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**Judicial Conference Committee on Judicial Conduct
and Disability**

**Rules for Judicial-Conduct
and Judicial-Disability Proceedings**

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.

1 **ARTICLE I. GENERAL PROVISIONS**

2
3 **1. Scope**

4 **These Rules govern proceedings under the Judicial Conduct**
5 **and Disability Act, 28 U.S.C. §§ 351-364 (the Act), to**
6 **determine whether a covered judge has engaged in conduct**
7 **prejudicial to the effective and expeditious administration**
8 **of the business of the courts or is unable to discharge the**
9 **duties of office because of mental or physical disability.**

10
11
12 **Commentary on Rule 1**

13
14 In September 2006, the Judicial Conduct and Disability
15 Act Study Committee, appointed in 2004 by Chief Justice
16 Rehnquist and known as the "Breyer Committee," presented a
17 report, known as the "Breyer Committee Report," 239 F.R.D.
18 116 (Sept. 2006), to Chief Justice Roberts that evaluated
19 implementation of the Judicial Conduct and Disability Act of
20 1980, 28 U.S.C. §§ 351-364. The Breyer Committee had been
21 formed in response to criticism from the public and the
22 Congress regarding the effectiveness of the Act's
23 implementation. The Executive Committee of the Judicial
24 Conference directed the Judicial Conference Committee on
25 Judicial Conduct and Disability to consider the
26 recommendations made by the Breyer Committee and to report
27 on their implementation to the Conference.

28
29 The Breyer Committee found that it could not evaluate
30 implementation of the Act without establishing interpretive
31 standards, Breyer Committee Report, 239 F.R.D. at 132, and
32 that a major problem faced by chief judges in implementing
33 the Act was the lack of authoritative interpretive
34 standards. *Id.* at 212-15. The Breyer Committee then
35 established standards to guide its evaluation, some of which
36 were new formulations and some of which were taken from the
37 "Illustrative Rules Governing Complaints of Judicial
38 Misconduct and Disability," discussed below. The principal
39 standards used by the Breyer Committee are in Appendix E of
40 its Report. *Id.* at 238.

41
42 Based on the findings of the Breyer Committee, the
43 Judicial Conference Committee on Judicial Conduct and
44 Disability concluded that there was a need for the Judicial
45 Conference to exercise its power under Section 358 of the
46 Act to fashion standards guiding the various officers and
47 bodies who must exercise responsibility under the Act. To
48 that end, the Judicial Conference Committee proposed rules

1 that were based largely on Appendix E of the Breyer
2 Committee Report and the Illustrative Rules.
3

4 The Illustrative Rules were originally prepared in 1986
5 by the Special Committee of the Conference of Chief Judges
6 of the United States Courts of Appeals, and were
7 subsequently revised and amended, most recently in 2000, by
8 the predecessor to the Committee on Judicial Conduct and
9 Disability. The Illustrative Rules were adopted, with minor
10 variations, by circuit judicial councils, to govern
11 complaints under the Judicial Conduct and Disability Act.
12

13 After being submitted for public comment pursuant to 28
14 U.S.C. § 358(c), the present Rules were promulgated by the
15 Judicial Conference on
16
17

18 **2. Effect and Construction**

- 19 (a) **Generally.** These Rules are mandatory; they supersede
20 any conflicting judicial-council rules. Judicial
21 councils may promulgate additional rules to implement
22 the Act as long as those rules do not conflict with
23 these Rules.
- 24 (b) **Exception.** A Rule will not apply if, when performing
25 duties authorized by the Act, a chief judge, a special
26 committee, a judicial council, the Judicial Conference
27 Committee on Judicial Conduct and Disability, or the
28 Judicial Conference of the United States expressly
29 finds that exceptional circumstances render application
30 of that Rule in a particular proceeding manifestly
31 unjust or contrary to the purposes of the Act or these
32 Rules.
33

34 35 **Commentary on Rule 2**

36
37 Unlike the Illustrative Rules, these Rules provide
38 mandatory and nationally uniform provisions governing the
39 substantive and procedural aspects of misconduct and
40 disability proceedings under the Act. The mandatory nature
41 of these Rules is authorized by 28 U.S.C. § 358(a) and (c).
42 Judicial councils retain the power to promulgate rules
43 consistent with these Rules. For example, a local rule may
44 authorize the electronic distribution of materials pursuant
45 to Rule 8(b).
46

1 Rule 2(b) recognizes that unforeseen and exceptional
2 circumstances may call for a different approach in
3 particular cases.
4
5

6 3. Definitions

- 7 (a) Chief Judge. "Chief judge" means the chief judge of a
8 United States Court of Appeals, of the United States
9 Court of International Trade, or of the United States
10 Court of Federal Claims.
- 11 (b) Circuit Clerk. "Circuit clerk" means a clerk of a
12 United States court of appeals, the clerk of the United
13 States Court of International Trade, the clerk of the
14 United States Court of Federal Claims, or the circuit
15 executive of the United States Court of Appeals for the
16 Federal Circuit.
- 17 (c) Complaint. A complaint is:
18 (1) a document that, in accordance with Rule 6, is
19 filed by any person in his or her individual
20 capacity or on behalf of a professional
21 organization; or
22 (2) information from any source, other than a document
23 described in (c)(1), that gives a chief judge
24 probable cause to believe that a covered judge, as
25 defined in Rule 4, has engaged in misconduct or may
26 have a disability, whether or not the information
27 is framed as or is intended to be an allegation of
28 misconduct or disability.
- 29 (d) Court of Appeals, District Court, and District Judge.
30 "Courts of appeals," "district court," and "district
31 judge," where appropriate, include the United States
32 Court of Federal Claims, the United States Court of
33 International Trade, and the judges thereof.
- 34 (e) Disability. "Disability" is a temporary or permanent
35 condition rendering a judge unable to discharge the
36 duties of the particular judicial office. Examples of
37 disability include substance abuse, the inability to
38 stay awake during court proceedings, or a severe
39 impairment of cognitive abilities.
- 40 (f) Judicial Council and Circuit. "Judicial council" and
41 "circuit," where appropriate, include any courts
42 designated in 28 U.S.C. § 363.
- 43 (g) Magistrate Judge. "Magistrate judge," where
44 appropriate, includes a special master appointed by the
45 Court of Federal Claims under 42 U.S.C. § 300aa-12(c).
- 46 (h) Misconduct. Cognizable misconduct:

- 1 (1) is conduct prejudicial to the effective and
2 expeditious administration of the business of the
3 courts. Misconduct includes, but is not limited to:
4 (A) using the judge's office to obtain special
5 treatment for friends or relatives;
6 (B) accepting bribes, gifts, or other personal favors
7 related to the judicial office;
8 (C) having improper discussions with parties or
9 counsel for one side in a case;
10 (D) treating litigants or attorneys in a demonstrably
11 egregious and hostile manner;
12 (E) engaging in partisan political activity or making
13 inappropriately partisan statements;
14 (F) soliciting funds for organizations; or
15 (G) violating other specific, mandatory standards of
16 judicial conduct, such as those pertaining to
17 restrictions on outside income and requirements
18 for financial disclosure.
- 19 (2) is conduct occurring outside the performance of
20 official duties if the conduct might have a
21 prejudicial effect on the administration of the
22 business of the courts, including a substantial and
23 widespread lowering of public confidence in the
24 courts among reasonable people.
- 25 (3) does not include:
26 (A) an allegation that is directly related to the
27 merits of a decision or procedural ruling. An
28 allegation that calls into question the
29 correctness of a judge's ruling, including a
30 failure to recuse, without more, is merits-
31 related. If the decision or ruling is alleged to
32 be the result of an improper motive, e.g., a
33 bribe, ex parte contact, racial or ethnic bias,
34 or improper conduct in rendering a decision or
35 ruling, such as personally derogatory remarks
36 irrelevant to the issues, the complaint is not
37 cognizable to the extent that it attacks the
38 merits.
- 39 (B) an allegation about delay in rendering a decision
40 or ruling, unless the allegation concerns an
41 improper motive in delaying a particular decision
42 or habitual delay in a significant number of
43 unrelated cases.
- 44 (i) Subject Judge. "Subject judge" means any judge
45 described in Rule 4 who is the subject of a complaint.
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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).

1 Rule 3(e) relates to disability and provides only the most
2 general definition, recognizing that a fact-specific
3 approach is the only one available.
4

5 The phrase "prejudicial to the effective and expeditious
6 administration of the business of the courts" is not subject
7 to precise definition, and subsection (h)(1) therefore
8 provides some specific examples. Although the Code of
9 Conduct for United States Judges may be informative, its
10 main precepts are highly general; the Code is in many
11 potential applications aspirational rather than a set of
12 disciplinary rules. Ultimately, the responsibility for
13 determining what constitutes misconduct under the statute is
14 the province of the judicial council of the circuit subject
15 to such review and limitations as are ordained by the
16 statute and by these Rules.
17

18 Even where specific, mandatory rules exist -- for
19 example, governing the receipt of gifts by judges, outside
20 earned income, and financial disclosure obligations -- the
21 distinction between the misconduct statute and the specific,
22 mandatory rules must be borne in mind. For example, an
23 inadvertent, minor violation of any one of these Rules,
24 promptly remedied when called to the attention of the judge,
25 might still be a violation but might not rise to the level
26 of misconduct under the statute. By contrast, a pattern of
27 such violations of the Code might well rise to the level of
28 misconduct.
29

30 An allegation can meet the statutory standard even though
31 the judge's alleged conduct did not occur in the course of
32 the performance of official duties. The Code of Conduct for
33 United States Judges expressly covers a wide range of
34 extra-official activities, and some of these activities may
35 constitute misconduct. For example, allegations that a
36 judge solicited funds for a charity or participated in a
37 partisan political event are cognizable under the Act.
38

39 On the other hand, judges are entitled to some leeway in
40 extra-official activities. For example, misconduct may not
41 include a judge being repeatedly and publicly discourteous
42 to a spouse (not including physical abuse) even though this
43 might cause some reasonable people to have diminished
44 confidence in the courts. Rule 3(h)(2) states that conduct
45 of this sort is covered, for example, when it might lead to
46 a "substantial and widespread" lowering of such confidence.
47

1 Rule 3(h)(3)(A) tracks the Act, 28 U.S.C.
2 § 352(b)(1)(A)(ii), in excluding from the definition of
3 misconduct allegations "[d]irectly related to the merits of
4 a decision or procedural ruling." This exclusion preserves
5 the independence of judges in the exercise of judicial power
6 by ensuring that the complaint procedure is not used to
7 collaterally attack the substance of a judge's ruling. Any
8 allegation that calls into question the correctness of an
9 official action of a judge -- without more -- is
10 merits-related. The phrase "decision or procedural ruling"
11 is not limited to rulings issued in deciding Article III
12 cases or controversies. Thus, a complaint challenging the
13 correctness of a chief judge's determination to dismiss a
14 prior misconduct complaint would be properly dismissed as
15 merits-related -- in other words, as challenging the
16 substance of the judge's administrative determination to
17 dismiss the complaint -- even though it does not concern the
18 judge's rulings in Article III litigation. Similarly, an
19 allegation that a judge had incorrectly declined to approve
20 a Criminal Justice Act voucher is merits-related under this
21 standard.
22

23 Conversely, an allegation -- however unsupported -- that
24 a judge conspired with a prosecutor to make a particular
25 ruling is not merits-related, even though it "relates" to a
26 ruling in a colloquial sense. Such an allegation attacks
27 the propriety of conspiring with the prosecutor and goes
28 beyond a challenge to the correctness -- "the merits" -- of
29 the ruling itself. An allegation that a judge ruled against
30 the complainant because the complainant is a member of a
31 particular racial or ethnic group, or because the judge
32 dislikes the complainant personally, is also not
33 merits-related. Such an allegation attacks the propriety of
34 arriving at rulings with an illicit or improper motive.
35 Similarly, an allegation that a judge used an inappropriate
36 term to refer to a class of people is not merits-related
37 even if the judge used it on the bench or in an opinion; the
38 correctness of the judge's rulings is not at stake. An
39 allegation that a judge treated litigants or attorneys in a
40 demonstrably egregious and hostile manner while on the bench
41 is also not merits-related.
42

43 The existence of an appellate remedy is usually
44 irrelevant to whether an allegation is merits-related. The
45 merits-related ground for dismissal exists to protect
46 judges' independence in making rulings, not to protect or
47 promote the appellate process. A complaint alleging an
48 incorrect ruling is merits-related even though the

1 complainant has no recourse from that ruling. By the same
2 token, an allegation that is otherwise cognizable under the
3 Act should not be dismissed merely because an appellate
4 remedy appears to exist (for example, vacating a ruling that
5 resulted from an improper ex parte communication). However,
6 there may be occasions when appellate and misconduct
7 proceedings overlap, and consideration and disposition of a
8 complaint under these Rules may be properly deferred by a
9 chief judge until the appellate proceedings are concluded in
10 order to avoid, inter alia, inconsistent decisions.
11

