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate corrective action or intervening events have remedied or mooted the problems raised by the complaint pursuant to Rule 11(d) or (e). Although the subject judge may ostensibly be vindicated by the dismissal or conclusion of a complaint, a chief judge's order may include language disagreeable to the subject judge. For example, an order may dismiss a complaint, but state that the subject judge did in fact engage in misconduct. Accordingly, a subject judge may wish to object to the content of the order and is given the opportunity to petition the judicial council of the circuit for review.

Subsection (b) contains a time limit of thirty-five days to file a petition for review. It is important to establish a time limit on petitions for review of chief judges' dispositions in order to provide finality to the process. If the complaint requires an investigation, the investigation should proceed; if it does not, the subject judge should know that the matter is closed.

The standards for timely filing under the Federal Rules of Appellate Procedure should be applied to petitions for review. See Fed. R. App. P. 25(a)(2)(A) and (C).

Rule 18(e) provides for an automatic extension of the time limit imposed under subsection (b) if a person files a petition that is rejected for failure to comply with formal requirements.

19. Judicial-Council Disposition of Petitions for Review

(a) Rights of Subject Judge. At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Judicial

Conference Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.

(b) Judicial-Council Action. After considering a petition for review and the materials before it, a judicial council may:

(1) affirm the chief judge's disposition by denying the petition;

(2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;

(3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or

(4) in exceptional circumstances, take other appropriate action.

(c) Notice of Council Decision. Copies of the judicial council's order, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

(d) Memorandum of Council Decision. If the council's order affirms the chief judge's disposition, a supporting memorandum must be prepared only if the judicial council concludes that there is a need to supplement the chief judge's explanation. A memorandum supporting a council order must not include the name of the complainant or the subject judge.

(e) Review of Judicial-Council Decision. If the judicial council's decision is adverse to the petitioner, and if no member of the council dissented on the ground that a special committee should be appointed under Rule 11(f), the complainant must be notified that he or she has no right to seek review of the decision. If there was a dissent, the petitioner must be informed that he or she can file a petition for review under Rule 21(b) solely on the issue of whether a special committee should be appointed.

(f) Public Availability of Judicial-Council Decision. Materials related to the council's decision must be made public to the extent, at the time, and in the manner set forth in Rule 24.

Commentary on Rule 19

This Rule is largely adapted from the Act and is self-explanatory.

The council should ordinarily review the decision of the chief judge on the merits, treating the petition for review for all practical purposes as an appeal. The judicial council may respond to a petition by affirming the chief judge's order, remanding the matter, or, in exceptional cases, taking other appropriate action.

20. Judicial-Council Consideration of Reports and Recommendations of Special Committees

(a) Rights of Subject Judge. Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present argument through counsel, written or oral, as determined by the council. The judge must not otherwise communicate with council members about the matter.

(b) Judicial-Council Action.

(1) Discretionary actions. Subject to the judge's rights set forth in subsection (a), the judicial council may:

(A) dismiss the complaint because:

(i) even if the claim is true, the claimed conduct 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;

(ii) the complaint is directly related to the merits of a decision or procedural ruling;

(iii) the facts on which the complaint is based have not been established; or

(iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351-364.

(B) conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.

(C) refer the complaint to the Judicial Conference of the United States with the council's recommendations for action.

(D) take remedial action to ensure the effective and expeditious administration of the business of the courts, including:

(i) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(ii) ordering that no new cases be assigned to the subject judge for a limited, fixed period;

(iii) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings under 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa-12(c)(2);

(iv) in the case of a bankruptcy judge, removing the judge from office under 28 U.S.C. § 152(e);

(v) in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements will be waived; and

(vi) in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b) so that an additional judge may be appointed.

(E) take any combination of actions described in (b)(1)(A)-(D) of this Rule that is within its power.

(2) Mandatory actions. A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that:

(A) might constitute ground for impeachment; or

(B) in the interest of justice, is not amenable to resolution by the judicial council.

(c) Inadequate Basis for Decision. If the judicial council finds that a special committee's report, recommendations, and record provide an inadequate basis for decision, it may return the matter to the committee for further investigation and a new report, or it may conduct further investigation. If the judicial council decides to conduct further investigation, the subject judge must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The judicial council's conduct of the additional investigation must generally accord with the procedures and powers set forth in

Rules 13 through 16 for the conduct of an investigation by a special committee.

