

JUDICIAL CONFERENCE OF THE UNITED STATES

**RULES FOR JUDICIAL-CONDUCT AND
JUDICIAL-DISABILITY PROCEEDINGS**

Adopted by the Judicial Conference on March 11, 2008

The Rules for Judicial-Conduct and Judicial-Disability Proceedings adopted by the Judicial Conference of the United States on March 11, 2008, are adopted as the misconduct rules for the Ninth Circuit, effective April 10, 2008. Pending matters will continue to be governed by the rules in effect at the time the complaint was filed.

RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS

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1 **RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS**

2
3 **Preface**

4 These Rules were promulgated by the Judicial Conference of the United States, after public
5 comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for
6 addressing complaints filed by complainants or identified by chief judges, under the Judicial
7 Conduct and Disability Act, 28 U.S.C. §§ 351-364.
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1 **ARTICLE I. GENERAL PROVISIONS**

2
3 **1. Scope**

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

8
9 **Commentary on Rule 1**

10
11 In September 2006, the Judicial Conduct and Disability Act Study Committee, appointed
12 in 2004 by Chief Justice Rehnquist and known as the "Breyer Committee," presented a report,
13 known as the "Breyer Committee Report," 239 F.R.D. 116 (Sept. 2006), to Chief Justice Roberts
14 that evaluated implementation of the Judicial Conduct and Disability Act of 1980, 28 U.S.C.
15 §§ 351-364. The Breyer Committee had been formed in response to criticism from the public
16 and the Congress regarding the effectiveness of the Act's implementation. The Executive
17 Committee of the Judicial Conference directed the Judicial Conference Committee on Judicial
18 Conduct and Disability to consider the recommendations made by the Breyer Committee and to
19 report on their implementation to the Conference.

20
21 The Breyer Committee found that it could not evaluate implementation of the Act
22 without establishing interpretive standards, Breyer Committee Report, 239 F.R.D. at 132, and
23 that a major problem faced by chief judges in implementing the Act was the lack of authoritative
24 interpretive standards. *Id.* at 212-15. The Breyer Committee then established standards to guide
25 its evaluation, some of which were new formulations and some of which were taken from the
26 "Illustrative Rules Governing Complaints of Judicial Misconduct and Disability," discussed
27 below. The principal standards used by the Breyer Committee are in Appendix E of its Report.
28 *Id.* at 238.

29
30 Based on the findings of the Breyer Committee, the Judicial Conference Committee on
31 Judicial Conduct and Disability concluded that there was a need for the Judicial Conference to
32 exercise its power under Section 358 of the Act to fashion standards guiding the various officers
33 and bodies who must exercise responsibility under the Act. To that end, the Judicial Conference
34 Committee proposed rules that were based largely on Appendix E of the Breyer Committee
35 Report and the Illustrative Rules.

36
37 The Illustrative Rules were originally prepared in 1986 by the Special Committee of the
38 Conference of Chief Judges of the United States Courts of Appeals, and were subsequently
39 revised and amended, most recently in 2000, by the predecessor to the Committee on Judicial
40 Conduct and Disability. The Illustrative Rules were adopted, with minor variations, by circuit
41 judicial councils, to govern complaints under the Judicial Conduct and Disability Act.

42
43 After being submitted for public comment pursuant to 28 U.S.C. § 358(c), the present
44 Rules were promulgated by the Judicial Conference on March 11, 2008.

1 **2. Effect and Construction**

- 2 (a) **Generally.** These Rules are mandatory; they supersede any conflicting judicial-
- 3 **council rules. Judicial councils may promulgate additional rules to implement the**
- 4 **Act as long as those rules do not conflict with these Rules.**
- 5 (b) **Exception.** A Rule will not apply if, when performing duties authorized by the Act,
- 6 **a chief judge, a special committee, a judicial council, the Judicial Conference**
- 7 **Committee on Judicial Conduct and Disability, or the Judicial Conference of the**
- 8 **United States expressly finds that exceptional circumstances render application of**
- 9 **that Rule in a particular proceeding manifestly unjust or contrary to the purposes**
- 10 **of the Act or these Rules.**

11
12 **Commentary on Rule 2**

13
14 Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform

15 provisions governing the substantive and procedural aspects of misconduct and disability

16 proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C.

17 § 358(a) and (c). Judicial councils retain the power to promulgate rules consistent with these

18 Rules. For example, a local rule may authorize the electronic distribution of materials pursuant

19 to Rule 8(b).

20
21 Rule 2(b) recognizes that unforeseen and exceptional circumstances may call for a

22 different approach in particular cases.

23

24 **3. Definitions**

- 25 (a) **Chief Judge.** “Chief judge” means the chief judge of a United States Court of
- 26 **Appeals, of the United States Court of International Trade, or of the United States**
- 27 **Court of Federal Claims.**
- 28 (b) **Circuit Clerk.** “Circuit clerk” means a clerk of a United States court of appeals, the
- 29 **clerk of the United States Court of International Trade, the clerk of the United**
- 30 **States Court of Federal Claims, or the circuit executive of the United States Court**
- 31 **of Appeals for the Federal Circuit.**
- 32 (c) **Complaint.** A complaint is:
- 33 (1) a document that, in accordance with Rule 6, is filed by any person in his or
- 34 **her individual capacity or on behalf of a professional organization; or**
- 35 (2) **information from any source, other than a document described in (c)(1), that**
- 36 **gives a chief judge probable cause to believe that a covered judge, as defined**
- 37 **in Rule 4, has engaged in misconduct or may have a disability, whether or**
- 38 **not the information is framed as or is intended to be an allegation of**
- 39 **misconduct or disability.**
- 40 (d) **Court of Appeals, District Court, and District Judge.** “Courts of appeals,” “district
- 41 **court,” and “district judge,” where appropriate, include the United States Court of**
- 42 **Federal Claims, the United States Court of International Trade, and the judges**
- 43 **thereof.**
- 44 (e) **Disability.** “Disability” is a temporary or permanent condition rendering a judge
- 45 **unable to discharge the duties of the particular judicial office. Examples of**
- 46 **disability include substance abuse, the inability to stay awake during court**
- 47 **proceedings, or a severe impairment of cognitive abilities.**
- 48

- 1 (f) **Judicial Council and Circuit.** “Judicial council” and “circuit,” where appropriate,
 2 include any courts designated in 28 U.S.C. § 363.
- 3 (g) **Magistrate Judge.** “Magistrate judge,” where appropriate, includes a special
 4 master appointed by the Court of Federal Claims under 42 U.S.C. § 300aa–12(c).
- 5 (h) **Misconduct. Cognizable misconduct:**
- 6 (1) is conduct prejudicial to the effective and expeditious administration of the
 7 business of the courts. Misconduct includes, but is not limited to:
- 8 (A) using the judge's office to obtain special treatment for friends or
 9 relatives;
- 10 (B) accepting bribes, gifts, or other personal favors related to the judicial
 11 office;
- 12 (C) having improper discussions with parties or counsel for one side in a
 13 case;
- 14 (D) treating litigants or attorneys in a demonstrably egregious and hostile
 15 manner;
- 16 (E) engaging in partisan political activity or making inappropriately
 17 partisan statements;
- 18 (F) soliciting funds for organizations; or
- 19 (G) violating other specific, mandatory standards of judicial conduct,
 20 such as those pertaining to restrictions on outside income and
 21 requirements for financial disclosure.
- 22 (2) is conduct occurring outside the performance of official duties if the conduct
 23 might have a prejudicial effect on the administration of the business of the
 24 courts, including a substantial and widespread lowering of public confidence
 25 in the courts among reasonable people.
- 26 (3) does not include:
- 27 (A) an allegation that is directly related to the merits of a decision or
 28 procedural ruling. An allegation that calls into question the
 29 correctness of a judge's ruling, including a failure to recuse, without
 30 more, is merits-related. If the decision or ruling is alleged to be the
 31 result of an improper motive, e.g., a bribe, ex parte contact, racial or
 32 ethnic bias, or improper conduct in rendering a decision or ruling,
 33 such as personally derogatory remarks irrelevant to the issues, the
 34 complaint is not cognizable to the extent that it attacks the merits.
- 35 (B) an allegation about delay in rendering a decision or ruling, unless the
 36 allegation concerns an improper motive in delaying a particular
 37 decision or habitual delay in a significant number of unrelated cases.
- 38 (i) **Subject Judge.** “Subject judge” means any judge described in Rule 4 who is the
 39 subject of a complaint.

40
 41 **Commentary on Rule 3**

42
 43 Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative
 44 Rules.

45
 46 Unless otherwise specified or the context otherwise indicates, the term "complaint" is
 47 used in these Rules to refer both to complaints identified by a chief judge under Rule 5 and to
 48 complaints filed by complainants under Rule 6.

1 Under the Act, a "complaint" may be filed by "any person" or "identified" by a chief
2 judge. See 28 U.S.C. § 351(a) and (b). Under Rule 3(c)(1), complaints may be submitted by a
3 person, in his or her individual capacity, or by a professional organization. Generally, the word
4 "complaint" brings to mind the commencement of an adversary proceeding in which the
5 contending parties are left to present the evidence and legal arguments, and judges play the role
6 of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial
7 process. For example, even absent a complaint under Rule 6, chief judges are expected in some
8 circumstances to trigger the process -- "identify a complaint," see 28 U.S.C. § 351(b) and Rule 5
9 -- and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer
10 Committee Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by
11 someone other than the chief judge, the complainant lacks many rights that a litigant would have,
12 and the chief judge, instead of being limited to the "four corners of the complaint," must, under
13 Rule 11, proceed as though misconduct or disability has been alleged where the complainant
14 reveals information of misconduct or disability but does not claim it as such. See Breyer
15 Committee Report, 239 F.R.D. at 183-84.

16
17 An allegation of misconduct or disability filed under Rule 6 is a "complaint," and the
18 Rule so provides in subsection (c)(1). However, both the nature of the process and the use of the
19 term "identify" suggest that the word "complaint" covers more than a document formally
20 triggering the process. The process relies on chief judges considering known information and
21 triggering the process when appropriate. "Identifying" a "complaint," therefore, is best
22 understood as the chief judge's concluding that information known to the judge constitutes
23 probable cause to believe that misconduct occurred or a disability exists, whether or not the
24 information is framed as, or intended to be an accusation. This definition is codified in (c)(2).

