

**RULES GOVERNING JUDICIAL CONDUCT AND
DISABILITY PROCEEDINGS UNDERTAKEN
PURSUANT TO 28 U.S.C. §§ 351-364**

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**RULES GOVERNING COMPLAINTS OF
JUDICIAL CONDUCT AND DISABILITY**

Preface

These Rules and accompanying Commentaries were promulgated by the Judicial Conference of the United States, after public comment, pursuant to 28 U.S.C. §§ 331 and 358, to establish standards and procedures for addressing complaints filed or identified by chief circuit judges, under the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364.

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ARTICLE I. GENERAL PROVISIONS

Rule 1. Scope.

These Rules govern the conduct of proceedings undertaken pursuant to 28 U.S.C. §§ 351-364 regarding whether a covered judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts or is unable to discharge the duties of office by reason of mental or physical disability.

Commentary to Rule 1

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

The Breyer Committee found that it could not evaluate implementation of the Act without establishing interpretive standards, Breyer Report, 239 F.R.D. at 132, and that a major problem faced by chief circuit judges in implementing the Act was the lack of authoritative interpretive standards. See id. at 212-15. The Breyer Committee then established standards to guide its evaluations, some of which were new formulations and some of which were taken from the “Illustrative Rules Governing Complaints of Judicial Misconduct and Disability,” discussed below. The principal standards used by the Breyer Committee are in Appendix E of its Report. Id. at 238.

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

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

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

Rule 2. Effect and Construction.

Notwithstanding any rule of a judicial council to the contrary, these Rules are mandatory unless a chief circuit judge, a special committee, a judicial council, the Judicial Conference Committee on Judicial Conduct and Disability, or the Judicial Conference of the United States, in the performance of acts authorized by 28 U.S.C. §§ 351-364 and these Rules, expressly finds that exceptional circumstances render the application of a Rule in a particular proceeding manifestly unjust or contrary to the purposes of 28 U.S.C. §§ 351-364 or these Rules. Judicial councils may promulgate additional rules to implement 28 U.S.C. §§ 351-364 that are not inconsistent with these Rules.

Commentary to Rule 2

Unlike the Illustrative Rules, these Rules provide mandatory and nationally uniform provisions governing the substantive and procedural aspects of misconduct and disability proceedings under the Act. The mandatory nature of these Rules is authorized by 28 U.S.C. § 358(a) and (c). Rule 2, however, recognizes that unforeseen and exceptional circumstances may call for a different approach in particular cases.

Judicial councils retain the power to promulgate rules consistent with these Rules. For example, a local rule may authorize the electronic distribution of materials pursuant to Rule 8(b).

Rule 3. Definitions.

(a) Complaint. A complaint is:

- (1) a document filed by any person in his or her individual capacity or on behalf of a professional organization pursuant to Rule 6; or**
(2) information from any source, other than a document described in (a)(1), known to a chief circuit judge, constituting probable cause to believe that misconduct or disability involving a covered judge exists, whether or not the information is framed as, or intended to be, an allegation of misconduct or disability.

(b) Misconduct. Misconduct is:

- (1) conduct prejudicial to the effective and expeditious administration of the business of the courts. Misconduct may include, but is not limited to, use of the judge's office to obtain special treatment for friends and relatives; acceptance of bribes, gifts, or other personal favors related to the judicial office; improper discussions with parties or counsel for one side in a case; treating litigants or attorneys in an egregiously and demonstrably hostile manner; engaging in partisan political activity or making partisan statements; participating in organizational fundraising; or violating other specific, mandatory standards of judicial conduct, such as those pertaining to the regulation of gifts, restrictions on outside income, financial disclosure, or abuses of judicial office. Conduct occurring outside the performance of official duties is not excluded if it might have a prejudicial effect on the administration of the business of the courts, including, but not limited to, a**

1 substantial and widespread lowering of public confidence in the courts
2 among reasonable persons.

3 (2) Excluded from the definition of misconduct are:

4 (A) allegations that are directly related to the merits of a decision or
5 procedural ruling. Any allegation that calls into question the correctness
6 of a ruling of a judge, including a failure to recuse, without more, is
7 merits related. However, a complaint that involves both the merits and
8 an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias,
9 or improper conduct in rendering a decision or ruling, such as personally
10 derogatory remarks irrelevant to the issues, is excluded only to the extent
11 it attacks the merits.