(d) Council Vote. Council action must be taken by a majority of those members of the council who are not disqualified. A decision to remove a bankruptcy judge from office requires a majority vote of all the members of the council.

(e) Recommendation for Fee Reimbursement. If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office of the United States Courts use funds appropriated to the Judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).

(f) Council Action. Council action must be by written order. Unless the council finds that extraordinary reasons would make it contrary to the interests of justice, the order must be accompanied by a memorandum setting forth the factual determinations on which it is based and the reasons for the council action. The order and the supporting memorandum must be provided to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability. The complainant and the subject judge must be notified of any right to review of the judicial council's decision as provided in Rule 21(b).

Commentary on Rule 20

This Rule is largely adapted from the Illustrative Rules.

Rule 20(a) provides that within twenty-one days after the filing of the report of a special committee, the subject judge may address a written response to all of the members of the judicial council. The subject judge must also be given an opportunity to present oral argument to the council, personally or through counsel. The subject judge may not otherwise communicate with council members about the matter.

Rule 20(c) provides that if the judicial council decides to conduct an additional investigation, the subject judge

must be given adequate prior notice in writing of that decision and of the general scope and purpose of the additional investigation. The conduct of the investigation will be generally in accordance with the procedures set forth in Rules 13 through 16 for the conduct of an investigation by a special committee. However, if hearings are held, the council may limit testimony or the presentation of evidence to avoid unnecessary repetition of testimony and evidence before the special committee.

Rule 20(d) provides that council action must be taken by a majority of those members of the council who are not disqualified, except that a decision to remove a bankruptcy judge from office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate to apply a similar rule to the less severe actions that a judicial council may take under the Act. If some members of the council are disqualified in the matter, their disqualification should not be given the effect of a vote against council action.

With regard to Rule 20(e), the judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office of the United States Courts that the subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1) (A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

Rule 20(f) requires that council action normally be supported with a memorandum of factual determinations and reasons and that notice of the action be given to the complainant and the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject judge include notice of any right to petition for review of the council's decision under Rule 21(b).

ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT AND DISABILITY

21. Committee on Judicial Conduct and Disability

(a) Review by Committee. The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its disposition of petitions for review is ordinarily final. The Judicial Conference of the United States may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.

(b) Reviewable Matters.

(1) Upon petition. A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:

(A) Rule 20(b)(1)(A), (B), (D), or (E); or

(B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f); in that event, the Committee's review will be limited to the issue of whether a special committee should be appointed.

(2) Upon Committee's initiative. At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.

(c) Committee Vote. Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. If only six members are qualified to vote on a petition

for review, the decision must be made by a majority of a panel of five members drawn from a randomly selected list that rotates after each decision by a panel drawn from the list. The members who will determine the petition must be selected based on committee membership as of the date on which the petition is received. Those members selected to hear the petition should serve in that capacity until final disposition of the petition, whether or not their term of committee membership has ended. If only four members are qualified to vote, the Chief Justice must appoint, if available, an ex-member of the Committee or, if not, another United States judge to consider the petition.

(d) Additional Investigation. Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331.

(e) Oral Argument; Personal Appearance. There is ordinarily no oral argument or personal appearance before the Committee. In its discretion, the Committee may permit written submissions from the complainant or subject judge.

(f) Committee Decisions. Committee decisions under this Rule must be transmitted promptly to the Judicial Conference of the United States. Other distribution will be by the Administrative Office at the direction of the Committee chair.

(g) Finality. All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final.

Commentary on Rule 21

This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of such dispositions by the Conference. However, there is no right to such review in any party.

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of dismissals or conclusions

of complaints under Rule 19(b)(1) or (4). Where one or more members of a judicial council reviewing a petition have dissented on the ground that a special committee should have been appointed, the complainant or subject judge has the right to petition for review by the Committee but only as to that issue. Under Rule 21(b)(2), the Judicial Conference Committee on Judicial Conduct and Disability may review such a dismissal or conclusion in its sole discretion, whether or not such a dissent occurred, and only as to the appointment of a special committee. No party has a right to such review, and such review will be rare.