25
26 Rule 3(e) relates to disability and provides only the most general definition, recognizing
27 that a fact-specific approach is the only one available.

28
29 The phrase "prejudicial to the effective and expeditious administration of the business of
30 the courts" is not subject to precise definition, and subsection (h)(1) therefore provides some
31 specific examples. Although the Code of Conduct for United States Judges may be informative,
32 its main precepts are highly general; the Code is in many potential applications aspirational
33 rather than a set of disciplinary rules. Ultimately, the responsibility for determining what
34 constitutes misconduct under the statute is the province of the judicial council of the circuit
35 subject to such review and limitations as are ordained by the statute and by these Rules.

36
37 Even where specific, mandatory rules exist -- for example, governing the receipt of gifts
38 by judges, outside earned income, and financial disclosure obligations -- the distinction between
39 the misconduct statute and the specific, mandatory rules must be borne in mind. For example, an
40 inadvertent, minor violation of any one of these Rules, promptly remedied when called to the
41 attention of the judge, might still be a violation but might not rise to the level of misconduct
42 under the statute. By contrast, a pattern of such violations of the Code might well rise to the
43 level of misconduct.

44
45 An allegation can meet the statutory standard even though the judge's alleged conduct did
46 not occur in the course of the performance of official duties. The Code of Conduct for United
47 States Judges expressly covers a wide range of extra-official activities, and some of these
48 activities may constitute misconduct. For example, allegations that a judge solicited funds for a
49 charity or participated in a partisan political event are cognizable under the Act.

1 On the other hand, judges are entitled to some leeway in extra-official activities. For
2 example, misconduct may not include a judge being repeatedly and publicly discourteous to a
3 spouse (not including physical abuse) even though this might cause some reasonable people to
4 have diminished confidence in the courts. Rule 3(h)(2) states that conduct of this sort is covered,
5 for example, when it might lead to a "substantial and widespread" lowering of such confidence.
6

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

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

34 The existence of an appellate remedy is usually irrelevant to whether an allegation is
35 merits-related. The merits-related ground for dismissal exists to protect judges' independence in
36 making rulings, not to protect or promote the appellate process. A complaint alleging an
37 incorrect ruling is merits-related even though the complainant has no recourse from that ruling.
38 By the same token, an allegation that is otherwise cognizable under the Act should not be
39 dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling
40 that resulted from an improper ex parte communication). However, there may be occasions
41 when appellate and misconduct proceedings overlap, and consideration and disposition of a
42 complaint under these Rules may be properly deferred by a chief judge until the appellate
43 proceedings are concluded in order to avoid, inter alia, inconsistent decisions.
44

45 Because of the special need to protect judges' independence in deciding what to say in an
46 opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a
47 non-frivolous allegation that a judge's language in a ruling reflected an improper motive. If the
48 judge's language was relevant to the case at hand -- for example a statement that a claim is
49 legally or factually "frivolous" -- then the judge's choice of language is presumptively

1 merits-related and excluded, absent evidence apart from the ruling itself suggesting an improper
2 motive. If, on the other hand, the challenged language does not seem relevant on its face, then
3 an additional inquiry under Rule 11 is necessary.
4

5 With regard to Rule 3(h)(3)(B), a complaint of delay in a single case is excluded as
6 merits-related. Such an allegation may be said to challenge the correctness of an official action
7 of the judge -- in other words, assigning a low priority to deciding the particular case. But, by
8 the same token, an allegation of a habitual pattern of delay in a significant number of unrelated
9 cases, or an allegation of deliberate delay in a single case arising out of an illicit motive, is not
10 merits-related.
11

12 The remaining subsections of Rule 3 provide technical definitions clarifying the
13 application of the Rules to the various kinds of courts covered.
14

15 **4. Covered Judges**

16 **A complaint under these Rules may concern the actions or capacity only of judges of**
17 **United States courts of appeals, judges of United States district courts, judges of United**
18 **States bankruptcy courts, United States magistrate judges, and judges of the courts**
19 **specified in 28 U.S.C. § 363.**
20

21 **Commentary on Rule 4**

22

23 This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of
24 complaints against persons not covered by the Act, such as other court personnel, or against both
25 covered judges and noncovered persons.
26

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

28

29 **5. Identification of a Complaint**

- 30 (a) **Identification.** When a chief judge has information constituting reasonable grounds
31 for inquiry into whether a covered judge has engaged in misconduct or has a
32 disability, the chief judge may conduct an inquiry, as he or she deems appropriate,
33 into the accuracy of the information even if no related complaint has been filed. A
34 chief judge who finds probable cause to believe that misconduct has occurred or
35 that a disability exists may seek an informal resolution that he or she finds
36 satisfactory. If no informal resolution is achieved or is feasible, the chief judge may
37 identify a complaint and, by written order stating the reasons, begin the review
38 provided in Rule 11. If the evidence of misconduct is clear and convincing and no
39 informal resolution is achieved or is feasible, the chief judge must identify a
40 complaint. A chief judge must not decline to identify a complaint merely because
41 the person making the allegation has not filed a complaint under Rule 6. This Rule
42 is subject to Rule 7.
- 43 (b) **Noncompliance with Rule 6(d).** Rule 6 complaints that do not comply with the
44 requirements of Rule 6(d) must be considered under this Rule.
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Commentary on Rule 5

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

The Act authorizes the chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry. If the chief judge concludes that there is probable cause to believe that misconduct has occurred or a disability exists, the chief judge may seek an informal resolution, if feasible, and if failing in that, may identify a complaint. Discretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding. On the other hand, if the inquiry leads the chief judge to conclude that there is clear and convincing evidence of misconduct or a disability, and no satisfactory informal resolution has been achieved or is feasible, the chief judge is required to identify a complaint.

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

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

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

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

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

Subsection (a) concludes by stating that this Rule is "subject to Rule 7." This is intended to establish that only: (i) the chief judge of the home circuit of a potential subject judge, or

1 (ii) the chief judge of a circuit in which misconduct is alleged to have occurred in the course of
2 official business while the potential subject judge was sitting by designation, shall have the
3 power or a duty under this Rule to identify a complaint.
4

5 Subsection (b) provides that complaints filed under Rule 6 that do not comply with the
6 requirements of Rule 6(d), must be considered under this Rule. For instance, if a complaint has
7 been filed but the form submitted is unsigned, or the truth of the statements therein are not
8 verified in writing under penalty of perjury, then a chief judge must nevertheless consider the
9 allegations as known information, and proceed to follow the process described in Rule 5(a).
10

11 **6. Filing a Complaint**

- 12 (a) **Form.** A complainant may use the form reproduced in the appendix to these Rules
13 or a form designated by the rules of the judicial council in the circuit in which the
14 complaint is filed. A complaint form is also available on each court of appeals'
15 website or may be obtained from the circuit clerk or any district court or
16 bankruptcy court within the circuit. A form is not necessary to file a complaint, but
17 the complaint must be written and must include the information described in (b).
18 (b) **Brief Statement of Facts.** A complaint must contain a concise statement that details
19 the specific facts on which the claim of misconduct or disability is based. The
20 statement of facts should include a description of:
21 (1) what happened;
22 (2) when and where the relevant events happened;
23 (3) any information that would help an investigator check the facts; and
24 (4) for an allegation of disability, any additional facts that form the basis of that
25 allegation.
26 (c) **Legibility.** A complaint should be typewritten if possible. If not typewritten, it must
27 be legible. An illegible complaint will be returned to the complainant with a request
28 to resubmit it in legible form. If a resubmitted complaint is still illegible, it will not
29 be accepted for filing.
30 (d) **Complainant's Address and Signature; Verification.** The complainant must provide
31 a contact address and sign the complaint. The truth of the statements made in the
32 complaint must be verified in writing under penalty of perjury. If any of these
33 requirements are not met, the complaint will be accepted for filing, but it will be
34 reviewed under only Rule 5(b).
35 (e) **Number of Copies; Envelope Marking.** The complainant shall provide the number
36 of copies of the complaint required by local rule. Each copy should be in an
37 envelope marked "Complaint of Misconduct" or "Complaint of Disability." The
38 envelope must not show the name of any subject judge.
39

40 **Commentary on Rule 6**

41
42 The Rule is adapted from the Illustrative Rules and is self-explanatory.
43

44 **7. Where to Initiate Complaints**

- 45 (a) **Where to File.** Except as provided in (b),
46 (1) a complaint against a judge of a United States court of appeals, a United
47 States district court, a United States bankruptcy court, or a United States
48

- 1 magistrate judge must be filed with the circuit clerk in the jurisdiction in
2 which the subject judge holds office.
- 3 (2) a complaint against a judge of the United States Court of International
4 Trade or the United States Court of Federal Claims must be filed with the
5 respective clerk of that court.
- 6 (3) a complaint against a judge of the United States Court of Appeals for the
7 Federal Circuit must be filed with the circuit executive of that court.
- 8 (b) **Misconduct in Another Circuit; Transfer.** If a complaint alleges misconduct in the
9 course of official business while the subject judge was sitting on a court by
10 designation under 28 U.S.C. §§ 291–293 and 294(d), the complaint may be filed or
11 identified with the circuit clerk of that circuit or of the subject judge's home circuit.
12 The proceeding will continue in the circuit of the first-filed or first-identified
13 complaint. The judicial council of the circuit where the complaint was first filed or
14 first identified may transfer the complaint to the subject judge's home circuit or to
15 the circuit where the alleged misconduct occurred, as the case may be.

16 17 Commentary on Rule 7

18
19 Title 28 U.S.C. § 351 states that complaints are to be filed with "the clerk of the court of
20 appeals for the circuit." However, in many circuits, this role is filled by circuit executives.
21 Accordingly, the term "circuit clerk," as defined in Rule 3(b) and used throughout these Rules,
22 applies to circuit executives.