12 Because of the special need to protect judges'
13 independence in deciding what to say in an opinion or
14 ruling, a somewhat different standard applies to determine
15 the merits-relatedness of a non-frivolous allegation that a
16 judge's language in a ruling reflected an improper motive.
17 If the judge's language was relevant to the case at hand --
18 for example a statement that a claim is legally or factually
19 "frivolous" -- then the judge's choice of language is
20 presumptively merits-related and excluded, absent evidence
21 apart from the ruling itself suggesting an improper motive.
22 If, on the other hand, the challenged language does not seem
23 relevant on its face, then an additional inquiry under Rule
24 11 is necessary.
25

26 With regard to Rule 3(h)(3)(B), a complaint of delay in a
27 single case is excluded as merits-related. Such an
28 allegation may be said to challenge the correctness of an
29 official action of the judge -- in other words, assigning a
30 low priority to deciding the particular case. But, by the
31 same token, an allegation of a habitual pattern of delay in
32 a significant number of unrelated cases, or an allegation of
33 deliberate delay in a single case arising out of an illicit
34 motive, is not merits-related.
35

36 The remaining subsections of Rule 3 provide technical
37 definitions clarifying the application of the Rules to the
38 various kinds of courts covered.
39
40

41 **4. Covered Judges**

42 A complaint under these Rules may concern the actions or
43 capacity only of judges of United States courts of appeals,
44 judges of United States district courts, judges of United
45 States bankruptcy courts, United States magistrate judges,
46 and judges of the courts specified in 28 U.S.C. § 363.
47
48

Commentary on Rule 4

1
2 This Rule tracks the Act. Rule 8(c) and (d) contain
3 provisions as to the handling of complaints against persons
4 not covered by the Act, such as other court personnel, or
5 against both covered judges and noncovered persons.
6
7

8 **ARTICLE II. INITIATION OF A COMPLAINT**

9 **5. Identification of a Complaint**

- 10 (a) Identification. When a chief judge has information
11 constituting reasonable grounds for inquiry into
12 whether a covered judge has engaged in misconduct or
13 has a disability, the chief judge may conduct an
14 inquiry, as he or she deems appropriate, into the
15 accuracy of the information even if no related
16 complaint has been filed. A chief judge who finds
17 probable cause to believe that misconduct has occurred
18 or that a disability exists may seek an informal
19 resolution that he or she finds satisfactory. If no
20 informal resolution is achieved or is feasible, the
21 chief judge may identify a complaint and, by written
22 order stating the reasons, begin the review provided in
23 Rule 11. If the evidence of misconduct is clear and
24 convincing and no informal resolution is achieved or is
25 feasible, the chief judge must identify a complaint. A
26 chief judge must not decline to identify a complaint
27 merely because the person making the allegation has not
28 filed a complaint under Rule 6. This Rule is subject
29 to Rule 7.
- 30 (b) Noncompliance with Rule 6(d). Rule 6 complaints that do
31 not comply with the requirements of Rule 6(d) must be
32 considered under this Rule.
33
34

35 **Commentary on Rule 5**

36
37 This Rule is adapted from the Breyer Committee Report,
38 239 F.R.D. at 245-46.
39

40 The Act authorizes the chief judge, by written order
41 stating reasons, to identify a complaint and thereby
42 dispense with the filing of a written complaint. See 28
43 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes
44 aware of information constituting reasonable grounds to
45 inquire into possible misconduct or disability on the part
46 of a covered judge, and no formal complaint has been filed,
47 the chief judge has the power in his or her discretion to
48 begin an appropriate inquiry. A chief judge's decision

1 whether to informally seek a resolution and/or to identify a
2 complaint is guided by the results of that inquiry. If the
3 chief judge concludes that there is probable cause to
4 believe that misconduct has occurred or a disability exists,
5 the chief judge may seek an informal resolution, if
6 feasible, and if failing in that, may identify a complaint.
7 Discretion is accorded largely for the reasons police
8 officers and prosecutors have discretion in making arrests
9 or bringing charges. The matter may be trivial and
10 isolated, based on marginal evidence, or otherwise highly
11 unlikely to lead to a misconduct or disability finding. On
12 the other hand, if the inquiry leads the chief judge to
13 conclude that there is clear and convincing evidence of
14 misconduct or a disability, and no satisfactory informal
15 resolution has been achieved or is feasible, the chief judge
16 is required to identify a complaint.
17

18 An informal resolution is one agreed to by the subject
19 judge and found satisfactory by the chief judge. Because
20 an informal resolution under Rule 5 reached before a
21 complaint is filed under Rule 6 will generally cause a
22 subsequent Rule 6 complaint alleging the identical matter
23 to be concluded, see Rule 11(d), the chief judge must be
24 sure that the resolution is fully appropriate before
25 endorsing it. In doing so, the chief judge must balance
26 the seriousness of the matter against the particular
27 judge's alacrity in addressing the issue. The availability
28 of this procedure should encourage attempts at swift
29 remedial action before a formal complaint is filed.
30

31 When a complaint is identified, a written order stating
32 the reasons for the identification must be provided; this
33 begins the process articulated in Rule 11. Rule 11 provides
34 that once the chief judge has identified a complaint, the
35 chief judge, subject to the disqualification provisions of
36 Rule 25, will perform, with respect to that complaint, all
37 functions assigned to the chief judge for the determination
38 of complaints filed by a complainant.
39

40 In high-visibility situations, it may be desirable for
41 the chief judge to identify a complaint without first
42 seeking an informal resolution (and then, if the
43 circumstances warrant, dismiss or conclude the identified
44 complaint without appointment of a special committee) in
45 order to assure the public that the allegations have not
46 been ignored.
47

1 A chief judge's decision not to identify a complaint
2 under Rule 5 is not appealable and is subject to Rule
3 3(h)(3)(A), which excludes merits-related complaints from
4 the definition of misconduct.
5

6 A chief judge may not decline to identify a complaint
7 solely on the basis that the unfiled allegations could be
8 raised by one or more persons in a filed complaint, but none
9 of these persons has opted to do so.
10

11 Subsection (a) concludes by stating that this Rule is
12 "subject to Rule 7." This is intended to establish that
13 only: (i) the chief judge of the home circuit of a
14 potential subject judge, or (ii) the chief judge of a
15 circuit in which misconduct is alleged to have occurred in
16 the course of official business while the potential subject
17 judge was sitting by designation, shall have the power or a
18 duty under this Rule to identify a complaint.
19

20 Subsection (b) provides that complaints filed under Rule
21 6 that do not comply with the requirements of Rule 6(d),
22 must be considered under this Rule. For instance, if a
23 complaint has been filed but the form submitted is unsigned,
24 or the truth of the statements therein are not verified in
25 writing under penalty of perjury, then a chief judge must
26 nevertheless consider the allegations as known information,
27 and proceed to follow the process described in Rule 5(a).
28
29

30 **6. Filing a Complaint**

- 31 (a) **Form.** A complainant may use the form reproduced in the
32 appendix to these Rules or a form designated by the
33 rules of the judicial council in the circuit in which
34 the complaint is filed. A complaint form is also
35 available on each court of appeals' website or may be
36 obtained from the circuit clerk or any district court
37 or bankruptcy court within the circuit. A form is not
38 necessary to file a complaint, but the complaint must
39 be written and must include the information described
40 in (b).
- 41 (b) **Brief Statement of Facts.** A complaint must contain a
42 concise statement that details the specific facts on
43 which the claim of misconduct or disability is based.
44 The statement of facts should include a description of:
45 (1) what happened;
46 (2) when and where the relevant events happened;
47 (3) any information that would help an investigator
48 check the facts; and

- 1 (4) for an allegation of disability, any additional
2 facts that form the basis of that allegation.
3 (c) Legibility. A complaint should be typewritten if
4 possible. If not typewritten, it must be legible. An
5 illegible complaint will be returned to the complainant
6 with a request to resubmit it in legible form. If a
7 resubmitted complaint is still illegible, it will not
8 be accepted for filing.
9 (d) Complainant's Address and Signature; Verification. The
10 complainant must provide a contact address and sign the
11 complaint. The truth of the statements made in the
12 complaint must be verified in writing under penalty of
13 perjury. If any of these requirements are not met, the
14 complaint will be accepted for filing, but it will be
15 reviewed under only Rule 5(b).
16 (e) Number of Copies; Envelope Marking. The complainant
17 shall provide the number of copies of the complaint
18 required by local rule. Each copy should be in an
19 envelope marked "Complaint of Misconduct" or "Complaint
20 of Disability." The envelope must not show the name of
21 any subject judge.
22
23

24 Commentary on Rule 6

25
26 The Rule is adapted from the Illustrative Rules and is
27 self-explanatory.
28
29

30 7. Where to Initiate Complaints

- 31 (a) Where to File. Except as provided in (b),
32 (1) a complaint against a judge of a United States
33 court of appeals, a United States district court, a
34 United States bankruptcy court, or a United States
35 magistrate judge must be filed with the circuit
36 clerk in the jurisdiction in which the subject
37 judge holds office.
38 (2) a complaint against a judge of the United States
39 Court of International Trade or the United States
40 Court of Federal Claims must be filed with the
41 respective clerk of that court.
42 (3) a complaint against a judge of the United States
43 Court of Appeals for the Federal Circuit must be
44 filed with the circuit executive of that court.
45 (b) Misconduct in Another Circuit; Transfer. If a complaint
46 alleges misconduct in the course of official business
47 while the subject judge was sitting on a court by
48 designation under 28 U.S.C. §§ 291-293 and 294(d), the

1 complaint may be filed or identified with the circuit
2 clerk of that circuit or of the subject judge's home
3 circuit. The proceeding will continue in the circuit of
4 the first-filed or first-identified complaint. The
5 judicial council of the circuit where the complaint was
6 first filed or first identified may transfer the
7 complaint to the subject judge's home circuit or to the
8 circuit where the alleged misconduct occurred, as the
9 case may be.

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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.

1 **8. Action by Clerk**

- 2 (a) **Receipt of Complaint.** Upon receiving a complaint
3 against a judge filed under Rule 5 or 6, the circuit
4 clerk must open a file, assign a docket number
5 according to a uniform numbering scheme promulgated by
6 the Judicial Conference Committee on Judicial Conduct
7 and Disability, and acknowledge the complaint's
8 receipt.
- 9 (b) **Distribution of Copies.** The clerk must promptly send
10 copies of a complaint filed under Rule 6 to the chief
11 judge or the judge authorized to act as chief judge
12 under Rule 25(f), and copies of complaints filed under
13 Rule 5 or 6 to each subject judge. The clerk must
14 retain the original complaint. Any further distribution
15 should be as provided by local rule.
- 16 (c) **Complaints Against Noncovered Persons.** If the clerk
17 receives a complaint about a person not holding an
18 office described in Rule 4, the clerk must not accept
19 the complaint for filing under these Rules.
- 20 (d) **Receipt of Complaint about a Judge and Another**
21 **Noncovered Person.** If a complaint is received about a
22 judge described in Rule 4 and a person not holding an
23 office described in Rule 4, the clerk must accept the
24 complaint for filing under these Rules only with regard
25 to the judge and must inform the complainant of the
26 limitation.

27
28 **Commentary on Rule 8**

29
30 This Rule is adapted from the Illustrative Rules and is
31 largely self-explanatory.

32
33 The uniform docketing scheme described in subsection (a)
34 should take into account potential problems associated with
35 a complaint that names multiple judges. One solution may be
36 to provide separate docket numbers for each subject judge.
37 Separate docket numbers would help avoid difficulties in
38 tracking cases, particularly if a complaint is dismissed
39 with respect to some, but not all of the named judges.

40
41 Complaints against noncovered persons are not to be
42 accepted for processing under these Rules but may, of
43 course, be accepted under other circuit rules or procedures
44 for grievances.
45
46

1 **9. Time for Filing or Identifying a Complaint**

2 A complaint may be filed or identified at any time. If the
3 passage of time has made an accurate and fair investigation
4 of a complaint impractical, the complaint must be dismissed
5 under Rule 11(c) (1) (E).
6
7

8 **Commentary on Rule 9**

9
10 This Rule is adapted from the Act, 28 U.S.C. §§ 351,
11 352(b) (1) (A) (iii), and the Illustrative Rules.
12
13

14 **10. Abuse of the Complaint Procedure**

- 15 (a) **Abusive Complaints.** A complainant who has filed
16 repetitive, harassing, or frivolous complaints, or has
17 otherwise abused the complaint procedure, may be
18 restricted from filing further complaints. After giving
19 the complainant an opportunity to show cause in writing
20 why his or her right to file further complaints should
21 not be limited, a judicial council may prohibit,
22 restrict, or impose conditions on the complainant's use
23 of the complaint procedure. Upon written request of the
24 complainant, the judicial council may revise or
25 withdraw any prohibition, restriction, or condition
26 previously imposed.
- 27 (b) **Orchestrated Complaints.** When many essentially
28 identical complaints from different complainants are
29 received and appear to be part of an orchestrated
30 campaign, the chief judge may recommend that the
31 judicial council issue a written order instructing the
32 circuit clerk to accept only a certain number of such
33 complaints for filing and to refuse to accept further
34 ones. The clerk must send a copy of any such order to
35 anyone whose complaint was not accepted.
36
37

38 **Commentary on Rule 10**

39
40 This Rule is adapted from the Illustrative Rules.
41

42 Rule 10(a) provides a mechanism for a judicial council to
43 restrict the filing of further complaints by a single
44 complainant who has abused the complaint procedure. In some
45 instances, however, the complaint procedure may be abused in
46 a manner for which the remedy provided in Rule 10(a) may not
47 be appropriate. For example, some circuits have been
48 inundated with submissions of dozens or hundreds of

1 essentially identical complaints against the same judge or
2 judges, all submitted by different complainants. In many of
3 these instances, persons with grievances against a
4 particular judge or judges used the Internet or other
5 technology to orchestrate mass complaint-filing campaigns
6 against them. If each complaint submitted as part of such a
7 campaign were accepted for filing and processed according to
8 these Rules, there would be a serious drain on court
9 resources without any benefit to the adjudication of the
10 underlying merits.