Rule 21(c) provides for review only by Committee members from circuits other than that of the subject judge. To avoid tie votes, the Committee will decide petitions for review by rotating panels of five when only six members are qualified. If only four members are qualified, the Chief Justice must appoint an additional judge to consider that petition for review.

Under this Rule, all Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24.

22. Procedures for Review

(a) Filing a Petition for Review. A petition for review of a judicial-council decision may be filed by sending a brief written statement to the Judicial Conference Committee on Judicial Conduct and Disability, addressed to:

Judicial Conference Committee on Judicial Conduct and Disability
Attn: Office of General Counsel
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

The Administrative Office will send a copy of the petition to the complainant or subject judge, as the case may be.

(b) Form and Contents of Petition for Review. No particular form is required. The petition must contain a short statement of the basic facts underlying the complaint, the history of its consideration before the appropriate judicial council, a copy of the judicial council's

decision, and the grounds on which the petitioner seeks review. The petition for review must specify the date and docket number of the judicial-council order for which review is sought. The petitioner may attach any documents or correspondence arising in the course of the proceeding before the judicial council or its special committee. A petition should not normally exceed 20 pages plus necessary attachments.

(c) Time. A petition must be submitted within 63 days of the date of the order for which review is sought.

(d) Copies. Seven copies of the petition for review must be submitted, at least one of which must be signed by the petitioner or his or her attorney. If the petitioner submits a signed declaration of inability to pay the expense of duplicating the petition, the Administrative Office must accept the original petition and must reproduce copies at its expense.

(e) Action on Receipt of Petition for Review. The Administrative Office must acknowledge receipt of a petition for review submitted under this Rule, notify the chair of the Judicial Conference Committee on Judicial Conduct and Disability, and distribute the petition to the members of the Committee for their deliberation.

Commentary on Rule 22

Rule 22 is self-explanatory.

ARTICLE VII. MISCELLANEOUS RULES

23. Confidentiality

(a) General Rule. The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except as allowed by these Rules. In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules when necessary to maintain public confidence in the federal judiciary's ability to redress misconduct or disability.

(b) Files. All files related to complaints must be separately maintained with appropriate security precautions to ensure confidentiality.

(c) Disclosure in Decisions. Except as otherwise provided in Rule 24, written decisions of the chief judge, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability, and dissenting opinions or separate statements of members of the council or Committee may contain information and exhibits that the authors consider appropriate for inclusion, and the information and exhibits may be made public.

(d) Availability to Judicial Conference. On request of the Judicial Conference or its Committee on Judicial Conduct and Disability, the circuit clerk must furnish any requested records related to a complaint.

(e) Availability to District Court. If the judicial council directs the initiation of proceedings for removal of a magistrate judge under Rule 20(b)(1)(D)(iii), the circuit clerk must provide to the chief judge of the district court copies of the report of the special committee and any other documents and records that were before the judicial council at the time of its decision. On request of the chief judge of the district court, the judicial council may authorize release to that chief judge of any other records relating to the investigation.

(f) Impeachment Proceedings. If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives.

(g) Subject Judge's Consent. If both the subject judge and the chief judge consent in writing, any materials from the files may be disclosed to any person. In any such disclosure, the chief judge may require that the identity of the complainant, or of witnesses in an investigation conducted by a chief judge, a special committee, or the judicial council, not be revealed.

(h) Disclosure in Special Circumstances. The Judicial Conference, its Committee on Judicial Conduct and Disability, or a judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. Disclosure may be made to judicial researchers engaged

in the study or evaluation of experience under the Act and related modes of judicial discipline, but only where the study or evaluation has been specifically approved by the Judicial Conference or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate steps must be taken to protect the identities of the subject judge, the complainant, and witnesses from public disclosure. Other appropriate safeguards to protect against the dissemination of confidential information may be imposed.

(i) Disclosure of Identity by Subject Judge. Nothing in this Rule precludes the subject judge from acknowledging that he or she is the judge referred to in documents made public under Rule 24.

(j) Assistance and Consultation. Nothing in this Rule precludes the chief judge or judicial council acting on a complaint filed under the Act from seeking the help of qualified staff or from consulting other judges who may be helpful in the disposition of the complaint.

Commentary on Rule 23

Rule 23 was adapted from the Illustrative Rules.