23
24 Section 351 uses the term "the circuit" in a way that suggests that either the home circuit
25 of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper
26 venue for complaints. With an exception for judges sitting by designation, the Rule requires the
27 identifying or filing of a misconduct or disability complaint in the circuit in which the judge
28 holds office, largely based on the administrative perspective of the Act. Given the Act's
29 emphasis on the future conduct of the business of the courts, the circuit in which the judge holds
30 office is the appropriate forum because that circuit is likely best able to influence a judge's future
31 behavior in constructive ways.

32
33 However, when judges sit by designation, the non-home circuit has a strong interest in
34 redressing misconduct in the course of official business, and where allegations also involve a
35 member of the bar -- *ex parte* contact between an attorney and a judge, for example -- it may
36 often be desirable to have the judicial and bar misconduct proceedings take place in the same
37 venue. Rule 7(b), therefore, allows transfer to, or filing or identification of a complaint in, the
38 non-home circuit. The proceeding may be transferred by the judicial council of the filing or
39 identified circuit to the other circuit.

40 41 **8. Action by Clerk**

- 42 (a) **Receipt of Complaint.** Upon receiving a complaint against a judge filed under Rule
43 5 or 6, the circuit clerk must open a file, assign a docket number according to a
44 uniform numbering scheme promulgated by the Judicial Conference Committee on
45 Judicial Conduct and Disability, and acknowledge the complaint's receipt.

- 1 (b) **Distribution of Copies.** The clerk must promptly send copies of a complaint filed
2 under Rule 6 to the chief judge or the judge authorized to act as chief judge under
3 Rule 25(f), and copies of complaints filed under Rule 5 or 6 to each subject judge.
4 The clerk must retain the original complaint. Any further distribution should be as
5 provided by local rule.
- 6 (c) **Complaints Against Noncovered Persons.** If the clerk receives a complaint about a
7 person not holding an office described in Rule 4, the clerk must not accept the
8 complaint for filing under these Rules.
- 9 (d) **Receipt of Complaint about a Judge and Another Noncovered Person.** If a
10 complaint is received about a judge described in Rule 4 and a person not holding an
11 office described in Rule 4, the clerk must accept the complaint for filing under these
12 Rules only with regard to the judge and must inform the complainant of the
13 limitation.

14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30 31 32 33 34 35 36 37 38 39 40 41 42 43 44 45 46 47 48

Commentary on Rule 8

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

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

Complaints against noncovered persons are not to be accepted for processing under these Rules but may, of course, be accepted under other circuit rules or procedures for grievances.

9. Time for Filing or Identifying a Complaint

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

Commentary on Rule 9

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

10. Abuse of the Complaint Procedure

- (a) **Abusive Complaints.** A complainant who has filed repetitive, harassing, or frivolous complaints, or has otherwise abused the complaint procedure, may be restricted from filing further complaints. After giving the complainant an opportunity to show cause in writing why his or her right to file further complaints should not be limited, a judicial council may prohibit, restrict, or impose conditions on the complainant's use of the complaint procedure. Upon written request of the complainant, the judicial council may revise or withdraw any prohibition, restriction, or condition previously imposed.
- (b) **Orchestrated Complaints.** When many essentially identical complaints from different complainants are received and appear to be part of an orchestrated

1 **campaign, the chief judge may recommend that the judicial council issue a written**
2 **order instructing the circuit clerk to accept only a certain number of such**
3 **complaints for filing and to refuse to accept further ones. The clerk must send a**
4 **copy of any such order to anyone whose complaint was not accepted.**

5
6 **Commentary on Rule 10**

7
8 This Rule is adapted from the Illustrative Rules.

9
10 Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further
11 complaints by a single complainant who has abused the complaint procedure. In some instances,
12 however, the complaint procedure may be abused in a manner for which the remedy provided in
13 Rule 10(a) may not be appropriate. For example, some circuits have been inundated with
14 submissions of dozens or hundreds of essentially identical complaints against the same judge or
15 judges, all submitted by different complainants. In many of these instances, persons with
16 grievances against a particular judge or judges used the Internet or other technology to
17 orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part
18 of such a campaign were accepted for filing and processed according to these Rules, there would
19 be a serious drain on court resources without any benefit to the adjudication of the underlying
20 merits.

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

29
30 **ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE**

31
32 **11. Review by the Chief Judge**

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

1 others who may have knowledge of the matter, and may review transcripts or other
2 relevant documents. In conducting the inquiry, the chief judge must not determine
3 any reasonably disputed issue.

4 (c) **Dismissal.**

5 (1) **Allowable grounds.** A complaint must be dismissed in whole or in part to the
6 extent that the chief judge concludes that the complaint:

7 (A) alleges conduct that, even if true, is not prejudicial to the effective and
8 expeditious administration of the business of the courts and does not
9 indicate a mental or physical disability resulting in inability to
10 discharge the duties of judicial office;

11 (B) is directly related to the merits of a decision or procedural ruling;

12 (C) is frivolous;

13 (D) is based on allegations lacking sufficient evidence to raise an inference
14 that misconduct has occurred or that a disability exists;

15 (E) is based on allegations which are incapable of being established
16 through investigation;

17 (F) has been filed in the wrong circuit under Rule 7; or

18 (G) is otherwise not appropriate for consideration under the Act.

19 (2) **Disallowed grounds.** A complaint must not be dismissed solely because it
20 repeats allegations of a previously dismissed complaint if it also contains
21 material information not previously considered and does not constitute
22 harassment of the subject judge.

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

25 (1) an informal resolution under Rule 5 satisfactory to the chief judge was
26 reached before the complaint was filed under Rule 6, or

27 (2) the chief judge determines that the subject judge has taken appropriate
28 voluntary corrective action that acknowledges and remedies the problems
29 raised by the complaint.

30 (e) **Intervening Events.** The chief judge may conclude the complaint proceeding in
31 whole or in part upon determining that intervening events render some or all of the
32 allegations moot or make remedial action impossible.

33 (f) **Appointment of Special Committee.** If some or all of the complaint is not dismissed
34 or concluded, the chief judge must promptly appoint a special committee to
35 investigate the complaint or any relevant portion of it and to make
36 recommendations to the judicial council. Before appointing a special committee, the
37 chief judge must invite the subject judge to respond to the complaint either orally or
38 in writing if the judge was not given an opportunity during the limited inquiry. In
39 the chief judge's discretion, separate complaints may be joined and assigned to a
40 single special committee. Similarly, a single complaint about more than one judge
41 may be severed and more than one special committee appointed.

42 (g) **Notice of Chief Judge's Action; Petitions for Review.**

43 (1) **When special committee is appointed.** If a special committee is appointed,
44 the chief judge must notify the complainant and the subject judge that the
45 matter has been referred to a special committee and identify the members of
46 the committee. A copy of the order appointing the special committee must be
47 sent to the Judicial Conference Committee on Judicial Conduct and
48 Disability.

- 1 (2) **When chief judge disposes of complaint without appointing special**
2 **committee. If the chief judge disposes of the complaint under Rule 11(c), (d),**
3 **or (e), the chief judge must prepare a supporting memorandum that sets**
4 **forth the reasons for the disposition. Except as authorized by 28 U.S.C.**
5 **§ 360, the memorandum must not include the name of the complainant or of**
6 **the subject judge. The order and the supporting memorandum, which may**
7 **be one document, must be provided to the complainant, the subject judge,**
8 **and the Judicial Conference Committee on Judicial Conduct and Disability.**
9 (3) **Right of petition for review. If the chief judge disposes of a complaint under**
10 **Rule 11(c), (d), or (e), the complainant and subject judge must be notified of**
11 **the right to petition the judicial council for review of the disposition, as**
12 **provided in Rule 18. If a petition for review is filed, the chief judge must**
13 **promptly transmit all materials obtained in connection with the inquiry**
14 **under Rule 11(b) to the circuit clerk for transmittal to the judicial council.**
15 (h) **Public Availability of Chief Judge's Decision. The chief judge's decision must be**
16 **made public to the extent, at the time, and in the manner provided in Rule 24.**

17
18 Commentary on Rule 11

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

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

38
39 In conducting a limited inquiry under subsection (b), the chief judge must avoid
40 determinations of reasonably disputed issues, including reasonably disputed issues as to whether
41 the facts alleged constitute misconduct or disability, which are ordinarily left to a special
42 committee and the judicial council. An allegation of fact is ordinarily not "refuted" simply
43 because the subject judge denies it. The limited inquiry must reveal something more in the way
44 of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is
45 the complainant's word against the subject judge's -- in other words, there is simply no other
46 significant evidence of what happened or of the complainant's unreliability -- then there must be
47 a special-committee investigation. Such a credibility issue is a matter "reasonably in dispute"
48 within the meaning of the Act.
49

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

11
12 Similarly, under (c)(1)(A), if it is clear that the conduct or disability alleged, even if true,
13 is not cognizable under these Rules, the complaint should be dismissed. If that issue is
14 reasonably in dispute, however, dismissal under (c)(1)(A) is inappropriate.

15
16 Essentially, the standard articulated in subsection (b) is that used to decide motions for
17 summary judgment pursuant to Fed. R. Civ. P. 56. Genuine issues of material fact are not
18 resolved at the summary judgment stage. A material fact is one that "might affect the outcome
19 of the suit under the governing law," and a dispute is "genuine" if "the evidence is such that a
20 reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby,
21 477 U.S. 242, 248 (1986). Similarly, the chief judge may not resolve a genuine issue concerning
22 a material fact or the existence of misconduct or a disability when conducting a limited inquiry
23 pursuant to subsection (b).

24
25 Subsection (c) describes the grounds on which a complaint may be dismissed. These are
26 adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at
27 239-45. Subsection (c)(1)(A) permits dismissal of an allegation that, even if true, does not
28 constitute misconduct or disability under the statutory standard. The proper standards are set out
29 in Rule 3 and discussed in the Commentary on that Rule. Subsection (c)(1)(B) permits dismissal
30 of complaints related to the merits of a decision by a subject judge; this standard is also governed
31 by Rule 3 and its accompanying Commentary.