11
12 A judicial council may, therefore, respond to such mass
13 filings under Rule 10(b) by declining to accept repetitive
14 complaints for filing, regardless of the fact that the
15 complaints are nominally submitted by different
16 complainants. When the first complaint or complaints have
17 been dismissed on the merits, and when further, essentially
18 identical submissions follow, the judicial council may issue
19 a second order noting that these are identical or repetitive
20 complaints, directing the circuit clerk not to accept these
21 complaints or any further such complaints for filing, and
22 directing the clerk to send each putative complainant copies
23 of both orders.

24 25 26 **ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF** 27 **JUDGE**

28 29 **11. Review by the Chief Judge**

- 30 (a) **Purpose of Chief Judge's Review.** When a complaint is
31 identified by the chief judge or is filed, the chief
32 judge must review it unless the chief judge is
33 disqualified under Rule 25. If the complaint contains
34 information constituting evidence of misconduct or
35 disability, but the complainant does not claim it as
36 such, the chief judge must treat the complaint as if it
37 did allege misconduct or disability and give notice to
38 the subject judge. After reviewing the complaint, the
39 chief judge must determine whether it should be:
40 (1) dismissed;
41 (2) concluded on the ground that voluntary corrective
42 action has been taken;
43 (3) concluded because intervening events have made
44 action on the complaint no longer necessary; or
45 (4) referred to a special committee.
- 46 (b) **Inquiry by Chief Judge.** In determining what action to
47 take under Rule 11(a), the chief judge may conduct a
48 limited inquiry. The chief judge, or a designee, may

1 communicate orally or in writing with the complainant,
2 the subject judge, and any others who may have
3 knowledge of the matter, and may review transcripts or
4 other relevant documents. In conducting the inquiry,
5 the chief judge must not determine any reasonably
6 disputed issue.

7 (c) Dismissal.

8 (1) Allowable grounds. A complaint must be dismissed in
9 whole or in part to the extent that the chief judge
10 concludes that the complaint:

- 11 (A) alleges conduct that, even if true, is not
12 prejudicial to the effective and expeditious
13 administration of the business of the courts and
14 does not indicate a mental or physical disability
15 resulting in inability to discharge the duties of
16 judicial office;
17 (B) is directly related to the merits of a decision
18 or procedural ruling;
19 (C) is frivolous;
20 (D) is based on allegations lacking sufficient
21 evidence to raise an inference that misconduct
22 has occurred or that a disability exists;
23 (E) is based on allegations which are incapable of
24 being established through investigation;
25 (F) has been filed in the wrong circuit under Rule 7;
26 or
27 (G) is otherwise not appropriate for consideration
28 under the Act.

29 (2) Disallowed grounds. A complaint must not be
30 dismissed solely because it repeats allegations of
31 a previously dismissed complaint if it also
32 contains material information not previously
33 considered and does not constitute harassment of
34 the subject judge.

35 (d) Corrective Action. The chief judge may conclude the
36 complaint proceeding in whole or in part if:

- 37 (1) an informal resolution under Rule 5 satisfactory to
38 the chief judge was reached before the complaint
39 was filed under Rule 6, or
40 (2) the chief judge determines that the subject judge
41 has taken appropriate voluntary corrective action
42 that acknowledges and remedies the problems raised
43 by the complaint.

44 (e) Intervening Events. The chief judge may conclude the
45 complaint proceeding in whole or in part upon
46 determining that intervening events render some or all
47 of the allegations moot or make remedial action
48 impossible.

- 1 (f) Appointment of Special Committee. If some or all of the
2 complaint is not dismissed or concluded, the chief
3 judge must promptly appoint a special committee to
4 investigate the complaint or any relevant portion of it
5 and to make recommendations to the judicial council.
6 Before appointing a special committee, the chief judge
7 must invite the subject judge to respond to the
8 complaint either orally or in writing if the judge was
9 not given an opportunity during the limited inquiry. In
10 the chief judge's discretion, separate complaints may
11 be joined and assigned to a single special committee.
12 Similarly, a single complaint about more than one judge
13 may be severed and more than one special committee
14 appointed.
- 15 (g) Notice of Chief Judge's Action; Petitions for Review.
- 16 (1) When special committee is appointed. If a special
17 committee is appointed, the chief judge must notify
18 the complainant and the subject judge that the
19 matter has been referred to a special committee and
20 identify the members of the committee. A copy of
21 the order appointing the special committee must be
22 sent to the Judicial Conference Committee on
23 Judicial Conduct and Disability.
- 24 (2) When chief judge disposes of complaint without
25 appointing special committee. If the chief judge
26 disposes of the complaint under Rule 11(c), (d), or
27 (e), the chief judge must prepare a supporting
28 memorandum that sets forth the reasons for the
29 disposition. Except as authorized by 28 U.S.C.
30 § 360, the memorandum must not include the name of
31 the complainant or of the subject judge. The order
32 and the supporting memorandum, which may be one
33 document, must be provided to the complainant, the
34 subject judge, and the Judicial Conference
35 Committee on Judicial Conduct and Disability.
- 36 (3) Right of petition for review. If the chief judge
37 disposes of a complaint under Rule 11(c), (d), or
38 (e), the complainant and subject judge must be
39 notified of the right to petition the judicial
40 council for review of the disposition, as provided
41 in Rule 18. If a petition for review is filed, the
42 chief judge must promptly transmit all materials
43 obtained in connection with the inquiry under Rule
44 11(b) to the circuit clerk for transmittal to the
45 judicial council.
- 46 (h) Public Availability of Chief Judge's Decision. The
47 chief judge's decision must be made public to the

1 extent, at the time, and in the manner provided in Rule
2 24.
3
4

5 Commentary on Rule 11
6

7 Subsection (a) lists the actions available to a chief
8 judge in reviewing a complaint. This subsection provides
9 that where a complaint has been filed under Rule 6, the
10 ordinary doctrines of waiver do not apply. A chief judge
11 must identify as a complaint any misconduct or disability
12 issues raised by the factual allegations of the complaint
13 even if the complainant makes no such claim with regard to
14 those issues. For example, an allegation limited to
15 misconduct in fact-finding that mentions periods during a
16 trial when the judge was asleep must be treated as a
17 complaint regarding disability. Some formal order giving
18 notice of the expanded scope of the proceeding must be given
19 to the subject judge.
20

21 Subsection (b) describes the nature of the chief judge's
22 inquiry. It is based largely on the Breyer Committee
23 Report, 239 F.R.D. at 243-45. The Act states that dismissal
24 is appropriate "when a limited inquiry . . . demonstrates
25 that the allegations in the complaint lack any factual
26 foundation or are conclusively refuted by objective
27 evidence." 28 U.S.C. § 352(b)(1)(B). At the same time,
28 however, Section 352(a) states that "[t]he chief judge shall
29 not undertake to make findings of fact about any matter that
30 is reasonably in dispute." These two statutory standards
31 should be read together, so that a matter is not
32 "reasonably" in dispute if a limited inquiry shows that the
33 allegations do not constitute misconduct or disability, that
34 they lack any reliable factual foundation, or that they are
35 conclusively refuted by objective evidence.
36

37 In conducting a limited inquiry under subsection (b), the
38 chief judge must avoid determinations of reasonably disputed
39 issues, including reasonably disputed issues as to whether
40 the facts alleged constitute misconduct or disability, which
41 are ordinarily left to a special committee and the judicial
42 council. An allegation of fact is ordinarily not "refuted"
43 simply because the subject judge denies it. The limited
44 inquiry must reveal something more in the way of refutation
45 before it is appropriate to dismiss a complaint that is
46 otherwise cognizable. If it is the complainant's word
47 against the subject judge's -- in other words, there is
48 simply no other significant evidence of what happened or of

1 the complainant's unreliability -- then there must be a
2 special-committee investigation. Such a credibility issue
3 is a matter "reasonably in dispute" within the meaning of
4 the Act.
5

6 However, dismissal following a limited inquiry may occur
7 when the complaint refers to transcripts or to witnesses and
8 the chief judge determines that the transcripts and
9 witnesses all support the subject judge. Breyer Committee
10 Report, 239 F.R.D. at 243. For example, consider a
11 complaint alleging that the subject judge said X, and the
12 complaint mentions, or it is independently clear, that five
13 people may have heard what the judge said. Id. The chief
14 judge is told by the subject judge and one witness that the
15 judge did not say X, and the chief judge dismisses the
16 complaint without questioning the other four possible
17 witnesses. Id. In this example, the matter remains
18 reasonably in dispute. If all five witnesses say the judge
19 did not say X, dismissal is appropriate, but if potential
20 witnesses who are reasonably accessible have not been
21 questioned, then the matter remains reasonably in dispute.
22 Id.
23

24 Similarly, under (c)(1)(A), if it is clear that the
25 conduct or disability alleged, even if true, is not
26 cognizable under these Rules, the complaint should be
27 dismissed. If that issue is reasonably in dispute, however,
28 dismissal under (c)(1)(A) is inappropriate.
29

30 Essentially, the standard articulated in subsection (b)
31 is that used to decide motions for summary judgment pursuant
32 to Fed. R. Civ. P. 56. Genuine issues of material fact are
33 not resolved at the summary judgment stage. A material fact
34 is one that "might affect the outcome of the suit under the
35 governing law," and a dispute is "genuine" if "the evidence
36 is such that a reasonable jury could return a verdict for
37 the nonmoving party." Anderson v. Liberty Lobby, 477 U.S.
38 242, 248 (1986). Similarly, the chief judge may not resolve
39 a genuine issue concerning a material fact or the existence
40 of misconduct or a disability when conducting a limited
41 inquiry pursuant to subsection (b).
42

43 Subsection (c) describes the grounds on which a complaint
44 may be dismissed. These are adapted from the Act, 28 U.S.C.
45 § 352(b), and the Breyer Committee Report, 239 F.R.D. at
46 239-45. Subsection (c)(1)(A) permits dismissal of an
47 allegation that, even if true, does not constitute
48 misconduct or disability under the statutory standard. The

1 proper standards are set out in Rule 3 and discussed in the
2 Commentary on that Rule. Subsection (c)(1)(B) permits
3 dismissal of complaints related to the merits of a decision
4 by a subject judge; this standard is also governed by Rule 3
5 and its accompanying Commentary.
6

7 Subsections (c)(1)(C)-(E) implement the statute by
8 allowing dismissal of complaints that are "frivolous,
9 lacking sufficient evidence to raise an inference that
10 misconduct has occurred, or containing allegations which are
11 incapable of being established through investigation." 28
12 U.S.C. § 352(b)(1)(A)(iii).
13

14 Dismissal of a complaint as "frivolous," under Rule
15 11(c)(1)(C), will generally occur without any inquiry beyond
16 the face of the complaint. For instance, when the
17 allegations are facially incredible or so lacking in indicia
18 of reliability that no further inquiry is warranted,
19 dismissal under this subsection is appropriate.
20

21 A complaint warranting dismissal under Rule 11(c)(1)(D)
22 is illustrated by the following example. Consider a
23 complainant who alleges an impropriety and asserts that he
24 knows of it because it was observed and reported to him by a
25 person who is identified. The judge denies that the event
26 occurred. When contacted, the source also denies it. In
27 such a case, the chief judge's proper course of action may
28 turn on whether the source had any role in the allegedly
29 improper conduct. If the complaint was based on a lawyer's
30 statement that he or she had an improper ex parte contact
31 with a judge, the lawyer's denial of the impropriety might
32 not be taken as wholly persuasive, and it would be
33 appropriate to conclude that a real factual issue is raised.
34 On the other hand, if the complaint quoted a disinterested
35 third party and that disinterested party denied that the
36 statement had been made, there would be no value in opening
37 a formal investigation. In such a case, it would be
38 appropriate to dismiss the complaint under Rule 11(c)(1)(D).
39

40 Rule 11(c)(1)(E) is intended, among other things, to
41 cover situations when no evidence is offered or identified,
42 or when the only identified source is unavailable. Breyer
43 Committee Report, 239 F.R.D. at 243. For example, a
44 complaint alleges that an unnamed attorney told the
45 complainant that the judge did X. Id. The subject judge
46 denies it. The chief judge requests that the complainant
47 (who does not purport to have observed the judge do X)
48 identify the unnamed witness, or that the unnamed witness