The Act applies a rule of confidentiality to "papers, documents, and records of proceedings related to investigations conducted under this chapter" and states that they may not be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C. § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are subject to the rule, and who is within the circle of people who may have access to information without breaching the rule?

With regard to the first question, Rule 23(a) provides that judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts are obliged to respect the confidentiality requirement. This of course includes subject judges who do not consent to identification under Rule 23(i).

With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly to consideration of a complaint at any stage.

With regard to the third question, there is no barrier of confidentiality among a chief judge, judicial council, the

Judicial Conference, and the Judicial Conference Committee on Judicial Conduct and Disability. Each may have access to any of the confidential records for use in their consideration of a referred matter, a petition for review, or monitoring the administration of the Act. A district court may have similar access if the judicial council orders the district court to initiate proceedings to remove a magistrate judge from office, and Rule 23(e) so provides.

In extraordinary circumstances, a chief judge may disclose the existence of a proceeding under these Rules. The disclosure of such information in high-visibility or controversial cases is to reassure the public that the federal judiciary is capable of redressing judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent the chief judge from "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).

Rule 23 recognizes that there must be some exceptions to the Act's confidentiality requirement. For example, the Act requires that certain orders and the reasons for them must be made public. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that memoranda supporting chief judge and council orders, as well as dissenting opinions and separate statements, may contain references to information that would otherwise be confidential and that such information may be made public. However, subsection (c) is subject to Rule 24(a) which provides the general rule regarding the public availability of decisions. For example, the name of a subject judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

The Act makes clear that there is a barrier of confidentiality between the judicial branch and the legislative. It provides that material may be disclosed to Congress only if it is believed necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2). Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of the proceeding to the House of Representatives if the Conference believes that impeachment of a subject judge may be appropriate. Rule 23(f) implements this requirement.

The Act provides that confidential materials may be disclosed if authorized in writing by the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g)

implements this requirement. Once the subject judge has consented to the disclosure of confidential materials related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary to protect the confidentiality interests of the complainant or of witnesses who have testified in investigatory proceedings or who have provided information in response to a limited inquiry undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to require that the identities of the complainant or of such witnesses, as well as any identifying information, be shielded in any materials disclosed, except insofar as the chief judge has secured the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated need for disclosure of the information that, in the judgment of the chief judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may be the case where the complainant is delusional or where the complainant or a particular witness has already demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

Rule 23(h) permits disclosure of additional information in circumstances not enumerated. For example, disclosure may be appropriate to permit a prosecution for perjury based on testimony given before a special committee. Another example might involve evidence of criminal conduct by a judge discovered by a special committee.

Subsection (h) also permits the authorization of disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to judicial researchers engaged in the study or evaluation of experience under the Act and related modes of judicial discipline. The Rule envisions disclosure of information from the official record of complaint proceedings to a limited category of persons for appropriately authorized research purposes only, and with appropriate safeguards to protect individual identities in any published research results that ensue. In authorizing disclosure, the judicial council may refuse to release particular materials when such release would be contrary to the interests of justice, or that constitute purely internal communications. The Rule does not envision disclosure of purely internal communications between judges and their colleagues and staff.

Under Rule 23(j), chief judges and judicial councils may seek staff assistance or consult with other judges who may be helpful in the process of complaint disposition; the confidentiality requirement does not preclude this. The chief judge, for example, may properly seek the advice and assistance of another judge who the chief judge deems to be in the best position to communicate with the subject judge in an attempt to bring about corrective action. As another example, a new chief judge may wish to confer with a predecessor to learn how similar complaints have been handled. In consulting with other judges, of course, the chief judge should disclose information regarding the complaint only to the extent the chief judge deems necessary under the circumstances.

24. Public Availability of Decisions

(a) General Rule; Specific Cases. When final action has been taken on a complaint and it is no longer subject to review, all orders entered by the chief judge and judicial council, including any supporting memoranda and any dissenting opinions or separate statements by members of the judicial council, must be made public, with the following exceptions:

(1) if the complaint is finally dismissed under Rule 11(c) without the appointment of a special committee, or if it is concluded under Rule 11(d) because of voluntary corrective action, the publicly available materials must not disclose the name of the subject judge without his or her consent.