32
33 Subsections (c)(1)(C)-(E) implement the statute by allowing dismissal of complaints that
34 are "frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred, or
35 containing allegations which are incapable of being established through investigation." 28
36 U.S.C. § 352(b)(1)(A)(iii).

37
38 Dismissal of a complaint as "frivolous," under Rule 11(c)(1)(C), will generally occur
39 without any inquiry beyond the face of the complaint. For instance, when the allegations are
40 facially incredible or so lacking in indicia of reliability that no further inquiry is warranted,
41 dismissal under this subsection is appropriate.

42
43 A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following
44 example. Consider a complainant who alleges an impropriety and asserts that he knows of it
45 because it was observed and reported to him by a person who is identified. The judge denies that
46 the event occurred. When contacted, the source also denies it. In such a case, the chief judge's
47 proper course of action may turn on whether the source had any role in the allegedly improper
48 conduct. If the complaint was based on a lawyer's statement that he or she had an improper ex
49 parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly

1 persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the
2 other hand, if the complaint quoted a disinterested third party and that disinterested party denied
3 that the statement had been made, there would be no value in opening a formal investigation. In
4 such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D).
5

6 Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is
7 offered or identified, or when the only identified source is unavailable. Breyer Committee
8 Report, 239 F.R.D. at 243. For example, a complaint alleges that an unnamed attorney told the
9 complainant that the judge did X. Id. The subject judge denies it. The chief judge requests that
10 the complainant (who does not purport to have observed the judge do X) identify the unnamed
11 witness, or that the unnamed witness come forward so that the chief judge can learn the unnamed
12 witness's account. Id. The complainant responds that he has spoken with the unnamed witness,
13 that the unnamed witness is an attorney who practices in federal court, and that the unnamed
14 witness is unwilling to be identified or to come forward. Id. at 243-44. The allegation is then
15 properly dismissed as containing allegations that are incapable of being established through
16 investigation. Id.
17

18 If, however, the situation involves a reasonable dispute over credibility, the matter should
19 proceed. For example, the complainant alleges an impropriety and alleges that he or she
20 observed it and that there were no other witnesses; the subject judge denies that the event
21 occurred. Unless the complainant's allegations are facially incredible or so lacking indicia of
22 reliability warranting dismissal under Rule 11(c)(1)(C), a special committee must be appointed
23 because there is a material factual question that is reasonably in dispute.
24

25 Dismissal is also appropriate when a complaint is filed so long after an alleged event that
26 memory loss, death, or changes to unknown residences prevent a proper investigation.
27

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

34 Rule 11(d) implements the Act's provision for dismissal if voluntary appropriate
35 corrective action has been taken. It is largely adapted from the Breyer Committee Report, 239
36 F.R.D. 244-45. The Act authorizes the chief judge to conclude the proceedings if "appropriate
37 corrective action has been taken." 28 U.S.C. § 352(b)(2). Under the Rule, action taken after the
38 complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the
39 complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the
40 conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of
41 the complaint. Id. Terminating a complaint based on corrective action is premised on the
42 implicit understanding that voluntary self-correction or redress of misconduct or a disability is
43 preferable to sanctions. Id. The chief judge may facilitate this process by giving the subject
44 judge an objective view of the appearance of the judicial conduct in question and by suggesting
45 appropriate corrective measures. Id. Moreover, when corrective action is taken under Rule 5
46 satisfactory to the chief judge before a complaint is filed, that informal resolution will be
47 sufficient to conclude a subsequent complaint based on the identical conduct.
48
49

1 "Corrective action" must be voluntary action taken by the subject judge. Breyer
2 Committee Report, 239 F.R.D. at 244. A remedial action directed by the chief judge or by an
3 appellate court without the participation of the subject judge in formulating the directive or
4 without the subject judge's subsequent agreement to such action does not constitute the requisite
5 voluntary corrective action. Id. Neither the chief judge nor an appellate court has authority
6 under the Act to impose a formal remedy or sanction; only the judicial council can impose a
7 formal remedy or sanction under 28 U.S.C. § 354(a)(2). Id. Compliance with a previous council
8 order may serve as corrective action allowing conclusion of a later complaint about the same
9 behavior. Id.

10
11 Where a judge's conduct has resulted in identifiable, particularized harm to the
12 complainant or another individual, appropriate corrective action should include steps taken by
13 that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from
14 a case, or a pledge to refrain from similar conduct in the future. Id. While the Act is generally
15 forward-looking, any corrective action should, to the extent possible, serve to correct a specific
16 harm to an individual, if such harm can reasonably be remedied. Id. In some cases, corrective
17 action may not be "appropriate" to justify conclusion of a complaint unless the complainant or
18 other individual harmed is meaningfully apprised of the nature of the corrective action in the
19 chief judge's order, in a direct communication from the subject judge, or otherwise. Id.

20
21 Voluntary corrective action should be proportionate to any plausible allegations of
22 misconduct in the complaint. The form of corrective action should also be proportionate to any
23 sanctions that a judicial council might impose under Rule 20(b), such as a private or public
24 reprimand or a change in case assignments. Breyer Committee Report, 239 F.R.D at 244-45. In
25 other words, minor corrective action will not suffice to dispose of a serious matter. Id.

26
27 Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to
28 "conclude the proceeding," if "action on the complaint is no longer necessary because of
29 intervening events," such as a resignation from judicial office. Ordinarily, however, stepping
30 down from an administrative post such as chief judge, judicial-council member, or court-
31 committee chair does not constitute an event rendering unnecessary any further action on a
32 complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long
33 as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct
34 must be addressed. Id.

35
36 If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee
37 must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the
38 complaint before a special committee is appointed, if no earlier response was invited.

39
40 Subject judges, of course, receive copies of complaints at the same time that they are
41 referred to the chief judge, and they are free to volunteer responses to them. Under Rule 11(b),
42 the chief judge may request a response if it is thought necessary. However, many complaints are
43 clear candidates for dismissal even if their allegations are accepted as true, and there is no need
44 for the subject judge to devote time to a defense.

45
46 The Act requires that the order dismissing a complaint or concluding the proceeding
47 contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C.
48 § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the
49 order will be made public, usually without disclosing the names of the complainant or the subject

1 judge. If desired for administrative purposes, more identifying information can be included in a
2 non-public version of the order.
3

4 When complaints are disposed of by chief judges, the statutory purposes are best served
5 by providing the complainant with a full, particularized, but concise explanation, giving reasons
6 for the conclusions reached. See also Commentary on Rule 24, dealing with public availability.
7

8 Rule 11(g) provides that the complainant and subject judge must be notified, in the case
9 of a disposition by the chief judge, of the right to petition the judicial council for review. A copy
10 of a chief judge's order and memorandum, which may be one document, disposing of a
11 complaint must be sent by the circuit clerk to the Judicial Conference Committee on Judicial
12 Conduct and Disability.
13
14

1 **ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL**
2 **COMMITTEE**

3
4 **12. Composition of Special Committee**

- 5 (a) **Membership.** Except as provided in (e), a special committee appointed under Rule
6 11(f) must consist of the chief judge and equal numbers of circuit and district
7 judges. If the complaint is about a district judge, bankruptcy judge, or magistrate
8 judge, then, when possible, the district-judge members of the committee must be
9 from districts other than the district of the subject judge. For the courts named in
10 28 U.S.C. § 363, the committee must be selected from the judges serving on the
11 subject judge's court.
- 12 (b) **Presiding Officer.** When appointing the committee, the chief judge may serve as the
13 presiding officer or else must designate a committee member as the presiding
14 officer.
- 15 (c) **Bankruptcy Judge or Magistrate Judge as Adviser.** If the subject judge is a
16 bankruptcy judge or magistrate judge, he or she may, within 14 days after being
17 notified of the committee's appointment, ask the chief judge to designate as a
18 committee adviser another bankruptcy judge or magistrate judge, as the case may
19 be. The chief judge must grant such a request but may otherwise use discretion in
20 naming the adviser. Unless the adviser is a Court of Federal Claims special master
21 appointed under 42 U.S.C. § 300aa-12(c), the adviser must be from a district other
22 than the district of the subject bankruptcy judge or subject magistrate judge. The
23 adviser cannot vote but has the other privileges of a committee member.
- 24 (d) **Provision of Documents.** The chief judge must certify to each other member of the
25 committee and to any adviser copies of the complaint and statement of facts in
26 whole or relevant part, and any other relevant documents on file.
- 27 (e) **Continuing Qualification of Committee Members.** A member of a special
28 committee who was qualified to serve when appointed may continue to serve on the
29 committee even though the member relinquishes the position of chief judge, active
30 circuit judge, or active district judge, as the case may be, but only if the member
31 continues to hold office under Article III, Section 1, of the Constitution of the United
32 States, or under 28 U.S.C. § 171.
- 33 (f) **Inability of Committee Member to Complete Service.** If a member of a special
34 committee can no longer serve because of death, disability, disqualification,
35 resignation, retirement from office, or other reason, the chief judge must decide
36 whether to appoint a replacement member, either a circuit or district judge as
37 needed under (a). No special committee appointed under these Rules may function
38 with only a single member, and the votes of a two-member committee must be
39 unanimous.
- 40 (g) **Voting.** All actions by a committee must be by vote of a majority of all members of
41 the committee.
42

43 **Commentary on Rule 12**

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

46
47 Rule 12 leaves the size of a special committee flexible, to be determined on a
48 case-by-case basis. The question of committee size is one that should be weighed with care in

1 view of the potential for consuming the members' time; a large committee should be appointed
2 only if there is a special reason to do so.
3

4 Although the Act requires that the chief judge be a member of each special committee, 28
5 U.S.C. § 353(a)(1), it does not require that the chief judge preside. Accordingly, Rule 12(b)
6 provides that if the chief judge does not preside, he or she must designate another committee
7 member as the presiding officer.
8

9 Rule 12(c) provides that the chief judge must appoint a bankruptcy judge or magistrate
10 judge as an adviser to a special committee at the request of a bankruptcy or magistrate subject
11 judge.
12

13 Subsection (c) also provides that the adviser will have all the privileges of a committee
14 member except a vote. The adviser, therefore, may participate in all deliberations of the
15 committee, question witnesses at hearings, and write a separate statement to accompany the
16 special committee's report to the judicial council.
17