1 come forward so that the chief judge can learn the unnamed
2 witness's account. Id. The complainant responds that he
3 has spoken with the unnamed witness, that the unnamed
4 witness is an attorney who practices in federal court, and
5 that the unnamed witness is unwilling to be identified or to
6 come forward. Id. at 243-44. The allegation is then
7 properly dismissed as containing allegations that are
8 incapable of being established through investigation. Id.
9

10 If, however, the situation involves a reasonable dispute
11 over credibility, the matter should proceed. For example,
12 the complainant alleges an impropriety and alleges that he
13 or she observed it and that there were no other witnesses;
14 the subject judge denies that the event occurred. Unless
15 the complainant's allegations are facially incredible or so
16 lacking indicia of reliability warranting dismissal under
17 Rule 11(c)(1)(C), a special committee must be appointed
18 because there is a material factual question that is
19 reasonably in dispute.
20

21 Dismissal is also appropriate when a complaint is filed
22 so long after an alleged event that memory loss, death, or
23 changes to unknown residences prevent a proper
24 investigation.
25

26 Subsection (c)(2) indicates that the investigative nature
27 of the process prevents the application of claim preclusion
28 principles where new and material evidence becomes
29 available. However, it also recognizes that at some point a
30 renewed investigation may constitute harassment of the
31 subject judge and should be foregone, depending of course on
32 the seriousness of the issues and the weight of the new
33 evidence.
34

35 Rule 11(d) implements the Act's provision for dismissal
36 if voluntary appropriate corrective action has been taken.
37 It is largely adapted from the Breyer Committee Report, 239
38 F.R.D. 244-45. The Act authorizes the chief judge to
39 conclude the proceedings if "appropriate corrective action
40 has been taken." 28 U.S.C. § 352(b)(2). Under the Rule,
41 action taken after the complaint is filed is "appropriate"
42 when it acknowledges and remedies the problem raised by the
43 complaint. Breyer Committee Report, 239 F.R.D. at 244.
44 Because the Act deals with the conduct of judges, the
45 emphasis is on correction of the judicial conduct that was
46 the subject of the complaint. Id. Terminating a complaint
47 based on corrective action is premised on the implicit
48 understanding that voluntary self-correction or redress of

1 misconduct or a disability is preferable to sanctions. Id.
2 The chief judge may facilitate this process by giving the
3 subject judge an objective view of the appearance of the
4 judicial conduct in question and by suggesting appropriate
5 corrective measures. Id. Moreover, when corrective action
6 is taken under Rule 5 satisfactory to the chief judge before
7 a complaint is filed, that informal resolution will be
8 sufficient to conclude a subsequent complaint based on the
9 identical conduct.

10 "Corrective action" must be voluntary action taken by the
11 subject judge. Breyer Committee Report, 239 F.R.D. at 244.
12 A remedial action directed by the chief judge or by an
13 appellate court without the participation of the subject
14 judge in formulating the directive or without the subject
15 judge's subsequent agreement to such action does not
16 constitute the requisite voluntary corrective action. Id.
17 Neither the chief judge nor an appellate court has authority
18 under the Act to impose a formal remedy or sanction; only
19 the judicial council can impose a formal remedy or sanction
20 under 28 U.S.C. § 354(a)(2). Id. Compliance with a
21 previous council order may serve as corrective action
22 allowing conclusion of a later complaint about the same
23 behavior. Id.

24
25
26 Where a judge's conduct has resulted in identifiable,
27 particularized harm to the complainant or another
28 individual, appropriate corrective action should include
29 steps taken by that judge to acknowledge and redress the
30 harm, if possible, such as by an apology, recusal from a
31 case, or a pledge to refrain from similar conduct in the
32 future. Id. While the Act is generally forward-looking,
33 any corrective action should, to the extent possible, serve
34 to correct a specific harm to an individual, if such harm
35 can reasonably be remedied. Id. In some cases, corrective
36 action may not be "appropriate" to justify conclusion of a
37 complaint unless the complainant or other individual harmed
38 is meaningfully apprised of the nature of the corrective
39 action in the chief judge's order, in a direct communication
40 from the subject judge, or otherwise. Id.

41
42 Voluntary corrective action should be proportionate to
43 any plausible allegations of misconduct in the complaint.
44 The form of corrective action should also be proportionate
45 to any sanctions that a judicial council might impose under
46 Rule 20(b), such as a private or public reprimand or a
47 change in case assignments. Breyer Committee Report, 239

1 F.R.D at 244-45. In other words, minor corrective action
2 will not suffice to dispose of a serious matter. Id.
3

4 Rule 11(e) implements Section 352(b)(2) of the Act, which
5 permits the chief judge to "conclude the proceeding," if
6 "action on the complaint is no longer necessary because of
7 intervening events," such as a resignation from judicial
8 office. Ordinarily, however, stepping down from an
9 administrative post such as chief judge, judicial-council
10 member, or court-committee chair does not constitute an
11 event rendering unnecessary any further action on a
12 complaint alleging judicial misconduct. Breyer Committee
13 Report, 239 F.R.D. at 245. As long as the subject of the
14 complaint performs judicial duties, a complaint alleging
15 judicial misconduct must be addressed. Id.
16

17 If a complaint is not disposed of pursuant to Rule 11(c),
18 (d), or (e), a special committee must be appointed. Rule
19 11(f) states that a subject judge must be invited to respond
20 to the complaint before a special committee is appointed, if
21 no earlier response was invited.
22

23 Subject judges, of course, receive copies of complaints
24 at the same time that they are referred to the chief judge,
25 and they are free to volunteer responses to them. Under
26 Rule 11(b), the chief judge may request a response if it is
27 thought necessary. However, many complaints are clear
28 candidates for dismissal even if their allegations are
29 accepted as true, and there is no need for the subject judge
30 to devote time to a defense.
31

32 The Act requires that the order dismissing a complaint or
33 concluding the proceeding contain a statement of reasons and
34 that a copy of the order be sent to the complainant. 28
35 U.S.C. § 352(b). Rule 24, dealing with availability of
36 information to the public, contemplates that the order will
37 be made public, usually without disclosing the names of the
38 complainant or the subject judge. If desired for
39 administrative purposes, more identifying information can be
40 included in a non-public version of the order.
41

42 When complaints are disposed of by chief judges, the
43 statutory purposes are best served by providing the
44 complainant with a full, particularized, but concise
45 explanation, giving reasons for the conclusions reached.
46 See also Commentary on Rule 24, dealing with public
47 availability.
48

1 Rule 11(g) provides that the complainant and subject
2 judge must be notified, in the case of a disposition by the
3 chief judge, of the right to petition the judicial council
4 for review. A copy of a chief judge's order and memorandum,
5 which may be one document, disposing of a complaint must be
6 sent by the circuit clerk to the Judicial Conference
7 Committee on Judicial Conduct and Disability.
8
9

10 **ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL** 11 **COMMITTEE** 12

13 **12. Composition of Special Committee**

- 14 (a) **Membership.** Except as provided in (e), a special
15 committee appointed under Rule 11(f) must consist of
16 the chief judge and equal numbers of circuit and
17 district judges. If the complaint is about a district
18 judge, bankruptcy judge, or magistrate judge, then,
19 when possible, the district-judge members of the
20 committee must be from districts other than the
21 district of the subject judge. For the courts named in
22 28 U.S.C. § 363, the committee must be selected from
23 the judges serving on the subject judge's court.
- 24 (b) **Presiding Officer.** When appointing the committee, the
25 chief judge may serve as the presiding officer or else
26 must designate a committee member as the presiding
27 officer.
- 28 (c) **Bankruptcy Judge or Magistrate Judge as Adviser.** If the
29 subject judge is a bankruptcy judge or magistrate
30 judge, he or she may, within 14 days after being
31 notified of the committee's appointment, ask the chief
32 judge to designate as a committee adviser another
33 bankruptcy judge or magistrate judge, as the case may
34 be. The chief judge must grant such a request but may
35 otherwise use discretion in naming the adviser. Unless
36 the adviser is a Court of Federal Claims special master
37 appointed under 42 U.S.C. § 300aa-12(c), the adviser
38 must be from a district other than the district of the
39 subject bankruptcy judge or subject magistrate judge.
40 The adviser cannot vote but has the other privileges of
41 a committee member.
- 42 (d) **Provision of Documents.** The chief judge must certify to
43 each other member of the committee and to any adviser
44 copies of the complaint and statement of facts in whole
45 or relevant part, and any other relevant documents on
46 file.
- 47 (e) **Continuing Qualification of Committee Members.** A member
48 of a special committee who was qualified to serve when

1 appointed may continue to serve on the committee even
2 though the member relinquishes the position of chief
3 judge, active circuit judge, or active district judge,
4 as the case may be, but only if the member continues to
5 hold office under Article III, Section 1, of the
6 Constitution of the United States, or under 28 U.S.C.
7 § 171.

- 8 (f) Inability of Committee Member to Complete Service. If a
9 member of a special committee can no longer serve
10 because of death, disability, disqualification,
11 resignation, retirement from office, or other reason,
12 the chief judge must decide whether to appoint a
13 replacement member, either a circuit or district judge
14 as needed under (a). No special committee appointed
15 under these Rules may function with only a single
16 member, and the votes of a two-member committee must be
17 unanimous.
- 18 (g) Voting. All actions by a committee must be by vote of a
19 majority of all members of the committee.
20

21 22 Commentary on Rule 12 23

24 This Rule is adapted from the Act and the Illustrative
25 Rules.
26

27 Rule 12 leaves the size of a special committee flexible,
28 to be determined on a case-by-case basis. The question of
29 committee size is one that should be weighed with care in
30 view of the potential for consuming the members' time; a
31 large committee should be appointed only if there is a
32 special reason to do so.
33

34 Although the Act requires that the chief judge be a
35 member of each special committee, 28 U.S.C. § 353(a)(1), it
36 does not require that the chief judge preside. Accordingly,
37 Rule 12(b) provides that if the chief judge does not
38 preside, he or she must designate another committee member
39 as the presiding officer.
40

41 Rule 12(c) provides that the chief judge must appoint a
42 bankruptcy judge or magistrate judge as an adviser to a
43 special committee at the request of a bankruptcy or
44 magistrate subject judge.
45

46 Subsection (c) also provides that the adviser will have
47 all the privileges of a committee member except a vote. The
48 adviser, therefore, may participate in all deliberations of

1 the committee, question witnesses at hearings, and write a
2 separate statement to accompany the special committee's
3 report to the judicial council.
4

5 Rule 12(e) provides that a member of a special committee
6 who remains an Article III judge may continue to serve on
7 the committee even though the member's status otherwise
8 changes. Thus, a committee that originally consisted of the
9 chief judge and an equal number of circuit and district
10 judges, as required by the law, may continue to function
11 even though changes of status alter that composition. This
12 provision reflects the belief that stability of membership
13 will contribute to the quality of the work of such
14 committees.
15

16 Stability of membership is also the principal concern
17 animating Rule 12(f), which deals with the case in which a
18 special committee loses a member before its work is
19 complete. The Rule permits the chief judge to determine
20 whether a replacement member should be appointed.
21 Generally, appointment of a replacement member is desirable
22 in these situations unless the committee has conducted
23 evidentiary hearings before the vacancy occurs. However,
24 cases may arise in which a committee is in the late stages
25 of its work, and in which it would be difficult for a new
26 member to play a meaningful role. The Rule also preserves
27 the collegial character of the committee process by
28 prohibiting a single surviving member from serving as a
29 committee and by providing that a committee of two surviving
30 members will, in essence, operate under a unanimity rule.
31

32 Rule 12(g) provides that actions of a special committee
33 must be by vote of a majority of all the members. All the
34 members of a committee should participate in committee
35 decisions. In that circumstance, it seems reasonable to
36 require that committee decisions be made by a majority of
37 the membership, rather than a majority of some smaller
38 quorum.
39
40

41 **13. Conduct of an Investigation**

- 42 (a) **Extent and Methods of Special-Committee Investigation.**
43 Each special committee must determine the appropriate
44 extent and methods of the investigation in light of the
45 allegations of the complaint. If, in the course of the
46 investigation, the committee has cause to believe that
47 the subject judge may have engaged in misconduct or has
48 a disability that is beyond the scope of the complaint,

1 the committee must refer the new matter to the chief
2 judge for action under Rule 5 or Rule 11.