(2) if the complaint is concluded because of intervening events, or dismissed at any time after a special committee is appointed, the judicial council must determine whether the name of the subject judge should be disclosed.

(3) if the complaint is finally disposed of by a privately communicated censure or reprimand, the publicly available materials must not disclose either the name of the subject judge or the text of the reprimand.

(4) if the complaint is finally disposed of under Rule 20(b)(1)(D) by any action other than private censure or reprimand, the text of the dispositive order must be included in the materials made public, and the name of the subject judge must be disclosed.

(5) the name of the complainant must not be disclosed in materials made public under this Rule unless the chief judge orders disclosure.

(b) Manner of Making Public. The orders described in (a) must be made public by placing them in a publicly accessible file in the office of the circuit clerk or by placing the orders on the court's public website. If the orders appear to have precedential value, the chief judge may cause them to be published. In addition, the Judicial Conference Committee on Judicial Conduct and Disability will make available on the Federal Judiciary's website, www.uscourts.gov, selected illustrative orders described in paragraph (a), appropriately redacted, to provide additional information to the public on how complaints are addressed under the Act.

(c) Orders of Judicial Conference Committee. Orders of this Committee constituting final action in a complaint proceeding arising from a particular circuit will be made available to the public in the office of the clerk of the relevant court of appeals. The Committee will also make such orders available on the Federal Judiciary's website, www.uscourts.gov. When authorized by the Committee, other orders related to complaint proceedings will similarly be made available.

(d) Complaints Referred to the Judicial Conference of the United States. If a complaint is referred to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2), materials relating to the complaint will be made public only if ordered by the Judicial Conference.

Commentary on Rule 24

Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer Committee.

The Act requires the circuits to make available only written orders of a judicial council or the Judicial Conference imposing some form of sanction. 28 U.S.C. § 360(b). The Judicial Conference, however, has long recognized the desirability of public availability of a broader range of orders and other materials. In 1994, the Judicial Conference "urge[d] all circuits and courts covered by the Act to submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have significant precedential value to

other circuits and courts covered by the Act." Report of the Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this recommendation, the 2000 revision of the Illustrative Rules contained a public availability provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the circuits "to submit non-routine public orders disposing of complaints of judicial misconduct or disability for publication by on-line and print services." Report of the Proceedings of the Judicial Conference of the United States, Sept. 2002, at 58. The Breyer Committee Report further emphasized that "[p]osting such orders on the judicial branch's public website would not only benefit judges directly, it would also encourage scholarly commentary and analysis of the orders." Breyer Committee Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public availability of a wide range of materials.

Rule 24 provides for public availability of orders of the chief judge, the judicial council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any memoranda supporting their orders, together with any dissenting opinions or separate statements by members of the judicial council. However, these orders and memoranda are to be made public only when final action on the complaint has been taken and any right of review has been exhausted. The provision that decisions will be made public only after final action has been taken is designed in part to avoid public disclosure of the existence of pending proceedings. Whether the name of the subject judge is disclosed will then depend on the nature of the final action. If the final action is an order predicated on a finding of misconduct or disability (other than a privately communicated censure or reprimand) the name of the judge must be made public. If the final action is dismissal of the complaint, the name of the subject judge must not be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by the chief judge on the basis of voluntary corrective action, the name of the subject judge must not be disclosed. Shielding the name of the subject judge in this circumstance should encourage informal disposition.

If a complaint is dismissed as moot, or because intervening events have made action on the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the judicial council to determine whether

the subject judge will be identified. In such a case, no final decision has been rendered on the merits, but it may be in the public interest -- particularly if a judicial officer resigns in the course of an investigation -- to make the identity of the judge known.

Once a special committee has been appointed, and a proceeding is concluded by the full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of the name of the subject judge.

Finally, Rule 24(a)(5) provides that the identity of the complainant will be disclosed only if the chief judge so orders. Identifying the complainant when the subject judge is not identified would increase the likelihood that the identity of the subject judge would become publicly known, thus circumventing the policy of nondisclosure. It may not always be practicable to shield the complainant's identity while making public disclosure of the judicial council's order and supporting memoranda; in some circumstances, moreover, the complainant may consent to public identification.