18 Rule 12(e) provides that a member of a special committee who remains an Article III
19 judge may continue to serve on the committee even though the member's status otherwise
20 changes. Thus, a committee that originally consisted of the chief judge and an equal number of
21 circuit and district judges, as required by the law, may continue to function even though changes
22 of status alter that composition. This provision reflects the belief that stability of membership
23 will contribute to the quality of the work of such committees.
24

25 Stability of membership is also the principal concern animating Rule 12(f), which deals
26 with the case in which a special committee loses a member before its work is complete. The
27 Rule permits the chief judge to determine whether a replacement member should be appointed.
28 Generally, appointment of a replacement member is desirable in these situations unless the
29 committee has conducted evidentiary hearings before the vacancy occurs. However, cases may
30 arise in which a committee is in the late stages of its work, and in which it would be difficult for
31 a new member to play a meaningful role. The Rule also preserves the collegial character of the
32 committee process by prohibiting a single surviving member from serving as a committee and by
33 providing that a committee of two surviving members will, in essence, operate under a unanimity
34 rule.
35

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

41 **13. Conduct of an Investigation**

- 42 (a) **Extent and Methods of Special-Committee Investigation.** Each special committee
43 must determine the appropriate extent and methods of the investigation in light of
44 the allegations of the complaint. If, in the course of the investigation, the committee
45 has cause to believe that the subject judge may have engaged in misconduct or has a
46 disability that is beyond the scope of the complaint, the committee must refer the
47 new matter to the chief judge for action under Rule 5 or Rule 11.
- 48 (b) **Criminal Conduct.** If the committee's investigation concerns conduct that may be a
49 crime, the committee must consult with the appropriate prosecutorial authorities to

1 **the extent permitted by the Act to avoid compromising any criminal investigation.**
2 **The committee has final authority over the timing and extent of its investigation and**
3 **the formulation of its recommendations.**

4 (c) **Staff.** The committee may arrange for staff assistance to conduct the investigation.
5 It may use existing staff of the judicial branch or may hire special staff through the
6 **Director of the Administrative Office of the United States Courts.**

7 (d) **Delegation of Subpoena Power; Contempt.** The chief judge may delegate the
8 **authority to exercise the committee's subpoena powers. The judicial council or**
9 **special committee may institute a contempt proceeding under 28 U.S.C. § 332(d)**
10 **against anyone who fails to comply with a subpoena.**

11 12 **Commentary on Rule 13**

13
14 This Rule is adapted from the Illustrative Rules.

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

25
26 One of the difficult questions that can arise is the relationship between proceedings under
27 the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the
28 special committee in cases in which criminal conduct is suspected, but gives the committee the
29 authority to determine the appropriate pace of its activity in light of any criminal investigation.

30
31 Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena
32 powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be
33 issued on behalf of judicial councils by the circuit clerk "at the direction of the chief judge of the
34 circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates someone
35 else as presiding officer of a special committee, the presiding officer also be delegated the
36 authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is
37 not intended to imply, however, that the decision to use the subpoena power is exercisable by the
38 presiding officer alone. *See* Rule 12(g).

39 40 **14. Conduct of Hearings by Special Committee**

41 (a) **Purpose of Hearings.** The committee may hold hearings to take testimony and
42 receive other evidence, to hear argument, or both. If the committee is investigating
43 allegations against more than one judge, it may hold joint or separate hearings.

44 (b) **Committee Evidence.** Subject to Rule 15, the committee must obtain material,
45 nonredundant evidence in the form it considers appropriate. In the committee's
46 discretion, evidence may be obtained by committee members, staff, or both.
47 Witnesses offering testimonial evidence may include the complainant and the
48 subject judge.

- 1 (c) **Counsel for Witnesses.** The subject judge has the right to counsel. The special
2 committee has discretion to decide whether other witnesses may have counsel
3 present when they testify.
- 4 (d) **Witness Fees.** Witness fees must be paid as provided in 28 U.S.C. § 1821.
- 5 (e) **Oath.** All testimony taken at a hearing must be given under oath or affirmation.
- 6 (f) **Rules of Evidence.** The Federal Rules of Evidence do not apply to special-
7 committee hearings.
- 8 (g) **Record and Transcript.** A record and transcript must be made of all hearings.
9

10 Commentary on Rule 14

11
12 This Rule is adapted from Section 353 of the Act and the Illustrative Rules.

13
14 Rule 14 is concerned with the conduct of fact-finding hearings. Special-committee
15 hearings will normally be held only after the investigative work has been completed and the
16 committee has concluded that there is sufficient evidence to warrant a formal fact-finding
17 proceeding. Special-committee proceedings are primarily inquisitorial rather than adversarial.
18 Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing
19 will have something of an adversary character. Nevertheless, that tendency should be moderated
20 to the extent possible. Even though a proceeding will commonly have investigative and hearing
21 stages, committee members should not regard themselves as prosecutors one day and judges the
22 next. Their duty -- and that of their staff -- is at all times to be impartial seekers of the truth.
23

24 Rule 14(b) contemplates that material evidence will be obtained by the committee and
25 presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the
26 hearings should regard it as their role to present evidence representing the entire picture. With
27 respect to testimonial evidence, the subject judge should normally be called as a committee
28 witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena
29 powers are available, subject to the normal testimonial privileges. Although Rule 15(c)
30 recognizes the subject judge's statutory right to call witnesses on his or her own behalf, exercise
31 of this right should not usually be necessary.
32

33 **15. Rights of Subject Judge**

- 34 (a) **Notice.**
 - 35 (1) **Generally.** The subject judge must receive written notice of:
 - 36 (A) the appointment of a special committee under Rule 11(f);
 - 37 (B) the expansion of the scope of an investigation under Rule 13(a);
 - 38 (C) any hearing under Rule 14, including its purposes, the names of any
39 witnesses the committee intends to call, and the text of any statements
40 that have been taken from those witnesses.
 - 41 (2) **Suggestion of additional witnesses.** The subject judge may suggest additional
42 witnesses to the committee.
- 43 (b) **Report of the Special Committee.** The subject judge must be sent a copy of the
44 special committee's report when it is filed with the judicial council.
- 45 (c) **Presentation of Evidence.** At any hearing held under Rule 14, the subject judge has
46 the right to present evidence, to compel the attendance of witnesses, and to compel
47 the production of documents. At the request of the subject judge, the chief judge or
48 the judge's designee must direct the circuit clerk to issue a subpoena to a witness

1 under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to
2 cross-examine committee witnesses, in person or by counsel.

- 3 (d) **Presentation of Argument.** The subject judge may submit written argument to the
4 special committee and must be given a reasonable opportunity to present oral
5 argument at an appropriate stage of the investigation.
- 6 (e) **Attendance at Hearings.** The subject judge has the right to attend any hearing held
7 under Rule 14 and to receive copies of the transcript, of any documents introduced,
8 and of any written arguments submitted by the complainant to the committee.
- 9 (f) **Representation by Counsel.** The subject judge may choose to be represented by
10 counsel in the exercise of any right enumerated in this Rule. As provided in Rule
11 20(e), the United States may bear the costs of the representation.

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Commentary on Rule 15

This Rule is adapted from the Act and the Illustrative Rules.

The Act states that these Rules must contain provisions requiring that "the judge whose conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing." 28 U.S.C. § 358(b)(2). To implement this provision, Rule 15(e) gives the judge the right to attend any hearing held for the purpose of receiving evidence of record or hearing argument under Rule 14.

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

16. Rights of Complainant in Investigation

- (a) **Notice.** The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.
- (b) **Opportunity to Provide Evidence.** If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.
- (c) **Presentation of Argument.** The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.
- (d) **Representation by Counsel.** A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel.
- (e) **Cooperation.** In exercising its discretion under this Rule, a special committee may take into account the degree of the complainant's cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge.

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Commentary on Rule 16

This Rule is adapted from the Act and the Illustrative Rules.

In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) provides that, where a special committee has been appointed and it determines that the complainant may have additional evidence, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the committee may be either a member or staff.

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

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

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

17. Special-Committee Report

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

Commentary on Rule 17

This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for sending a copy of the special-committee report and accompanying statement to the Judicial Conference Committee is new.

1 **ARTICLE V. JUDICIAL-COUNCIL REVIEW**

2
3 **18. Petitions for Review of Chief Judge Dispositions Under**
4 **Rule 11(c), (d), or (e)**

- 5 (a) **Petitions for Review.** After the chief judge issues an order under Rule 11(c), (d), or
6 (e), a complainant or subject judge may petition the judicial council of the circuit to
7 review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council
8 may refer a petition for review filed under this Rule to a panel of no fewer than five
9 members of the council, at least two of whom must be district judges.
- 10 (b) **When to File; Form; Where to File.** A petition for review must be filed in the office
11 of the circuit clerk within 35 days of the date on the clerk's letter informing the
12 parties of the chief judge's order. The petition should be in letter form, addressed
13 to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability
14 Petition." The name of the subject judge must not be shown on the envelope. The
15 letter should be typewritten or otherwise legible. It should begin with "I hereby
16 petition the judicial council for review of . . ." and state the reasons why the
17 petition should be granted. It must be signed.
- 18 (c) **Receipt and Distribution of Petition.** A circuit clerk who receives a petition for
19 review filed within the time allowed and in proper form must:
20 (1) acknowledge its receipt and send a copy to the complainant or subject judge,
21 as the case may be;
22 (2) promptly distribute to each member of the judicial council, or its relevant
23 panel, except for any member disqualified under Rule 25, or make available
24 in the manner provided by local rule, the following materials:
25 (A) copies of the complaint;
26 (B) all materials obtained by the chief judge in connection with the
27 inquiry;
28 (C) the chief judge's order disposing of the complaint;
29 (D) any memorandum in support of the chief judge's order;
30 (E) the petition for review; and
31 (F) an appropriate ballot;
32 (3) send the petition for review to the Judicial Conference Committee on
33 Judicial Conduct and Disability. Unless the Judicial Conference Committee
34 requests them, the clerk will not send copies of the materials obtained by the
35 chief judge.
- 36 (d) **Untimely Petition.** The clerk must refuse to accept a petition that is received after
37 the deadline in (b).
- 38 (e) **Timely Petition Not in Proper Form.** When the clerk receives a petition filed within
39 the time allowed but in a form that is improper to a degree that would substantially
40 impair its consideration by the judicial council — such as a document that is
41 ambiguous about whether it is intended to be a petition for review — the clerk must
42 acknowledge its receipt, call the filer's attention to the deficiencies, and give the filer
43 the opportunity to correct the deficiencies within 21 days of the date of the clerk's
44 letter about the deficiencies or within the original deadline for filing the petition,
45 whichever is later. If the deficiencies are corrected within the time allowed, the
46 clerk will proceed according to paragraphs (a) and (c) of this Rule. If the
47 deficiencies are not corrected, the clerk must reject the petition.
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Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