- 3 (b) Criminal Conduct. If the committee's investigation
4 concerns conduct that may be a crime, the committee
5 must consult with the appropriate prosecutorial
6 authorities to the extent permitted by the Act to avoid
7 compromising any criminal investigation. The committee
8 has final authority over the timing and extent of its
9 investigation and the formulation of its
10 recommendations.
- 11 (c) Staff. The committee may arrange for staff assistance
12 to conduct the investigation. It may use existing staff
13 of the judicial branch or may hire special staff
14 through the Director of the Administrative Office of
15 the United States Courts.
- 16 (d) Delegation of Subpoena Power; Contempt. The chief judge
17 may delegate the authority to exercise the committee's
18 subpoena powers. The judicial council or special
19 committee may institute a contempt proceeding under 28
20 U.S.C. § 332(d) against anyone who fails to comply with
21 a subpoena.
22
23

24 Commentary on Rule 13
25

26 This Rule is adapted from the Illustrative Rules.
27

28 Rule 13, as well as Rules 14, 15, and 16, are concerned
29 with the way in which a special committee carries out its
30 mission. They reflect the view that a special committee has
31 two roles that are separated in ordinary litigation. First,
32 the committee has an investigative role of the kind that is
33 characteristically left to executive branch agencies or
34 discovery by civil litigants. 28 U.S.C. § 353(c). Second,
35 it has a formalized fact-finding and recommendation-of-
36 disposition role that is characteristically left to juries,
37 judges, or arbitrators. *Id.* Rule 13 generally governs the
38 investigative stage. Even though the same body has
39 responsibility for both roles under the Act, it is important
40 to distinguish between them in order to ensure that
41 appropriate rights are afforded at appropriate times to the
42 subject judge.
43

44 One of the difficult questions that can arise is the
45 relationship between proceedings under the Act and criminal
46 investigations. Rule 13(b) assigns responsibility for
47 coordination to the special committee in cases in which
48 criminal conduct is suspected, but gives the committee the

1 authority to determine the appropriate pace of its activity
2 in light of any criminal investigation.
3

4 Title 28 U.S.C. § 356(a) provides that a special
5 committee will have full subpoena powers as provided in 28
6 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas
7 will be issued on behalf of judicial councils by the circuit
8 clerk "at the direction of the chief judge of the circuit or
9 his designee." Rule 13(d) contemplates that, where the
10 chief judge designates someone else as presiding officer of
11 a special committee, the presiding officer also be delegated
12 the authority to direct the circuit clerk to issue subpoenas
13 related to committee proceedings. That is not intended to
14 imply, however, that the decision to use the subpoena power
15 is exercisable by the presiding officer alone. See Rule
16 12(g).
17
18

19 **14. Conduct of Hearings by Special Committee**

- 20 (a) **Purpose of Hearings.** The committee may hold hearings to
21 take testimony and receive other evidence, to hear
22 argument, or both. If the committee is investigating
23 allegations against more than one judge, it may hold
24 joint or separate hearings.
- 25 (b) **Committee Evidence.** Subject to Rule 15, the committee
26 must obtain material, nonredundant evidence in the form
27 it considers appropriate. In the committee's
28 discretion, evidence may be obtained by committee
29 members, staff, or both. Witnesses offering testimonial
30 evidence may include the complainant and the subject
31 judge.
- 32 (c) **Counsel for Witnesses.** The subject judge has the right
33 to counsel. The special committee has discretion to
34 decide whether other witnesses may have counsel present
35 when they testify.
- 36 (d) **Witness Fees.** Witness fees must be paid as provided in
37 28 U.S.C. § 1821.
- 38 (e) **Oath.** All testimony taken at a hearing must be given
39 under oath or affirmation.
- 40 (f) **Rules of Evidence.** The Federal Rules of Evidence do not
41 apply to special-committee hearings.
- 42 (g) **Record and Transcript.** A record and transcript must be
43 made of all hearings.
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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

- 1 statements that have been taken from those
2 witnesses.
- 3 (2) Suggestion of additional witnesses. The subject
4 judge may suggest additional witnesses to the
5 committee.
- 6 (b) Report of the Special Committee. The subject judge must
7 be sent a copy of the special committee's report when
8 it is filed with the judicial council.
- 9 (c) Presentation of Evidence. At any hearing held under
10 Rule 14, the subject judge has the right to present
11 evidence, to compel the attendance of witnesses, and to
12 compel the production of documents. At the request of
13 the subject judge, the chief judge or the judge's
14 designee must direct the circuit clerk to issue a
15 subpoena to a witness under 28 U.S.C. § 332(d)(1). The
16 subject judge must be given the opportunity to cross-
17 examine committee witnesses, in person or by counsel.
- 18 (d) Presentation of Argument. The subject judge may submit
19 written argument to the special committee and must be
20 given a reasonable opportunity to present oral argument
21 at an appropriate stage of the investigation.
- 22 (e) Attendance at Hearings. The subject judge has the right
23 to attend any hearing held under Rule 14 and to receive
24 copies of the transcript, of any documents introduced,
25 and of any written arguments submitted by the
26 complainant to the committee.
- 27 (f) Representation by Counsel. The subject judge may choose
28 to be represented by counsel in the exercise of any
29 right enumerated in this Rule. As provided in Rule
30 20(e), the United States may bear the costs of the
31 representation.

32
33
34 **Commentary on Rule 15**

35
36 This Rule is adapted from the Act and the Illustrative
37 Rules.

38
39 The Act states that these Rules must contain provisions
40 requiring that "the judge whose conduct is the subject of a
41 complaint . . . be afforded an opportunity to appear (in
42 person or by counsel) at proceedings conducted by the
43 investigating panel, to present oral and documentary
44 evidence, to compel the attendance of witnesses or the
45 production of documents, to cross-examine witnesses, and
46 to present argument orally or in writing." 28 U.S.C.
47 § 358(b)(2). To implement this provision, Rule 15(e) gives
48 the judge the right to attend any hearing held for the

1 purpose of receiving evidence of record or hearing argument
2 under Rule 14.
3

4 The Act does not require that the subject judge be
5 permitted to attend all proceedings of the special
6 committee. Accordingly, the Rules do not give a right to
7 attend other proceedings -- for example, meetings at which
8 the committee is engaged in investigative activity, such as
9 interviewing persons to learn whether they ought to be
10 called as witnesses or examining for relevance purposes
11 documents delivered pursuant to a subpoena duces tecum, or
12 meetings in which the committee is deliberating on the
13 evidence or its recommendations.
14
15

16 **16. Rights of Complainant in Investigation**

- 17 (a) **Notice.** The complainant must receive written notice of
18 the investigation as provided in Rule 11(g)(1). When
19 the special committee's report to the judicial council
20 is filed, the complainant must be notified of the
21 filing. The judicial council may, in its discretion,
22 provide a copy of the report of a special committee to
23 the complainant.
- 24 (b) **Opportunity to Provide Evidence.** If the committee
25 determines that the complainant may have evidence that
26 does not already exist in writing, a representative of
27 the committee must interview the complainant.
- 28 (c) **Presentation of Argument.** The complainant may submit
29 written argument to the special committee. In its
30 discretion, the special committee may permit the
31 complainant to offer oral argument.
- 32 (d) **Representation by Counsel.** A complainant may submit
33 written argument through counsel and, if permitted to
34 offer oral argument, may do so through counsel.
- 35 (e) **Cooperation.** In exercising its discretion under this
36 Rule, a special committee may take into account the
37 degree of the complainant's cooperation in preserving
38 the confidentiality of the proceedings, including the
39 identity of the subject judge.
40
41

42 **Commentary on Rule 16**

43
44 This Rule is adapted from the Act and the Illustrative
45 Rules.
46

47 In accordance with the view of the process as
48 fundamentally administrative and inquisitorial, these Rules

1 do not give the complainant the rights of a party to
2 litigation, and leave the complainant's role largely to the
3 discretion of the special committee. However, Rule 16(b)
4 provides that, where a special committee has been appointed
5 and it determines that the complainant may have additional
6 evidence, the complainant must be interviewed by a
7 representative of the committee. Such an interview may be
8 in person or by telephone, and the representative of the
9 committee may be either a member or staff.

10
11 Rule 16 does not contemplate that the complainant will
12 ordinarily be permitted to attend proceedings of the special
13 committee except when testifying or presenting oral
14 argument. A special committee may exercise its discretion
15 to permit the complainant to be present at its proceedings,
16 or to permit the complainant, individually or through
17 counsel, to participate in the examination or
18 cross-examination of witnesses.

19
20 The Act authorizes an exception to the normal
21 confidentiality provisions where the judicial council in its
22 discretion provides a copy of the report of the special
23 committee to the complainant and to the subject judge. 28
24 U.S.C. § 360(a)(1). However, the Rules do not entitle the
25 complainant to a copy of the special committee's report.

26
27 In exercising their discretion regarding the role of the
28 complainant, the special committee and the judicial council
29 should protect the confidentiality of the complaint process.
30 As a consequence, subsection (e) provides that a special
31 committee may consider the degree to which a complainant has
32 cooperated in preserving the confidentiality of the
33 proceedings in determining what role beyond the minimum
34 required by these Rules should be given to that complainant.

35 36 37 **17. Special-Committee Report**

38 The committee must file with the judicial council a
39 comprehensive report of its investigation, including
40 findings and recommendations for council action. The report
41 must be accompanied by a statement of the vote by which it
42 was adopted, any separate or dissenting statements of
43 committee members, and the record of any hearings held under
44 Rule 14. A copy of the report and accompanying statement
45 must be sent to the Judicial Conference Committee on
46 Judicial Conduct and Disability.

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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;

- 1 (D) any memorandum in support of the chief judge's
2 order;
3 (E) the petition for review; and
4 (F) an appropriate ballot;
5 (3) send the petition for review to the Judicial
6 Conference Committee on Judicial Conduct and
7 Disability. Unless the Judicial Conference
8 Committee requests them, the clerk will not send
9 copies of the materials obtained by the chief
10 judge.
11 (d) Untimely Petition. The clerk must refuse to accept a
12 petition that is received after the deadline in (b).
13 (e) Timely Petition Not in Proper Form. When the clerk
14 receives a petition filed within the time allowed but
15 in a form that is improper to a degree that would
16 substantially impair its consideration by the judicial
17 council – such as a document that is ambiguous about
18 whether it is intended to be a petition for review –
19 the clerk must acknowledge its receipt, call the
20 filer's attention to the deficiencies, and give the
21 filer the opportunity to correct the deficiencies
22 within 21 days of the date of the clerk's letter about
23 the deficiencies or within the original deadline for
24 filing the petition, whichever is later. If the
25 deficiencies are corrected within the time allowed, the
26 clerk will proceed according to paragraphs (a) and (c)
27 of this Rule. If the deficiencies are not corrected,
28 the clerk must reject the petition.
29
30

31 Commentary on Rule 18

32 Rule 18 is adapted largely from the Illustrative Rules.
33

34 Subsection (a) permits a subject judge, as well as the
35 complainant, to petition for review of a chief judge's order
36 dismissing a complaint under Rule 11(c), or concluding that
37 appropriate corrective action or intervening events have
38 remedied or mooted the problems raised by the complaint
39 pursuant to Rule 11(d) or (e). Although the subject judge
40 may ostensibly be vindicated by the dismissal or conclusion
41 of a complaint, a chief judge's order may include language
42 disagreeable to the subject judge. For example, an order
43 may dismiss a complaint, but state that the subject judge
44 did in fact engage in misconduct. Accordingly, a subject
45 judge may wish to object to the content of the order and is
46 given the opportunity to petition the judicial council of
47 the circuit for review.
48

1 Subsection (b) contains a time limit of thirty-five days
2 to file a petition for review. It is important to establish
3 a time limit on petitions for review of chief judges'
4 dispositions in order to provide finality to the process.
5 If the complaint requires an investigation, the
6 investigation should proceed; if it does not, the subject
7 judge should know that the matter is closed.
8

9 The standards for timely filing under the Federal Rules
10 of Appellate Procedure should be applied to petitions for
11 review. See Fed. R. App. P. 25(a)(2)(A) and (C).
12

13 Rule 18(e) provides for an automatic extension of the
14 time limit imposed under subsection (b) if a person files a
15 petition that is rejected for failure to comply with formal
16 requirements.
17
18

19 **19. Judicial-Council Disposition of Petitions** 20 **for Review**

- 21 (a) **Rights of Subject Judge.** At any time after a
22 complainant files a petition for review, the subject
23 judge may file a written response with the circuit
24 clerk. The clerk must promptly distribute copies of the
25 response to each member of the judicial council or of
26 the relevant panel, unless that member is disqualified
27 under Rule 25. Copies must also be distributed to the
28 chief judge, to the complainant, and to the Judicial
29 Conference Committee on Judicial Conduct and
30 Disability. The subject judge must not otherwise
31 communicate with individual council members about the
32 matter. The subject judge must be given copies of any
33 communications to the judicial council from the
34 complainant.
- 35 (b) **Judicial-Council Action.** After considering a petition
36 for review and the materials before it, a judicial
37 council may:
- 38 (1) affirm the chief judge's disposition by denying the
39 petition;
 - 40 (2) return the matter to the chief judge with
41 directions to conduct a further inquiry under Rule
42 11(b) or to identify a complaint under Rule 5;
 - 43 (3) return the matter to the chief judge with
44 directions to appoint a special committee under
45 Rule 11(f); or
 - 46 (4) in exceptional circumstances, take other
47 appropriate action.

- 1 (c) Notice of Council Decision. Copies of the judicial
2 council's order, together with any accompanying
3 memorandum in support of the order or separate
4 concurring or dissenting statements, must be given to
5 the complainant, the subject judge, and the Judicial
6 Conference Committee on Judicial Conduct and
7 Disability.
- 8 (d) Memorandum of Council Decision. If the council's order
9 affirms the chief judge's disposition, a supporting
10 memorandum must be prepared only if the judicial
11 council concludes that there is a need to supplement
12 the chief judge's explanation. A memorandum supporting
13 a council order must not include the name of the
14 complainant or the subject judge.
- 15 (e) Review of Judicial-Council Decision. If the judicial
16 council's decision is adverse to the petitioner, and if
17 no member of the council dissented on the ground that a
18 special committee should be appointed under Rule 11(f),
19 the complainant must be notified that he or she has no
20 right to seek review of the decision. If there was a
21 dissent, the petitioner must be informed that he or she
22 can file a petition for review under Rule 21(b) solely
23 on the issue of whether a special committee should be
24 appointed.
- 25 (f) Public Availability of Judicial-Council Decision.
26 Materials related to the council's decision must be
27 made public to the extent, at the time, and in the
28 manner set forth in Rule 24.