25. Disqualification

(a) General Rule. Any judge is disqualified from participating in any proceeding under these Rules if the judge, in his or her discretion, concludes that circumstances warrant disqualification. If the complaint is filed by a judge, that judge is disqualified from participating in any consideration of the complaint except to the extent that these Rules provide for a complainant's participation. A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint.

(b) Subject Judge. A subject judge is disqualified from considering the complaint except to the extent that these Rules provide for participation by a subject judge.

(c) Chief Judge Not Disqualified from Considering a Petition for Review of a Chief Judge's Order. If a petition for review of a chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is not disqualified from participating in the council's consideration of the petition.

(d) Member of Special Committee Not Disqualified. A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report.

(e) Subject Judge's Disqualification After Appointment of a Special Committee. Upon appointment of a special committee, the subject judge is automatically disqualified from participating in any proceeding arising under the Act or these Rules as a member of any special committee, the judicial council of the circuit, the Judicial Conference of the United States, and the Judicial Conference Committee on Judicial Conduct and Disability. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review.

(f) Substitute for Disqualified Chief Judge. If the chief judge is disqualified from participating in consideration of the complaint, the duties and responsibilities of the chief judge under these Rules must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the judicial council.

(g) Judicial-Council Action When Multiple Judges Are Disqualified. Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 3(h)(3); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound

judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C).

(h) Disqualification of Members of the Judicial Conference Committee. No member of the Judicial Conference Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation.

Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

Subsection (e) makes it clear that the disqualification of the subject judge relates only to the subject judge's participation in any proceeding arising under the Act or these Rules as a member of a special committee, judicial council, Judicial Conference, or the Judicial Conference Committee. The Illustrative Rule, based on Section 359(a) of the Act, is ambiguous and could be read to disqualify a subject judge from service of any kind on each of the bodies mentioned. This is undoubtedly not the intent of the Act; such a disqualification would be anomalous in light of the Act's allowing a subject judge to continue to decide cases and to continue to exercise the powers of chief circuit or district judge. It would also create a substantial deterrence to the appointment of special committees, particularly where a special committee is needed solely because the chief judge may not decide matters of credibility in his or her review under Rule 11.

While a subject judge is barred by Rule 25(b) from participating in the disposition of the complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings arising under the Act or these Rules by a judge who is the subject of a special committee investigation may lead to an appearance of self-interest in creating substantive and procedural precedents governing such proceedings; Rule 25(e) bars such participation.

Under the Act, a complaint against the chief judge is to be handled by "that circuit judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule 25(f) provides that seniority among judges other than the chief judge is to be determined by date of commission, with the result that complaints against the chief judge may be routed to a former chief judge or other judge who was appointed earlier than the chief judge. The Rules do not purport to prescribe who is to preside over meetings of the judicial council. Consequently, where the presiding member of the judicial council is disqualified from participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing "the duties and responsibilities of the chief circuit judge under these Rules" does not apply to determine the acting presiding member of the judicial council. That is a matter left to the internal rules or operating practices of each judicial council. In most cases the most senior active circuit judge who is a member of the judicial council and who is not disqualified will preside.

Sometimes a single complaint is filed against a large group of judges. If the normal disqualification rules are observed in such a case, no court of appeals judge can serve as acting chief judge of the circuit, and the judicial council will be without appellate members. Where the complaint is against all circuit and district judges, under normal rules no member of the judicial council can perform the duties assigned to the council under the statute.

A similar problem is created by successive complaints arising out of the same underlying grievance. For example, a complainant files a complaint against a district judge based on alleged misconduct, and the complaint is dismissed by the chief judge under the statute. The complainant may then file a complaint against the chief judge for dismissing the first complaint, and when that complaint is dismissed by the next senior judge, still a third complaint may be filed. The threat is that the complainant will bump down the seniority ladder until, once again, there is no member of

the court of appeals who can serve as acting chief judge for the purpose of the next complaint. Similarly, complaints involving the merits of litigation may involve a series of decisions in which many judges participated or in which a rehearing en banc was denied by the court of appeals, and the complaint may name a majority of the judicial council as subject judges.

In recognition that these multiple-judge complaints are virtually always meritless, the judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in the interest of sound judicial administration to permit the chief judge to dispose of a complaint where it would otherwise be impossible for any active circuit judge in the circuit to act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after appropriate findings as to need and justification are made, to permit subject judges of the judicial council to participate in the disposition of a petition for review where it would otherwise be impossible to obtain a quorum.