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

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

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

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

19. Judicial-Council Disposition of Petitions for Review

- (a) **Rights of Subject Judge.** At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Judicial Conference Committee on Judicial Conduct and Disability. The subject judge must not otherwise communicate with individual council members about the matter. The subject judge must be given copies of any communications to the judicial council from the complainant.
- (b) **Judicial-Council Action.** After considering a petition for review and the materials before it, a judicial council may:
- (1) affirm the chief judge's disposition by denying the petition;
 - (2) return the matter to the chief judge with directions to conduct a further inquiry under Rule 11(b) or to identify a complaint under Rule 5;
 - (3) return the matter to the chief judge with directions to appoint a special committee under Rule 11(f); or
 - (4) in exceptional circumstances, take other appropriate action.
- (c) **Notice of Council Decision.** Copies of the judicial council's order, together with any accompanying memorandum in support of the order or separate concurring or dissenting statements, must be given to the complainant, the subject judge, and the Judicial Conference Committee on Judicial Conduct and Disability.

- 1 (d) **Memorandum of Council Decision.** If the council's order affirms the chief judge's
 2 disposition, a supporting memorandum must be prepared only if the judicial council
 3 concludes that there is a need to supplement the chief judge's explanation. A
 4 memorandum supporting a council order must not include the name of the
 5 complainant or the subject judge.
- 6 (e) **Review of Judicial-Council Decision.** If the judicial council's decision is adverse to
 7 the petitioner, and if no member of the council dissented on the ground that a
 8 special committee should be appointed under Rule 11(f), the complainant must be
 9 notified that he or she has no right to seek review of the decision. If there was a
 10 dissent, the petitioner must be informed that he or she can file a petition for review
 11 under Rule 21(b) solely on the issue of whether a special committee should be
 12 appointed.
- 13 (f) **Public Availability of Judicial-Council Decision.** Materials related to the council's
 14 decision must be made public to the extent, at the time, and in the manner set forth
 15 in Rule 24.

16
 17 **Commentary on Rule 19**

18
 19 This Rule is largely adapted from the Act and is self-explanatory.

20
 21 The council should ordinarily review the decision of the chief judge on the merits,
 22 treating the petition for review for all practical purposes as an appeal. The judicial council may
 23 respond to a petition by affirming the chief judge's order, remanding the matter, or, in
 24 exceptional cases, taking other appropriate action.

25
 26 **20. Judicial-Council Consideration of Reports and Recommendations of**
 27 **Special Committees**

- 28 (a) **Rights of Subject Judge.** Within 21 days after the filing of the report of a special
 29 committee, the subject judge may send a written response to the members of the
 30 judicial council. The judge must also be given an opportunity to present argument
 31 through counsel, written or oral, as determined by the council. The judge must not
 32 otherwise communicate with council members about the matter.
- 33 (b) **Judicial-Council Action.**
- 34 (1) **Discretionary actions.** Subject to the judge's rights set forth in subsection (a),
 35 the judicial council may:
- 36 (A) **dismiss the complaint because:**
- 37 (i) even if the claim is true, the claimed conduct is not conduct
 38 prejudicial to the effective and expeditious administration of
 39 the business of the courts and does not indicate a mental or
 40 physical disability resulting in inability to discharge the duties
 41 of office;
- 42 (ii) the complaint is directly related to the merits of a decision or
 43 procedural ruling;
- 44 (iii) the facts on which the complaint is based have not been
 45 established; or
- 46 (iv) the complaint is otherwise not appropriate for consideration
 47 under 28 U.S.C. §§ 351–364.
- 48

- 1 (B) conclude the proceeding because appropriate corrective action has
2 been taken or intervening events have made the proceeding
3 unnecessary.
- 4 (C) refer the complaint to the Judicial Conference of the United States
5 with the council's recommendations for action.
- 6 (D) take remedial action to ensure the effective and expeditious
7 administration of the business of the courts, including:
8 (i) censuring or reprimanding the subject judge, either by private
9 communication or by public announcement;
10 (ii) ordering that no new cases be assigned to the subject judge for
11 a limited, fixed period;
12 (iii) in the case of a magistrate judge, ordering the chief judge of
13 the district court to take action specified by the council,
14 including the initiation of removal proceedings under 28 U.S.C.
15 § 631(i) or 42 U.S.C. § 300aa-12(c)(2);
16 (iv) in the case of a bankruptcy judge, removing the judge from
17 office under 28 U.S.C. § 152(e);
18 (v) in the case of a circuit or district judge, requesting the judge to
19 retire voluntarily with the provision (if necessary) that
20 ordinary length-of-service requirements will be waived; and
21 (vi) in the case of a circuit or district judge who is eligible to retire
22 but does not do so, certifying the disability of the judge under
23 28 U.S.C. § 372(b) so that an additional judge may be
24 appointed.
- 25 (E) take any combination of actions described in (b)(1)(A)–(D) of this
26 Rule that is within its power.
- 27 (2) **Mandatory actions.** A judicial council must refer a complaint to the Judicial
28 Conference if the council determines that a circuit judge or district judge
29 may have engaged in conduct that:
30 (A) might constitute ground for impeachment; or
31 (B) in the interest of justice, is not amenable to resolution by the judicial
32 council.
- 33 (c) **Inadequate Basis for Decision.** If the judicial council finds that a special
34 committee's report, recommendations, and record provide an inadequate basis for
35 decision, it may return the matter to the committee for further investigation and a
36 new report, or it may conduct further investigation. If the judicial council decides
37 to conduct further investigation, the subject judge must be given adequate prior
38 notice in writing of that decision and of the general scope and purpose of the
39 additional investigation. The judicial council's conduct of the additional
40 investigation must generally accord with the procedures and powers set forth in
41 Rules 13 through 16 for the conduct of an investigation by a special committee.
- 42 (d) **Council Vote.** Council action must be taken by a majority of those members of the
43 council who are not disqualified. A decision to remove a bankruptcy judge from
44 office requires a majority vote of all the members of the council.
- 45 (e) **Recommendation for Fee Reimbursement.** If the complaint has been finally
46 dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge
47 so requests, the judicial council may recommend that the Director of the
48 Administrative Office of the United States Courts use funds appropriated to the
49 Judiciary to reimburse the judge for reasonable expenses incurred during the

1 investigation, when those expenses would not have been incurred but for the
2 requirements of the Act and these Rules. Reasonable expenses include attorneys'
3 fees and expenses related to a successful defense or prosecution of a proceeding
4 under Rule 21(a) or (b).

- 5 (f) **Council Action.** Council action must be by written order. Unless the council finds
6 that extraordinary reasons would make it contrary to the interests of justice, the
7 order must be accompanied by a memorandum setting forth the factual
8 determinations on which it is based and the reasons for the council action. The
9 order and the supporting memorandum must be provided to the complainant, the
10 subject judge, and the Judicial Conference Committee on Judicial Conduct and
11 Disability. The complainant and the subject judge must be notified of any right to
12 review of the judicial council's decision as provided in Rule 21(b).

13
14 **Commentary on Rule 20**

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

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

23
24 Rule 20(c) provides that if the judicial council decides to conduct an additional
25 investigation, the subject judge must be given adequate prior notice in writing of that decision
26 and of the general scope and purpose of the additional investigation. The conduct of the
27 investigation will be generally in accordance with the procedures set forth in Rules 13 through
28 16 for the conduct of an investigation by a special committee. However, if hearings are held, the
29 council may limit testimony or the presentation of evidence to avoid unnecessary repetition of
30 testimony and evidence before the special committee.

31
32 Rule 20(d) provides that council action must be taken by a majority of those members of
33 the council who are not disqualified, except that a decision to remove a bankruptcy judge from
34 office requires a majority of all the members of the council as required by 28 U.S.C. § 152(e).
35 However, it is inappropriate to apply a similar rule to the less severe actions that a judicial
36 council may take under the Act. If some members of the council are disqualified in the matter,
37 their disqualification should not be given the effect of a vote against council action.

38
39 With regard to Rule 20(e), the judicial council, on the request of the subject judge, may
40 recommend to the Director of the Administrative Office of the United States Courts that the
41 subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The
42 judicial council has the authority to recommend such reimbursement where, after investigation
43 by a special committee, the complaint has been finally dismissed or concluded under subsection
44 (b)(1) (A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for
45 the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words,
46 one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion.

47
48 Rule 20(f) requires that council action normally be supported with a memorandum of
49 factual determinations and reasons and that notice of the action be given to the complainant and

1 the subject judge. Rule 20(f) also requires that the notification to the complainant and the
2 subject judge include notice of any right to petition for review of the council's decision under
3 Rule 21(b).
4

5 **ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE** 6 **ON CONDUCT AND DISABILITY** 7

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

9 (a) **Review by Committee.** The Committee on Judicial Conduct and Disability,
10 consisting of seven members, considers and disposes of all petitions for review under
11 (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its
12 disposition of petitions for review is ordinarily final. The Judicial Conference of the
13 United States may, in its sole discretion, review any such Committee decision, but a
14 complainant or subject judge does not have a right to this review.