29
30
31 **Commentary on Rule 19**

32
33 This Rule is largely adapted from the Act and is
34 self-explanatory.

35
36 The council should ordinarily review the decision of the
37 chief judge on the merits, treating the petition for review
38 for all practical purposes as an appeal. The judicial
39 council may respond to a petition by affirming the chief
40 judge's order, remanding the matter, or, in exceptional
41 cases, taking other appropriate action.

42
43
44 **20. Judicial-Council Consideration of Reports
45 and Recommendations of Special Committees**

- 46 (a) Rights of Subject Judge. Within 21 days after the
47 filing of the report of a special committee, the
48 subject judge may send a written response to the

1 members of the judicial council. The judge must also be
2 given an opportunity to present argument through
3 counsel, written or oral, as determined by the council.
4 The judge must not otherwise communicate with council
5 members about the matter.

6 (b) Judicial-Council Action.

7 (1) Discretionary actions. Subject to the judge's
8 rights set forth in subsection (a), the judicial
9 council may:

10 (A) dismiss the complaint because:

- 11 (i) even if the claim is true, the claimed conduct
12 is not conduct prejudicial to the effective and
13 expeditious administration of the business of
14 the courts and does not indicate a mental or
15 physical disability resulting in inability to
16 discharge the duties of office;
17 (ii) the complaint is directly related to the merits
18 of a decision or procedural ruling;
19 (iii) the facts on which the complaint is based have
20 not been established; or
21 (iv) the complaint is otherwise not appropriate for
22 consideration under 28 U.S.C. §§ 351-364.

23 (B) conclude the proceeding because appropriate
24 corrective action has been taken or intervening
25 events have made the proceeding unnecessary.

26 (C) refer the complaint to the Judicial Conference of
27 the United States with the council's
28 recommendations for action.

29 (D) take remedial action to ensure the effective and
30 expeditious administration of the business of the
31 courts, including:

- 32 (i) censuring or reprimanding the subject judge,
33 either by private communication or by public
34 announcement;
35 (ii) ordering that no new cases be assigned to the
36 subject judge for a limited, fixed period;
37 (iii) in the case of a magistrate judge, ordering the
38 chief judge of the district court to take
39 action specified by the council, including the
40 initiation of removal proceedings under 28
41 U.S.C. § 631(i) or 42 U.S.C. § 300aa-12(c)(2);
42 (iv) in the case of a bankruptcy judge, removing the
43 judge from office under 28 U.S.C. § 152(e);
44 (v) in the case of a circuit or district judge,
45 requesting the judge to retire voluntarily with
46 the provision (if necessary) that ordinary
47 length-of-service requirements will be waived;
48 and

- 1 (vi) in the case of a circuit or district judge who
2 is eligible to retire but does not do so,
3 certifying the disability of the judge under 28
4 U.S.C. § 372(b) so that an additional judge may
5 be appointed.
- 6 (E) take any combination of actions described in
7 (b) (1) (A)-(D) of this Rule that is within its
8 power.
- 9 (2) Mandatory actions. A judicial council must refer a
10 complaint to the Judicial Conference if the council
11 determines that a circuit judge or district judge
12 may have engaged in conduct that:
- 13 (A) might constitute ground for impeachment; or
14 (B) in the interest of justice, is not amenable to
15 resolution by the judicial council.
- 16 (c) Inadequate Basis for Decision. If the judicial council
17 finds that a special committee's report,
18 recommendations, and record provide an inadequate basis
19 for decision, it may return the matter to the committee
20 for further investigation and a new report, or it may
21 conduct further investigation. If the judicial council
22 decides to conduct further investigation, the subject
23 judge must be given adequate prior notice in writing of
24 that decision and of the general scope and purpose of
25 the additional investigation. The judicial council's
26 conduct of the additional investigation must generally
27 accord with the procedures and powers set forth in
28 Rules 13 through 16 for the conduct of an investigation
29 by a special committee.
- 30 (d) Council Vote. Council action must be taken by a
31 majority of those members of the council who are not
32 disqualified. A decision to remove a bankruptcy judge
33 from office requires a majority vote of all the members
34 of the council.
- 35 (e) Recommendation for Fee Reimbursement. If the complaint
36 has been finally dismissed or concluded under (b) (1) (A)
37 or (B) of this Rule, and if the subject judge so
38 requests, the judicial council may recommend that the
39 Director of the Administrative Office of the United
40 States Courts use funds appropriated to the Judiciary
41 to reimburse the judge for reasonable expenses incurred
42 during the investigation, when those expenses would not
43 have been incurred but for the requirements of the Act
44 and these Rules. Reasonable expenses include attorneys'
45 fees and expenses related to a successful defense or
46 prosecution of a proceeding under Rule 21(a) or (b).
- 47 (f) Council Action. Council action must be by written
48 order. Unless the council finds that extraordinary

1 reasons would make it contrary to the interests of
2 justice, the order must be accompanied by a memorandum
3 setting forth the factual determinations on which it is
4 based and the reasons for the council action. The order
5 and the supporting memorandum must be provided to the
6 complainant, the subject judge, and the Judicial
7 Conference Committee on Judicial Conduct and
8 Disability. The complainant and the subject judge must
9 be notified of any right to review of the judicial
10 council's decision as provided in Rule 21(b).

11 12 13 Commentary on Rule 20

14
15 This Rule is largely adapted from the Illustrative Rules.

16
17 Rule 20(a) provides that within twenty-one days after the
18 filing of the report of a special committee, the subject
19 judge may address a written response to all of the members
20 of the judicial council. The subject judge must also be
21 given an opportunity to present oral argument to the
22 council, personally or through counsel. The subject judge
23 may not otherwise communicate with council members about the
24 matter.

25
26 Rule 20(c) provides that if the judicial council decides
27 to conduct an additional investigation, the subject judge
28 must be given adequate prior notice in writing of that
29 decision and of the general scope and purpose of the
30 additional investigation. The conduct of the investigation
31 will be generally in accordance with the procedures set
32 forth in Rules 13 through 16 for the conduct of an
33 investigation by a special committee. However, if hearings
34 are held, the council may limit testimony or the
35 presentation of evidence to avoid unnecessary repetition of
36 testimony and evidence before the special committee.

37
38 Rule 20(d) provides that council action must be taken by
39 a majority of those members of the council who are not
40 disqualified, except that a decision to remove a bankruptcy
41 judge from office requires a majority of all the members of
42 the council as required by 28 U.S.C. § 152(e). However, it
43 is inappropriate to apply a similar rule to the less severe
44 actions that a judicial council may take under the Act. If
45 some members of the council are disqualified in the matter,
46 their disqualification should not be given the effect of a
47 vote against council action.
48

1 With regard to Rule 20(e), the judicial council, on the
2 request of the subject judge, may recommend to the Director
3 of the Administrative Office of the United States Courts
4 that the subject judge be reimbursed for reasonable
5 expenses, including attorneys' fees, incurred. The judicial
6 council has the authority to recommend such reimbursement
7 where, after investigation by a special committee, the
8 complaint has been finally dismissed or concluded under
9 subsection (b)(1) (A) or (B) of this Rule. It is
10 contemplated that such reimbursement may be provided for the
11 successful prosecution or defense of a proceeding under Rule
12 21(a) or (b), in other words, one that results in a Rule
13 20(b)(1) (A) or (B) dismissal or conclusion.
14

15 Rule 20(f) requires that council action normally be
16 supported with a memorandum of factual determinations and
17 reasons and that notice of the action be given to the
18 complainant and the subject judge. Rule 20(f) also requires
19 that the notification to the complainant and the subject
20 judge include notice of any right to petition for review of
21 the council's decision under Rule 21(b).
22
23

24 **ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE** 25 **COMMITTEE ON CONDUCT AND DISABILITY**

26 **21. Committee on Judicial Conduct and Disability**

27 (a) **Review by Committee.** The Committee on Judicial Conduct
28 and Disability, consisting of seven members, considers
29 and disposes of all petitions for review under (b) of
30 this Rule, in conformity with the Committee's
31 jurisdictional statement. Its disposition of petitions
32 for review is ordinarily final. The Judicial Conference
33 of the United States may, in its sole discretion,
34 review any such Committee decision, but a complainant
35 or subject judge does not have a right to this review.
36

37 (b) **Reviewable Matters.**

38 (1) **Upon petition.** A complainant or subject judge may
39 petition the Committee for review of a judicial-
40 council order entered in accordance with:

41 (A) Rule 20(b)(1)(A), (B), (D), or (E); or

42 (B) Rule 19(b)(1) or (4) if one or more members of
43 the judicial council dissented from the order on
44 the ground that a special committee should be
45 appointed under Rule 11(f); in that event, the
46 Committee's review will be limited to the issue
47 of whether a special committee should be
48 appointed.

1 (2) Upon Committee's initiative. At its initiative and
2 in its sole discretion, the Committee may review
3 any judicial-council order entered under Rule
4 19(b)(1) or (4), but only to determine whether a
5 special committee should be appointed. Before
6 undertaking the review, the Committee must invite
7 that judicial council to explain why it believes
8 the appointment of a special committee is
9 unnecessary, unless the reasons are clearly stated
10 in the judicial council's order denying the
11 petition for review. If the Committee believes that
12 it would benefit from a submission by the subject
13 judge, it may issue an appropriate request. If the
14 Committee determines that a special committee
15 should be appointed, the Committee must issue a
16 written decision giving its reasons.

17 (c) Committee Vote. Any member of the Committee from the
18 same circuit as the subject judge is disqualified from
19 considering or voting on a petition for review.
20 Committee decisions under (b) of this Rule must be by
21 majority vote of the qualified Committee members. If
22 only six members are qualified to vote on a petition
23 for review, the decision must be made by a majority of
24 a panel of five members drawn from a randomly selected
25 list that rotates after each decision by a panel drawn
26 from the list. The members who will determine the
27 petition must be selected based on committee membership
28 as of the date on which the petition is received. Those
29 members selected to hear the petition should serve in
30 that capacity until final disposition of the petition,
31 whether or not their term of committee membership has
32 ended. If only four members are qualified to vote, the
33 Chief Justice must appoint, if available, an ex-member
34 of the Committee or, if not, another United States
35 judge to consider the petition.

36 (d) Additional Investigation. Except in extraordinary
37 circumstances, the Committee will not conduct an
38 additional investigation. The Committee may return the
39 matter to the judicial council with directions to
40 undertake an additional investigation. If the Committee
41 conducts an additional investigation, it will exercise
42 the powers of the Judicial Conference under 28 U.S.C.
43 § 331.

44 (e) Oral Argument; Personal Appearance. There is ordinarily
45 no oral argument or personal appearance before the
46 Committee. In its discretion, the Committee may permit
47 written submissions from the complainant or subject
48 judge.

- 1 (f) Committee Decisions. Committee decisions under this
2 Rule must be transmitted promptly to the Judicial
3 Conference of the United States. Other distribution
4 will be by the Administrative Office at the direction
5 of the Committee chair.
6 (g) Finality. All orders of the Judicial Conference or of
7 the Committee (when the Conference does not exercise
8 its power of review) are final.
9

10
11 Commentary on Rule 21
12

13 This Rule is largely self-explanatory.
14

15 Rule 21(a) is intended to clarify that the delegation of
16 power to the Judicial Conference Committee on Judicial
17 Conduct and Disability to dispose of petitions does not
18 preclude review of such dispositions by the Conference.
19 However, there is no right to such review in any party.
20

21 Rules 21(b)(1)(B) and (b)(2) are intended to fill a
22 jurisdictional gap as to review of dismissals or conclusions
23 of complaints under Rule 19(b)(1) or (4). Where one or more
24 members of a judicial council reviewing a petition have
25 dissented on the ground that a special committee should have
26 been appointed, the complainant or subject judge has the
27 right to petition for review by the Committee but only as to
28 that issue. Under Rule 21(b)(2), the Judicial Conference
29 Committee on Judicial Conduct and Disability may review such
30 a dismissal or conclusion in its sole discretion, whether or
31 not such a dissent occurred, and only as to the appointment
32 of a special committee. No party has a right to such
33 review, and such review will be rare.
34

35 Rule 21(c) provides for review only by Committee members
36 from circuits other than that of the subject judge. To
37 avoid tie votes, the Committee will decide petitions for
38 review by rotating panels of five when only six members are
39 qualified. If only four members are qualified, the Chief
40 Justice must appoint an additional judge to consider that
41 petition for review.
42

43 Under this Rule, all Committee decisions are final in
44 that they are unreviewable unless the Judicial Conference,
45 in its discretion, decides to review a decision. Committee
46 decisions, however, do not necessarily constitute final
47 action on a complaint for purposes of Rule 24.
48

1 **22. Procedures for Review**

2 **(a) Filing a Petition for Review.** A petition for review of
3 a judicial-council decision may be filed by sending a
4 brief written statement to the Judicial Conference
5 Committee on Judicial Conduct and Disability, addressed
6 to:

7 Judicial Conference Committee on Judicial Conduct and
8 Disability

9 Attn: Office of General Counsel

10 Administrative Office of the United States Courts

11 One Columbus Circle, NE

12 Washington, D.C. 20544

13 The Administrative Office will send a copy of the
14 petition to the complainant or subject judge, as the
15 case may be.