Applying a rule of necessity in these situations is consistent with the appearance of justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit.

Similarly, there is no unfairness in permitting subject judges, in these circumstances, to participate in the review of a chief judge's dismissal of an insubstantial complaint. The remaining option is to assign the matter to another body. Among other alternatives, the council may request a transfer of the petition under Rule 26. Given the administrative inconvenience and delay involved in these alternatives, it is desirable to request a transfer only if the judicial council determines that the petition is substantial enough to warrant such action.

In the unlikely event that a quorum of the judicial council cannot be obtained to consider the report of a special committee, it would normally be necessary to request a transfer under Rule 26.

Rule 25(h) recognizes that the jurisdictional statement of the Judicial Conference Committee contemplates consultation between members of the Committee and judicial participants in proceedings under the Act and these Rules. Such consultation should not automatically preclude participation by a member in that proceeding.

26. Transfer to Another Judicial Council

In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6 to the judicial council of another circuit. The request for a transfer may be made at any stage of the proceeding before a reference to the Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such a request, the Chief Justice may refuse the request or select the transferee judicial council, which may then exercise the powers of a judicial council under these Rules.

Commentary on Rule 26

Rule 26 is new; it implements the Breyer Committee's recommended use of transfers. Breyer Committee Report, 239 F.R.D. at 214-15.

Rule 26 authorizes the transfer of a complaint proceeding to another judicial council selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a serious complaint where there are multiple disqualifications among the original council, where the issues are highly visible and a local disposition may weaken public confidence in the process, where internal tensions arising in the council as a result of the complaint render disposition by a less involved council appropriate, or where a complaint calls into question policies or governance of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to avoid disputes in a council over where to transfer a sensitive matter and to ensure that the transferee council accepts the matter.

Upon receipt of a transferred proceeding, the transferee council shall determine the proper stage at which to begin consideration of the complaint -- for example, reference to

the transferee chief judge, appointment of a special committee, etc.

27. Withdrawal of Complaints and Petitions for Review

(a) Complaint Pending Before Chief Judge. With the chief judge's consent, a complainant may withdraw a complaint that is before the chief judge for a decision under Rule 11. The withdrawal of a complaint will not prevent a chief judge from identifying or having to identify a complaint under Rule 5 based on the withdrawn complaint.

(b) Complaint Pending before Special Committee or Judicial Council. After a complaint has been referred to a special committee for investigation and before the committee files its report, the complainant may withdraw the complaint only with the consent of both the subject judge and either the special committee or the judicial council.

(c) Petition for Review. A petition for review addressed to a judicial council under Rule 18, or the Judicial Conference Committee on Judicial Conduct and Disability under Rule 22 may be withdrawn if no action on the petition has been taken.

Commentary on Rule 27

Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once begun, as a matter of public business rather than as the property of the complainant. Accordingly, the chief judge or the judicial council remains responsible for addressing any complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

Under subsection 27(a), a complaint pending before the chief judge may be withdrawn if the chief judge consents. Where the complaint clearly lacked merit, the chief judge may accordingly be saved the burden of preparing a formal order and supporting memorandum. However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on allegations in a withdrawn complaint.

If the chief judge appoints a special committee, Rule 27(b) provides that the complaint may be withdrawn only with

the consent of both the body before which it is pending (the special committee or the judicial council) and the subject judge. Once a complaint has reached the stage of appointment of a special committee, a resolution of the issues may be necessary to preserve public confidence. Moreover, the subject judge is given the right to insist that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding were terminated by withdrawal of the complaint.

With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted authority to withdraw the petition. It is thought that the public's interest in the proceeding is adequately protected, because there will necessarily have been a decision by the chief judge and often by the judicial council as well in such a case.

28. Availability of Rules and Forms

These Rules and copies of the complaint form as provided in Rule 6(a) must be available without charge in the office of the clerk of each court of appeals, district court, bankruptcy court, or other federal court whose judges are subject to the Act. Each court must also make these Rules and the complaint form available on the court's website, or provide an Internet link to the Rules and complaint form that are available on the appropriate court of appeals' website.

29. Effective Date

These Rules will become effective 30 days after promulgation by the Judicial Conference of the United States.