15 (b) **Reviewable Matters.**

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

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

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

24 (2) **Upon Committee's initiative.** At its initiative and in its sole discretion, the
25 Committee may review any judicial-council order entered under Rule
26 19(b)(1) or (4), but only to determine whether a special committee should be
27 appointed. Before undertaking the review, the Committee must invite that
28 judicial council to explain why it believes the appointment of a special
29 committee is unnecessary, unless the reasons are clearly stated in the judicial
30 council's order denying the petition for review. If the Committee believes
31 that it would benefit from a submission by the subject judge, it may issue an
32 appropriate request. If the Committee determines that a special committee
33 should be appointed, the Committee must issue a written decision giving its
34 reasons.

35 (c) **Committee Vote.** Any member of the Committee from the same circuit as the
36 subject judge is disqualified from considering or voting on a petition for review.
37 Committee decisions under (b) of this Rule must be by majority vote of the qualified
38 Committee members. If only six members are qualified to vote on a petition for
39 review, the decision must be made by a majority of a panel of five members drawn
40 from a randomly selected list that rotates after each decision by a panel drawn from
41 the list. The members who will determine the petition must be selected based on
42 committee membership as of the date on which the petition is received. Those
43 members selected to hear the petition should serve in that capacity until final
44 disposition of the petition, whether or not their term of committee membership has
45 ended. If only four members are qualified to vote, the Chief Justice must appoint, if
46 available, an ex-member of the Committee or, if not, another United States judge to
47 consider the petition.
48

- 1 (d) **Additional Investigation.** Except in extraordinary circumstances, the Committee
2 will not conduct an additional investigation. The Committee may return the matter
3 to the judicial council with directions to undertake an additional investigation. If
4 the Committee conducts an additional investigation, it will exercise the powers of
5 the Judicial Conference under 28 U.S.C. § 331.
- 6 (e) **Oral Argument; Personal Appearance.** There is ordinarily no oral argument or
7 personal appearance before the Committee. In its discretion, the Committee may
8 permit written submissions from the complainant or subject judge.
- 9 (f) **Committee Decisions.** Committee decisions under this Rule must be transmitted
10 promptly to the Judicial Conference of the United States. Other distribution will be
11 by the Administrative Office at the direction of the Committee chair.
- 12 (g) **Finality.** All orders of the Judicial Conference or of the Committee (when the
13 Conference does not exercise its power of review) are final.

14
15 **Commentary on Rule 21**

16
17 This Rule is largely self-explanatory.

18
19 Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference
20 Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review
21 of such dispositions by the Conference. However, there is no right to such review in any party.
22

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

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

38 Under this Rule, all Committee decisions are final in that they are unreviewable unless
39 the Judicial Conference, in its discretion, decides to review a decision. Committee decisions,
40 however, do not necessarily constitute final action on a complaint for purposes of Rule 24.
41

42 **22. Procedures for Review**

- 43 (a) **Filing a Petition for Review.** A petition for review of a judicial-council decision may
44 be filed by sending a brief written statement to the Judicial Conference Committee
45 on Judicial Conduct and Disability, addressed to:
46
47
48

1 members of the council or Committee may contain information and exhibits that the
2 authors consider appropriate for inclusion, and the information and exhibits may be
3 made public.

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

44 Commentary on Rule 23

45 Rule 23 was adapted from the Illustrative Rules.
46

47 The Act applies a rule of confidentiality to "papers, documents, and records of
48 proceedings related to investigations conducted under this chapter" and states that they may not
49

1 be disclosed "by any person in any proceeding," with enumerated exceptions. 28 U.S.C.
2 § 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are
3 subject to the rule, and who is within the circle of people who may have access to information
4 without breaching the rule?
5

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

11 With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly
12 to consideration of a complaint at any stage.
13

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

22 In extraordinary circumstances, a chief judge may disclose the existence of a proceeding
23 under these Rules. The disclosure of such information in high-visibility or controversial cases is
24 to reassure the public that the federal judiciary is capable of redressing judicial misconduct or
25 disability. Moreover, the confidentiality requirement does not prevent the chief judge from
26 "communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the
27 matter," as part of a limited inquiry conducted by the chief judge under Rule 11(b).
28

29 Rule 23 recognizes that there must be some exceptions to the Act's confidentiality
30 requirement. For example, the Act requires that certain orders and the reasons for them must be
31 made public. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that memoranda supporting chief
32 judge and council orders, as well as dissenting opinions and separate statements, may contain
33 references to information that would otherwise be confidential and that such information may be
34 made public. However, subsection (c) is subject to Rule 24(a) which provides the general rule
35 regarding the public availability of decisions. For example, the name of a subject judge cannot
36 be made public in a decision if disclosure of the name is prohibited by that Rule.
37

38 The Act makes clear that there is a barrier of confidentiality between the judicial branch
39 and the legislative. It provides that material may be disclosed to Congress only if it is believed
40 necessary to an impeachment investigation or trial of a judge. 28 U.S.C. § 360(a)(2).
41 Accordingly, Section 355(b) of the Act requires the Judicial Conference to transmit the record of
42 the proceeding to the House of Representatives if the Conference believes that impeachment of a
43 subject judge may be appropriate. Rule 23(f) implements this requirement.
44

45 The Act provides that confidential materials may be disclosed if authorized in writing by
46 the subject judge and by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g) implements this
47 requirement. Once the subject judge has consented to the disclosure of confidential materials
48 related to a complaint, the chief judge ordinarily will refuse consent only to the extent necessary
49 to protect the confidentiality interests of the complainant or of witnesses who have testified in

1 investigatory proceedings or who have provided information in response to a limited inquiry
2 undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief judge to
3 require that the identities of the complainant or of such witnesses, as well as any identifying
4 information, be shielded in any materials disclosed, except insofar as the chief judge has secured
5 the consent of the complainant or of a particular witness to disclosure, or there is a demonstrated
6 need for disclosure of the information that, in the judgment of the chief judge, outweighs the
7 confidentiality interest of the complainant or of a particular witness (as may be the case where
8 the complainant is delusional or where the complainant or a particular witness has already
9 demonstrated a lack of concern about maintaining the confidentiality of the proceedings).

10
11 Rule 23(h) permits disclosure of additional information in circumstances not enumerated.
12 For example, disclosure may be appropriate to permit a prosecution for perjury based on
13 testimony given before a special committee. Another example might involve evidence of
14 criminal conduct by a judge discovered by a special committee.

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

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

37 38 **24. Public Availability of Decisions**

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

- 44 **(1) if the complaint is finally dismissed under Rule 11(c) without the**
45 **appointment of a special committee, or if it is concluded under Rule 11(d)**
46 **because of voluntary corrective action, the publicly available materials must**
47 **not disclose the name of the subject judge without his or her consent.**
- 48 **(2) if the complaint is concluded because of intervening events, or dismissed at**
49 **any time after a special committee is appointed, the judicial council must**
50 **determine whether the name of the subject judge should be disclosed.**

1 Rule 24 provides for public availability of orders of the chief judge, the judicial council,
2 and the Judicial Conference Committee on Judicial Conduct and Disability and the texts of any
3 memoranda supporting their orders, together with any dissenting opinions or separate statements
4 by members of the judicial council. However, these orders and memoranda are to be made
5 public only when final action on the complaint has been taken and any right of review has been
6 exhausted. The provision that decisions will be made public only after final action has been
7 taken is designed in part to avoid public disclosure of the existence of pending proceedings.
8 Whether the name of the subject judge is disclosed will then depend on the nature of the final
9 action. If the final action is an order predicated on a finding of misconduct or disability (other
10 than a privately communicated censure or reprimand) the name of the judge must be made
11 public. If the final action is dismissal of the complaint, the name of the subject judge must not
12 be disclosed. Rule 24(a)(1) provides that where a proceeding is concluded under Rule 11(d) by
13 the chief judge on the basis of voluntary corrective action, the name of the subject judge must
14 not be disclosed. Shielding the name of the subject judge in this circumstance should encourage
15 informal disposition.

16
17 If a complaint is dismissed as moot, or because intervening events have made action on
18 the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the
19 judicial council to determine whether the subject judge will be identified. In such a case, no
20 final decision has been rendered on the merits, but it may be in the public interest -- particularly
21 if a judicial officer resigns in the course of an investigation -- to make the identity of the judge
22 known.

23
24 Once a special committee has been appointed, and a proceeding is concluded by the full
25 council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of
26 the name of the subject judge.

27
28 Finally, Rule 24(a)(5) provides that the identity of the complainant will be disclosed only
29 if the chief judge so orders. Identifying the complainant when the subject judge is not identified
30 would increase the likelihood that the identity of the subject judge would become publicly
31 known, thus circumventing the policy of nondisclosure. It may not always be practicable to
32 shield the complainant's identity while making public disclosure of the judicial council's order
33 and supporting memoranda; in some circumstances, moreover, the complainant may consent to
34 public identification.

35 36 **25. Disqualification**

- 37 (a) **General Rule.** Any judge is disqualified from participating in any proceeding under
38 these Rules if the judge, in his or her discretion, concludes that circumstances
39 warrant disqualification. If the complaint is filed by a judge, that judge is
40 disqualified from participating in any consideration of the complaint except to the
41 extent that these Rules provide for a complainant's participation. A chief judge who
42 has identified a complaint under Rule 5 is not automatically disqualified from
43 considering the complaint.
- 44 (b) **Subject Judge.** A subject judge is disqualified from considering the complaint
45 except to the extent that these Rules provide for participation by a subject judge.
- 46 (c) **Chief Judge Not Disqualified from Considering a Petition for Review of a Chief**
47 **Judge's Order.** If a petition for review of a chief judge's order entered under Rule
48 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the
49 chief judge is not disqualified from participating in the council's consideration of
50 the petition.