16 **(b) Form and Contents of Petition for Review.** No particular
17 form is required. The petition must contain a short
18 statement of the basic facts underlying the complaint,
19 the history of its consideration before the appropriate
20 judicial council, a copy of the judicial council's
21 decision, and the grounds on which the petitioner seeks
22 review. The petition for review must specify the date
23 and docket number of the judicial-council order for
24 which review is sought. The petitioner may attach any
25 documents or correspondence arising in the course of
26 the proceeding before the judicial council or its
27 special committee. A petition should not normally
28 exceed 20 pages plus necessary attachments.

29 **(c) Time.** A petition must be submitted within 63 days of
30 the date of the order for which review is sought.

31 **(d) Copies.** Seven copies of the petition for review must be
32 submitted, at least one of which must be signed by the
33 petitioner or his or her attorney. If the petitioner
34 submits a signed declaration of inability to pay the
35 expense of duplicating the petition, the Administrative
36 Office must accept the original petition and must
37 reproduce copies at its expense.

38 **(e) Action on Receipt of Petition for Review.** The
39 Administrative Office must acknowledge receipt of a
40 petition for review submitted under this Rule, notify
41 the chair of the Judicial Conference Committee on
42 Judicial Conduct and Disability, and distribute the
43 petition to the members of the Committee for their
44 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. For auditing purposes, the circuit clerk must provide access to the Committee to records of proceedings under the Act at the site where the records are kept.
- (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

- 1 that chief judge of any other records relating to the
2 investigation.
- 3 (f) Impeachment Proceedings. If the Judicial Conference
4 determines that consideration of impeachment may be
5 warranted, it must transmit the record of all relevant
6 proceedings to the Speaker of the House of
7 Representatives.
- 8 (g) Subject Judge's Consent. If both the subject judge and
9 the chief judge consent in writing, any materials from
10 the files may be disclosed to any person. In any such
11 disclosure, the chief judge may require that the
12 identity of the complainant, or of witnesses in an
13 investigation conducted by a chief judge, a special
14 committee, or the judicial council, not be revealed.
- 15 (h) Disclosure in Special Circumstances. The Judicial
16 Conference, its Committee on Judicial Conduct and
17 Disability, or a judicial council may authorize
18 disclosure of information about the consideration of a
19 complaint, including the papers, documents, and
20 transcripts relating to the investigation, to the
21 extent that disclosure is justified by special
22 circumstances and is not prohibited by the Act.
23 Disclosure may be made to judicial researchers engaged
24 in the study or evaluation of experience under the Act
25 and related modes of judicial discipline, but only
26 where the study or evaluation has been specifically
27 approved by the Judicial Conference or by the Judicial
28 Conference Committee on Judicial Conduct and
29 Disability. Appropriate steps must be taken to protect
30 the identities of the subject judge, the complainant,
31 and witnesses from public disclosure. Other appropriate
32 safeguards to protect against the dissemination of
33 confidential information may be imposed.
- 34 (i) Disclosure of Identity by Subject Judge. Nothing in
35 this Rule precludes the subject judge from
36 acknowledging that he or she is the judge referred to
37 in documents made public under Rule 24.
- 38 (j) Assistance and Consultation. Nothing in this Rule
39 precludes the chief judge or judicial council acting on
40 a complaint filed under the Act from seeking the help
41 of qualified staff or from consulting other judges who
42 may be helpful in the disposition of the complaint.
43
44

45 Commentary on Rule 23

46 Rule 23 was adapted from the Illustrative Rules.
47
48

1 The Act applies a rule of confidentiality to "papers,
2 documents, and records of proceedings related to
3 investigations conducted under this chapter" and states that
4 they may not be disclosed "by any person in any proceeding,"
5 with enumerated exceptions. 28 U.S.C. § 360(a). Three
6 questions arise: Who is bound by the confidentiality rule,
7 what proceedings are subject to the rule, and who is within
8 the circle of people who may have access to information
9 without breaching the rule?

10
11 With regard to the first question, Rule 23(a) provides
12 that judges, employees of the judicial branch, and those
13 persons involved in recording proceedings and preparing
14 transcripts are obliged to respect the confidentiality
15 requirement. This of course includes subject judges who do
16 not consent to identification under Rule 23(i).

17
18 With regard to the second question, Rule 23(a) applies
19 the rule of confidentiality broadly to consideration of a
20 complaint at any stage.

21
22 With regard to the third question, there is no barrier of
23 confidentiality among a chief judge, judicial council, the
24 Judicial Conference, and the Judicial Conference Committee
25 on Judicial Conduct and Disability. Each may have access to
26 any of the confidential records for use in their
27 consideration of a referred matter, a petition for review,
28 or monitoring the administration of the Act. A district
29 court may have similar access if the judicial council orders
30 the district court to initiate proceedings to remove a
31 magistrate judge from office, and Rule 23(e) so provides.

32
33 In extraordinary circumstances, a chief judge may
34 disclose the existence of a proceeding under these Rules.
35 The disclosure of such information in high-visibility or
36 controversial cases is to reassure the public that the
37 federal judiciary is capable of redressing judicial
38 misconduct or disability. Moreover, the confidentiality
39 requirement does not prevent the chief judge from
40 "communicat[ing] orally or in writing with . . . [persons]
41 who may have knowledge of the matter," as part of a limited
42 inquiry conducted by the chief judge under Rule 11(b).

43
44 Rule 23 recognizes that there must be some exceptions to
45 the Act's confidentiality requirement. For example, the Act
46 requires that certain orders and the reasons for them must
47 be made public. 28 U.S.C. § 360(b). Rule 23(c) makes it
48 explicit that memoranda supporting chief judge and council

1 orders, as well as dissenting opinions and separate
2 statements, may contain references to information that would
3 otherwise be confidential and that such information may be
4 made public. However, subsection (c) is subject to Rule
5 24(a) which provides the general rule regarding the public
6 availability of decisions. For example, the name of a
7 subject judge cannot be made public in a decision if
8 disclosure of the name is prohibited by that Rule.
9

10 The Act makes clear that there is a barrier of
11 confidentiality between the judicial branch and the
12 legislative. It provides that material may be disclosed to
13 Congress only if it is believed necessary to an impeachment
14 investigation or trial of a judge. 28 U.S.C. § 360(a)(2).
15 Accordingly, Section 355(b) of the Act requires the Judicial
16 Conference to transmit the record of the proceeding to the
17 House of Representatives if the Conference believes that
18 impeachment of a subject judge may be appropriate. Rule
19 23(f) implements this requirement.
20

21 The Act provides that confidential materials may be
22 disclosed if authorized in writing by the subject judge and
23 by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g)
24 implements this requirement. Once the subject judge has
25 consented to the disclosure of confidential materials
26 related to a complaint, the chief judge ordinarily will
27 refuse consent only to the extent necessary to protect the
28 confidentiality interests of the complainant or of witnesses
29 who have testified in investigatory proceedings or who have
30 provided information in response to a limited inquiry
31 undertaken pursuant to Rule 11. It will generally be
32 necessary, therefore, for the chief judge to require that
33 the identities of the complainant or of such witnesses, as
34 well as any identifying information, be shielded in any
35 materials disclosed, except insofar as the chief judge has
36 secured the consent of the complainant or of a particular
37 witness to disclosure, or there is a demonstrated need for
38 disclosure of the information that, in the judgment of the
39 chief judge, outweighs the confidentiality interest of the
40 complainant or of a particular witness (as may be the case
41 where the complainant is delusional or where the complainant
42 or a particular witness has already demonstrated a lack of
43 concern about maintaining the confidentiality of the
44 proceedings).
45

46 Rule 23(h) permits disclosure of additional information
47 in circumstances not enumerated. For example, disclosure
48 may be appropriate to permit a prosecution for perjury based

1 on testimony given before a special committee. Another
2 example might involve evidence of criminal conduct by a
3 judge discovered by a special committee.
4

5 Subsection (h) also permits the authorization of
6 disclosure of information about the consideration of a
7 complaint, including the papers, documents, and transcripts
8 relating to the investigation, to judicial researchers
9 engaged in the study or evaluation of experience under the
10 Act and related modes of judicial discipline. The Rule
11 envisions disclosure of information from the official record
12 of complaint proceedings to a limited category of persons
13 for appropriately authorized research purposes only, and
14 with appropriate safeguards to protect individual identities
15 in any published research results that ensue. In
16 authorizing disclosure, the judicial council may refuse to
17 release particular materials when such release would be
18 contrary to the interests of justice, or that constitute
19 purely internal communications. The Rule does not envision
20 disclosure of purely internal communications between judges
21 and their colleagues and staff.
22

23 Under Rule 23(j), chief judges and judicial councils may
24 seek staff assistance or consult with other judges who may
25 be helpful in the process of complaint disposition; the
26 confidentiality requirement does not preclude this. The
27 chief judge, for example, may properly seek the advice and
28 assistance of another judge who the chief judge deems to be
29 in the best position to communicate with the subject judge
30 in an attempt to bring about corrective action. As another
31 example, a new chief judge may wish to confer with a
32 predecessor to learn how similar complaints have been
33 handled. In consulting with other judges, of course, the
34 chief judge should disclose information regarding the
35 complaint only to the extent the chief judge deems necessary
36 under the circumstances.
37
38

39 **24. Public Availability of Decisions**

40 (a) **General Rule; Specific Cases.** When final action has
41 been taken on a complaint and it is no longer subject
42 to review, all orders entered by the chief judge and
43 judicial council, including any supporting memoranda
44 and any dissenting opinions or separate statements by
45 members of the judicial council, must be made public,
46 with the following exceptions:

- 47 (1) if the complaint is finally dismissed under Rule
48 11(c) without the appointment of a special

1 committee, or if it is concluded under Rule 11(d)
2 because of voluntary corrective action, the
3 publicly available materials must not disclose the
4 name of the subject judge without his or her
5 consent.

6 (2) if the complaint is concluded because of
7 intervening events, or dismissed at any time after
8 a special committee is appointed, the judicial
9 council must determine whether the name of the
10 subject judge should be disclosed.

11 (3) if the complaint is finally disposed of by a
12 privately communicated censure or reprimand, the
13 publicly available materials must not disclose
14 either the name of the subject judge or the text of
15 the reprimand.

16 (4) if the complaint is finally disposed of under Rule
17 20(b)(1)(D) by any action other than private
18 censure or reprimand, the text of the dispositive
19 order must be included in the materials made
20 public, and the name of the subject judge must be
21 disclosed.

22 (5) the name of the complainant must not be disclosed
23 in materials made public under this Rule unless the
24 chief judge orders disclosure.

25 (b) Manner of Making Public. The orders described in (a)
26 must be made public by placing them in a publicly
27 accessible file in the office of the circuit clerk or
28 by placing the orders on the court's public website. If
29 the orders appear to have precedential value, the chief
30 judge may cause them to be published. In addition, the
31 Judicial Conference Committee on Judicial Conduct and
32 Disability will make available on the Federal
33 Judiciary's website, www.uscourts.gov, selected
34 illustrative orders described in paragraph (a),
35 appropriately redacted, to provide additional
36 information to the public on how complaints are
37 addressed under the Act.

38 (c) Orders of Judicial Conference Committee. Orders of this
39 Committee constituting final action in a complaint
40 proceeding arising from a particular circuit will be
41 made available to the public in the office of the clerk
42 of the relevant court of appeals. The Committee will
43 also make such orders available on the Federal
44 Judiciary's website, www.uscourts.gov. When authorized
45 by the Committee, other orders related to complaint
46 proceedings will similarly be made available.

47 (d) Complaints Referred to the Judicial Conference of the
48 United States. If a complaint is referred to the

1 been exhausted. The provision that decisions will be made
2 public only after final action has been taken is designed in
3 part to avoid public disclosure of the existence of pending
4 proceedings. Whether the name of the subject judge is
5 disclosed will then depend on the nature of the final
6 action. If the final action is an order predicated on a
7 finding of misconduct or disability (other than a privately
8 communicated censure or reprimand) the name of the judge
9 must be made public. If the final action is dismissal of
10 the complaint, the name of the subject judge must not be
11 disclosed. Rule 24(a)(1) provides that where a proceeding
12 is concluded under Rule 11(d) by the chief judge on the
13 basis of voluntary corrective action, the name of the
14 subject judge must not be disclosed. Shielding the name of
15 the subject judge in this circumstance should encourage
16 informal disposition.