- 1 (d) **Member of Special Committee Not Disqualified.** A member of the judicial council
2 who serves on a special committee, including the chief judge, is not disqualified
3 from participating in council consideration of the committee's report.
- 4 (e) **Subject Judge's Disqualification After Appointment of a Special Committee.** Upon
5 appointment of a special committee, the subject judge is automatically disqualified
6 from participating in any proceeding arising under the Act or these Rules as a
7 member of any special committee, the judicial council of the circuit, the Judicial
8 Conference of the United States, and the Judicial Conference Committee on Judicial
9 Conduct and Disability. The disqualification continues until all proceedings on the
10 complaint against the subject judge are finally terminated with no further right of
11 review.
- 12 (f) **Substitute for Disqualified Chief Judge.** If the chief judge is disqualified from
13 participating in consideration of the complaint, the duties and responsibilities of the
14 chief judge under these Rules must be assigned to the most-senior active circuit
15 judge not disqualified. If all circuit judges in regular active service are disqualified,
16 the judicial council may determine whether to request a transfer under Rule 26, or,
17 in the interest of sound judicial administration, to permit the chief judge to dispose
18 of the complaint on the merits. Members of the judicial council who are named in
19 the complaint may participate in this determination if necessary to obtain a quorum
20 of the judicial council.
- 21 (g) **Judicial-Council Action When Multiple Judges Are Disqualified.** Notwithstanding
22 any other provision in these Rules to the contrary,
23 (1) a member of the judicial council who is a subject judge may participate in its
24 disposition if:
25 (A) participation by one or more subject judges is necessary to obtain a
26 quorum of the judicial council;
27 (B) the judicial council finds that the lack of a quorum is due to the
28 naming of one or more judges in the complaint for the purpose of
29 disqualifying that judge or judges, or to the naming of one or more
30 judges based on their participation in a decision excluded from the
31 definition of misconduct under Rule 3(h)(3); and
32 (C) the judicial council votes that it is necessary, appropriate, and in the
33 interest of sound judicial administration that one or more subject
34 judges be eligible to act.
35 (2) otherwise disqualified members may participate in votes taken under
36 (g)(1)(B) and (g)(1)(C).
- 37 (h) **Disqualification of Members of the Judicial Conference Committee.** No member of
38 the Judicial Conference Committee on Judicial Conduct and Disability is
39 disqualified from participating in any proceeding under the Act or these Rules
40 because of consultations with a chief judge, a member of a special committee, or a
41 member of a judicial council about the interpretation or application of the Act or
42 these Rules, unless the member believes that the consultation would prevent fair-
43 minded participation.
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Commentary on Rule 25

Rule 25 is adapted from the Illustrative Rules.

Subsection (a) provides the general rule for disqualification. Of course, a judge is not disqualified simply because the subject judge is on the same court. However, this subsection recognizes that there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted.

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

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

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

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

1 A similar problem is created by successive complaints arising out of the same underlying
2 grievance. For example, a complainant files a complaint against a district judge based on alleged
3 misconduct, and the complaint is dismissed by the chief judge under the statute. The
4 complainant may then file a complaint against the chief judge for dismissing the first complaint,
5 and when that complaint is dismissed by the next senior judge, still a third complaint may be
6 filed. The threat is that the complainant will bump down the seniority ladder until, once again,
7 there is no member of the court of appeals who can serve as acting chief judge for the purpose of
8 the next complaint. Similarly, complaints involving the merits of litigation may involve a series
9 of decisions in which many judges participated or in which a rehearing en banc was denied by
10 the court of appeals, and the complaint may name a majority of the judicial council as subject
11 judges.

12 In recognition that these multiple-judge complaints are virtually always meritless, the
13 judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in
14 the interest of sound judicial administration to permit the chief judge to dispose of a complaint
15 where it would otherwise be impossible for any active circuit judge in the circuit to act, and
16 (2) whether it is necessary, appropriate, and in the interest of sound judicial administration, after
17 appropriate findings as to need and justification are made, to permit subject judges of the judicial
18 council to participate in the disposition of a petition for review where it would otherwise be
19 impossible to obtain a quorum.

20
21 Applying a rule of necessity in these situations is consistent with the appearance of
22 justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the
23 rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council
24 1992) (same). There is no unfairness in permitting the chief judge to dispose of a patently
25 insubstantial complaint that names all active circuit judges in the circuit.

26
27 Similarly, there is no unfairness in permitting subject judges, in these circumstances, to
28 participate in the review of a chief judge's dismissal of an insubstantial complaint. The
29 remaining option is to assign the matter to another body. Among other alternatives, the council
30 may request a transfer of the petition under Rule 26. Given the administrative inconvenience
31 and delay involved in these alternatives, it is desirable to request a transfer only if the judicial
32 council determines that the petition is substantial enough to warrant such action.

33
34 In the unlikely event that a quorum of the judicial council cannot be obtained to consider
35 the report of a special committee, it would normally be necessary to request a transfer under
36 Rule 26.

37
38 Rule 25(h) recognizes that the jurisdictional statement of the Judicial Conference
39 Committee contemplates consultation between members of the Committee and judicial
40 participants in proceedings under the Act and these Rules. Such consultation should not
41 automatically preclude participation by a member in that proceeding.

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

43
44 **In exceptional circumstances, a chief judge or a judicial council may ask the Chief Justice**
45 **to transfer a proceeding based on a complaint identified under Rule 5 or filed under Rule 6**
46 **to the judicial council of another circuit. The request for a transfer may be made at any**
47 **stage of the proceeding before a reference to the Judicial Conference under Rule**
48 **20(b)(1)(C) or 20(b)(2) or a petition for review is filed under Rule 22. Upon receiving such**

1 **a request, the Chief Justice may refuse the request or select the transferee judicial council,**
2 **which may then exercise the powers of a judicial council under these Rules.**

3
4 **Commentary on Rule 26**

5
6 Rule 26 is new; it implements the Breyer Committee's recommended use of transfers.
7 Breyer Committee Report, 239 F.R.D. at 214-15.

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

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

22
23 **27. Withdrawal of Complaints and Petitions for Review**

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

37
38 **Commentary on Rule 27**

39
40 Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once
41 begun, as a matter of public business rather than as the property of the complainant.
42 Accordingly, the chief judge or the judicial council remains responsible for addressing any
43 complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

44
45 Under subsection 27(a), a complaint pending before the chief judge may be withdrawn if
46 the chief judge consents. Where the complaint clearly lacked merit, the chief judge may
47 accordingly be saved the burden of preparing a formal order and supporting memorandum.
48 However, the chief judge may, or be obligated under Rule 5, to identify a complaint based on
49 allegations in a withdrawn complaint.

1 If the chief judge appoints a special committee, Rule 27(b) provides that the complaint
2 may be withdrawn only with the consent of both the body before which it is pending (the special
3 committee or the judicial council) and the subject judge. Once a complaint has reached the stage
4 of appointment of a special committee, a resolution of the issues may be necessary to preserve
5 public confidence. Moreover, the subject judge is given the right to insist that the matter be
6 resolved on the merits, thereby eliminating any ambiguity that might remain if the proceeding
7 were terminated by withdrawal of the complaint.
8

9 With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted
10 authority to withdraw the petition. It is thought that the public's interest in the proceeding is
11 adequately protected, because there will necessarily have been a decision by the chief judge and
12 often by the judicial council as well in such a case.
13

14 **28. Availability of Rules and Forms**

15 **These Rules and copies of the complaint form as provided in Rule 6(a) must be available**
16 **without charge in the office of the clerk of each court of appeals, district court, bankruptcy**
17 **court, or other federal court whose judges are subject to the Act. Each court must also**
18 **make these Rules and the complaint form available on the court's website, or provide an**
19 **Internet link to the Rules and complaint form that are available on the appropriate court**
20 **of appeals' website.**
21

22 **29. Effective Date**

23 **These Rules will become effective 30 days after promulgation by the Judicial Conference of**
24 **the United States.**
25

Please use the misconduct complaint form designated by Ninth Circuit Judicial Council:
http://www.ce9.uscourts.gov/misconduct/complaint_form.pdf

A P P E N D I X

COMPLAINT FORM

A two-page complaint form follows.

If the complaint is about a single judge, the complainant must file five copies of (1) the complaint form, (2) the statement of facts, and (3) any documents submitted. If the complaint is about more than one judge, one extra copy must be filed for each additional subject judge.

These materials should be mailed to:

Clerk, United States Court of Appeals
P.O. Box 193939
San Francisco, CA 94119-3939.

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

To begin the complaint process, complete this form and prepare the brief statement of facts described in item 5 (below). The RULES FOR JUDICIAL-CONDUCT AND JUDICIAL-DISABILITY PROCEEDINGS, adopted by the Judicial Conference of the United States, contain information on what to include in a complaint (Rule 6), where to file a complaint (Rule 7), and other important matters. The rules are available in federal court clerks' offices, on individual federal courts' Web sites, and on www.uscourts.gov.

Your complaint (this form and the statement of facts) should be typewritten and must be legible. For the number of copies to file, consult the local rules or clerk's office of the court in which your complaint is required to be filed. Enclose each copy of the complaint in an envelope marked "COMPLAINT OF MISCONDUCT" or "COMPLAINT OF DISABILITY" and submit it to the appropriate clerk of court. **Do not put the name of any judge on the envelope.**

1. Name of Complainant: _____
Contact Address: _____

Daytime telephone: (___) _____

2. Name(s) of Judge(s): _____
Court: _____

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

Yes No

If "yes," give the following information about each lawsuit:

Court: _____

Case Number: _____

Docket number of any appeal to the _____ Circuit: _____

Are (were) you a party or lawyer in the lawsuit?

Party Lawyer Neither

If you are (were) a party and have (had) a lawyer, give the lawyer's name, address, and telephone number:

4. Have you filed any lawsuits against the judge?

Yes No

If "yes," give the following information about each such lawsuit:

Court: _____

Case Number: _____

Present status of lawsuit: _____

Name, address, and telephone number of your lawyer for the lawsuit against the judge:

Court to which any appeal has been taken in the lawsuit against the judge:

Docket number of the appeal: _____

Present status of the appeal: _____

5. **Brief Statement of Facts.** Attach a brief statement of the specific facts on which the claim of judicial misconduct or disability is based. Include what happened, when and where it happened, and any information that would help an investigator check the facts. If the complaint alleges judicial disability, also include any additional facts that form the basis of that allegation.

6. **Declaration and signature:**

I declare under penalty of perjury that the statements made in this complaint are true and correct to the best of my knowledge.

(Signature) _____

(Date) _____