17
18 If a complaint is dismissed as moot, or because
19 intervening events have made action on the complaint
20 unnecessary, after appointment of a special committee, Rule
21 24(a)(2) allows the judicial council to determine whether
22 the subject judge will be identified. In such a case, no
23 final decision has been rendered on the merits, but it may
24 be in the public interest -- particularly if a judicial
25 officer resigns in the course of an investigation -- to make
26 the identity of the judge known.

27
28 Once a special committee has been appointed, and a
29 proceeding is concluded by the full council on the basis of
30 a remedial order of the council, Rule 24(a)(4) provides for
31 disclosure of the name of the subject judge.

32
33 Finally, Rule 24(a)(5) provides that the identity of the
34 complainant will be disclosed only if the chief judge so
35 orders. Identifying the complainant when the subject judge
36 is not identified would increase the likelihood that the
37 identity of the subject judge would become publicly known,
38 thus circumventing the policy of nondisclosure. It may not
39 always be practicable to shield the complainant's identity
40 while making public disclosure of the judicial council's
41 order and supporting memoranda; in some circumstances,
42 moreover, the complainant may consent to public
43 identification.

44 45 46 **25. Disqualification**

47 **(a) General Rule. Any judge is disqualified from**
48 **participating in any proceeding under these Rules if**

1 the judge, in his or her discretion, concludes that
2 circumstances warrant disqualification. If the
3 complaint is filed by a judge, that judge is
4 disqualified from participating in any consideration of
5 the complaint except to the extent that these Rules
6 provide for a complainant's participation. A chief
7 judge who has identified a complaint under Rule 5 is
8 not automatically disqualified from considering the
9 complaint.

- 10 (b) **Subject Judge.** A subject judge is disqualified from
11 considering the complaint except to the extent that
12 these Rules provide for participation by a subject
13 judge.
- 14 (c) **Chief Judge Not Disqualified from Considering a**
15 **Petition for Review of a Chief Judge's Order.** If a
16 petition for review of a chief judge's order entered
17 under Rule 11(c), (d), or (e) is filed with the
18 judicial council in accordance with Rule 18, the chief
19 judge is not disqualified from participating in the
20 council's consideration of the petition.
- 21 (d) **Member of Special Committee Not Disqualified.** A member
22 of the judicial council who serves on a special
23 committee, including the chief judge, is not
24 disqualified from participating in council
25 consideration of the committee's report.
- 26 (e) **Subject Judge's Disqualification After Appointment of a**
27 **Special Committee.** Upon appointment of a special
28 committee, the subject judge is automatically
29 disqualified from participating in any proceeding
30 arising under the Act or these Rules as a member of any
31 special committee, the judicial council of the circuit,
32 the Judicial Conference of the United States, and the
33 Judicial Conference Committee on Judicial Conduct and
34 Disability. The disqualification continues until all
35 proceedings on the complaint against the subject judge
36 are finally terminated with no further right of review.
- 37 (f) **Substitute for Disqualified Chief Judge.** If the chief
38 judge is disqualified from participating in
39 consideration of the complaint, the duties and
40 responsibilities of the chief judge under these Rules
41 must be assigned to the most-senior active circuit
42 judge not disqualified. If all circuit judges in
43 regular active service are disqualified, the judicial
44 council may determine whether to request a transfer
45 under Rule 26, or, in the interest of sound judicial
46 administration, to permit the chief judge to dispose of
47 the complaint on the merits. Members of the judicial
48 council who are named in the complaint may participate

1 in this determination if necessary to obtain a quorum
2 of the judicial council.

- 3 (g) **Judicial-Council Action When Multiple Judges Are**
4 **Disqualified. Notwithstanding any other provision in**
5 **these Rules to the contrary,**
6 (1) a member of the judicial council who is a subject
7 judge may participate in its disposition if:
8 (A) participation by one or more subject judges is
9 necessary to obtain a quorum of the judicial
10 council;
11 (B) the judicial council finds that the lack of a
12 quorum is due to the naming of one or more judges
13 in the complaint for the purpose of disqualifying
14 that judge or judges, or to the naming of one or
15 more judges based on their participation in a
16 decision excluded from the definition of
17 misconduct under Rule 3(h)(3); and
18 (C) the judicial council votes that it is necessary,
19 appropriate, and in the interest of sound
20 judicial administration that one or more subject
21 judges be eligible to act.
22 (2) otherwise disqualified members may participate in
23 votes taken under (g)(1)(B) and (g)(1)(C).
24 (h) **Disqualification of Members of the Judicial Conference**
25 **Committee. No member of the Judicial Conference**
26 **Committee on Judicial Conduct and Disability is**
27 **disqualified from participating in any proceeding under**
28 **the Act or these Rules because of consultations with a**
29 **chief judge, a member of a special committee, or a**
30 **member of a judicial council about the interpretation**
31 **or application of the Act or these Rules, unless the**
32 **member believes that the consultation would prevent**
33 **fair-minded participation.**

34
35
36 **Commentary on Rule 25**

37
38 Rule 25 is adapted from the Illustrative Rules.
39

40 Subsection (a) provides the general rule for
41 disqualification. Of course, a judge is not disqualified
42 simply because the subject judge is on the same court.
43 However, this subsection recognizes that there may be cases
44 in which an appearance of bias or prejudice is created by
45 circumstances other than an association with the subject
46 judge as a colleague. For example, a judge may have a
47 familial relationship with a complainant or subject judge.

1 When such circumstances exist, a judge may, in his or her
2 discretion, conclude that disqualification is warranted.
3

4 Subsection (e) makes it clear that the disqualification
5 of the subject judge relates only to the subject judge's
6 participation in any proceeding arising under the Act or
7 these Rules as a member of a special committee, judicial
8 council, Judicial Conference, or the Judicial Conference
9 Committee. The Illustrative Rule, based on Section 359(a)
10 of the Act, is ambiguous and could be read to disqualify a
11 subject judge from service of any kind on each of the bodies
12 mentioned. This is undoubtedly not the intent of the Act;
13 such a disqualification would be anomalous in light of the
14 Act's allowing a subject judge to continue to decide cases
15 and to continue to exercise the powers of chief circuit or
16 district judge. It would also create a substantial
17 deterrence to the appointment of special committees,
18 particularly where a special committee is needed solely
19 because the chief judge may not decide matters of
20 credibility in his or her review under Rule 11.
21

22 While a subject judge is barred by Rule 25(b) from
23 participating in the disposition of the complaint in which
24 he or she is named, Rule 25(e) recognizes that participation
25 in proceedings arising under the Act or these Rules by a
26 judge who is the subject of a special committee
27 investigation may lead to an appearance of self-interest in
28 creating substantive and procedural precedents governing
29 such proceedings; Rule 25(e) bars such participation.
30

31 Under the Act, a complaint against the chief judge is to
32 be handled by "that circuit judge in regular active service
33 next senior in date of commission." 28 U.S.C. § 351(c).
34 Rule 25(f) provides that seniority among judges other than
35 the chief judge is to be determined by date of commission,
36 with the result that complaints against the chief judge may
37 be routed to a former chief judge or other judge who was
38 appointed earlier than the chief judge. The Rules do not
39 purport to prescribe who is to preside over meetings of the
40 judicial council. Consequently, where the presiding member
41 of the judicial council is disqualified from participating
42 under these Rules, the order of precedence prescribed by
43 Rule 25(f) for performing "the duties and responsibilities
44 of the chief circuit judge under these Rules" does not apply
45 to determine the acting presiding member of the judicial
46 council. That is a matter left to the internal rules or
47 operating practices of each judicial council. In most cases

1 the most senior active circuit judge who is a member of the
2 judicial council and who is not disqualified will preside.
3

4 Sometimes a single complaint is filed against a large
5 group of judges. If the normal disqualification rules are
6 observed in such a case, no court of appeals judge can serve
7 as acting chief judge of the circuit, and the judicial
8 council will be without appellate members. Where the
9 complaint is against all circuit and district judges, under
10 normal rules no member of the judicial council can perform
11 the duties assigned to the council under the statute.
12

13 A similar problem is created by successive complaints
14 arising out of the same underlying grievance. For example,
15 a complainant files a complaint against a district judge
16 based on alleged misconduct, and the complaint is dismissed
17 by the chief judge under the statute. The complainant may
18 then file a complaint against the chief judge for dismissing
19 the first complaint, and when that complaint is dismissed by
20 the next senior judge, still a third complaint may be filed.
21 The threat is that the complainant will bump down the
22 seniority ladder until, once again, there is no member of
23 the court of appeals who can serve as acting chief judge for
24 the purpose of the next complaint. Similarly, complaints
25 involving the merits of litigation may involve a series of
26 decisions in which many judges participated or in which a
27 rehearing en banc was denied by the court of appeals, and
28 the complaint may name a majority of the judicial council as
29 subject judges.
30

31 In recognition that these multiple-judge complaints are
32 virtually always meritless, the judicial council is given
33 discretion to determine: (1) whether it is necessary,
34 appropriate, and in the interest of sound judicial
35 administration to permit the chief judge to dispose of a
36 complaint where it would otherwise be impossible for any
37 active circuit judge in the circuit to act, and (2) whether
38 it is necessary, appropriate, and in the interest of sound
39 judicial administration, after appropriate findings as to
40 need and justification are made, to permit subject judges of
41 the judicial council to participate in the disposition of a
42 petition for review where it would otherwise be impossible
43 to obtain a quorum.
44

45 Applying a rule of necessity in these situations is
46 consistent with the appearance of justice. See, e.g., In re
47 Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993)
48 (invoking the rule of necessity); In re Complaint of

1 Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council
2 1992) (same). There is no unfairness in permitting the
3 chief judge to dispose of a patently insubstantial complaint
4 that names all active circuit judges in the circuit.
5

6 Similarly, there is no unfairness in permitting subject
7 judges, in these circumstances, to participate in the review
8 of a chief judge's dismissal of an insubstantial complaint.
9 The remaining option is to assign the matter to another
10 body. Among other alternatives, the council may request a
11 transfer of the petition under Rule 26. Given the
12 administrative inconvenience and delay involved in these
13 alternatives, it is desirable to request a transfer only if
14 the judicial council determines that the petition is
15 substantial enough to warrant such action.
16

17 In the unlikely event that a quorum of the judicial
18 council cannot be obtained to consider the report of a
19 special committee, it would normally be necessary to request
20 a transfer under Rule 26.
21

22 Rule 25(h) recognizes that the jurisdictional statement
23 of the Judicial Conference Committee contemplates
24 consultation between members of the Committee and judicial
25 participants in proceedings under the Act and these Rules.
26 Such consultation should not automatically preclude
27 participation by a member in that proceeding.
28
29

30 **26. Transfer to Another Judicial Council**

31 In exceptional circumstances, a chief judge or a judicial
32 council may ask the Chief Justice to transfer a proceeding
33 based on a complaint identified under Rule 5 or filed under
34 Rule 6 to the judicial council of another circuit. The
35 request for a transfer may be made at any stage of the
36 proceeding before a reference to the Judicial Conference
37 under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review
38 is filed under Rule 22. Upon receiving such a request, the
39 Chief Justice may refuse the request or select the
40 transferee judicial council, which may then exercise the
41 powers of a judicial council under these Rules.
42
43

44 **Commentary on Rule 26**

45
46 Rule 26 is new; it implements the Breyer Committee's
47 recommended use of transfers. Breyer Committee Report, 239
48 F.R.D. at 214-15.

1
2 Rule 26 authorizes the transfer of a complaint proceeding
3 to another judicial council selected by the Chief Justice.
4 Such transfers may be appropriate, for example, in the case
5 of a serious complaint where there are multiple
6 disqualifications among the original council, where the
7 issues are highly visible and a local disposition may weaken
8 public confidence in the process, where internal tensions
9 arising in the council as a result of the complaint render
10 disposition by a less involved council appropriate, or where
11 a complaint calls into question policies or governance of
12 the home court of appeals. The power to effect a transfer
13 is lodged in the Chief Justice to avoid disputes in a
14 council over where to transfer a sensitive matter and to
15 ensure that the transferee council accepts the matter.
16

17 Upon receipt of a transferred proceeding, the transferee
18 council shall determine the proper stage at which to begin
19 consideration of the complaint -- for example, reference to
20 the transferee chief judge, appointment of a special
21 committee, etc.
22
23

24 **27. Withdrawal of Complaints and Petitions for** 25 **Review**

- 26 (a) **Complaint Pending Before Chief Judge.** With the chief
27 judge's consent, a complainant may withdraw a complaint
28 that is before the chief judge for a decision under
29 Rule 11. The withdrawal of a complaint will not prevent
30 a chief judge from identifying or having to identify a
31 complaint under Rule 5 based on the withdrawn
32 complaint.
- 33 (b) **Complaint Pending before Special Committee or Judicial**
34 **Council.** After a complaint has been referred to a
35 special committee for investigation and before the
36 committee files its report, the complainant may
37 withdraw the complaint only with the consent of both
38 the subject judge and either the special committee or
39 the judicial council.
- 40 (c) **Petition for Review.** A petition for review addressed to
41 a judicial council under Rule 18, or the Judicial
42 Conference Committee on Judicial Conduct and Disability
43 under Rule 22 may be withdrawn if no action on the
44 petition has been taken.
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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.

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29. Effective Date

These Rules will become effective 30 days after promulgation by the Judicial Conference of the United States.