12 (B) allegations about delay in rendering a decision or ruling. However, a
13 complaint involving habitual delay in a significant number of unrelated
14 cases or an improper motive in delaying a particular decision is not
15 excluded.

16 (c) Disability. “Disability” is a temporary or permanent condition rendering a
17 judge unable to discharge the duties of the particular judicial office. Examples of disability
18 may include, but are not limited to, substance abuse, the inability to stay awake during
19 court proceedings, or a severe impairment of cognitive abilities.

20 (d) Subject Judge. “Subject judge” means any judge described in Rule 4 who is
21 the subject of a complaint.

22 (e) Chief Circuit Judge. “Chief circuit judge” includes the chief judges of the
23 United States Court of Appeals for the Federal Circuit, United States Court of
24 International Trade, and United States Court of Federal Claims.

25 (f) Judicial Council and Circuit. “Judicial council” and “circuit,” where
26 appropriate, includes the courts mentioned in 28 U.S.C. § 363.

27 (g) Clerk of the Court of Appeals. “Clerk of the court of appeals,” where
28 appropriate, includes clerks of the courts named in 28 U.S.C. § 363.

29 (h) Court of Appeals, District Court, and District Judge. “Courts of appeals,”
30 “district court,” and “district judge,” where appropriate, include the United States Court
31 of Federal Claims, the United States Court of International Trade, and the judges thereof.

32 (i) Magistrate Judge. “Magistrate judge” shall, where appropriate, include
33 special masters appointed by the Court of Federal Claims pursuant to 42 U.S.C. § 300aa-
34 12(c).

35 **Commentary on Rule 3**

36
37 Rule 3 is derived and adapted from the Breyer Committee Report and the Illustrative
38 Rules.

39
40 Unless otherwise specified or the context otherwise indicates, the term “complaint” is
41 used in these Rules to refer both to complaints identified by a chief circuit judge under Rule 5
42 and to complaints filed by complainants under Rule 6.

43
44 Under the Act, a “complaint” may be filed by “any person” or “identified” by a chief
45 circuit judge. See 28 U.S.C. § 351(a) and (b). Under this Rule, complaints may be submitted by
46 a person, in his or her individual capacity, or by a professional organization. Generally, the word
47 “complaint” brings to mind the commencement of an adversary proceeding in which the
48 contending parties are left to present the evidence and legal arguments, and judges play the role

1 of an essentially passive arbiter. The Act, however, establishes an administrative, inquisitorial
2 process. For example, even absent a complaint under Rule 6, chief circuit judges are expected in
3 some circumstances to trigger the process -- “identify a complaint,” see 28 U.S.C. § 351(b) and
4 Rule 5 -- and conduct an investigation without becoming a party. See 28 U.S.C. § 352(a); Breyer
5 Report, 239 F.R.D. at 214; Illustrative Rule 2(j). Even when a complaint is filed by someone
6 other than the chief circuit judge, the complainant lacks many rights that a litigant would have,
7 and the chief circuit judge, instead of being limited to the “four corners of the complaint,” must,
8 under Rule 11, proceed as though misconduct or disability has been alleged where the
9 complainant reveals information of misconduct or disability but does not claim it as such. See
10 Breyer Report, 239 F.R.D. at 183-84.

11
12 An allegation of misconduct or disability filed under Rule 6 is a “complaint,” and the
13 Rule so provides in (a)(1). But both the nature of the process and the use of the term “identify”
14 suggest that the word “complaint” covers more than a document formally triggering the process.
15 The process relies on chief circuit judges considering known information and triggering the
16 process when appropriate. “Identifying” a “complaint,” therefore, is best understood as the chief
17 circuit judge’s concluding that information known to the judge constitutes probable cause to
18 believe that misconduct occurred or a disability exists, whether or not the information is framed
19 as, or intended to be an accusation. This definition is codified in (a)(2).

20
21 The term “prejudicial to the effective and expeditious administration of the business
22 of the courts” is not subject to precise definition, and subsection (b)(1) therefore provides some
23 specific examples. Although the Code of Conduct for United States Judges may be informative,
24 its main precepts are highly general, the Code is in many potential applications aspirational rather
25 than a set of disciplinary rules, and the numerous interpretative opinions represent only the
26 advisory views of the Committee on Codes of Conduct with which there may be permissible
27 disagreement and noncompliance. See, e.g., In re Literary Works in Elec. Databases Copyright
28 Litig., ___ F.3d ___, No. , 2007 WL 4197418 (2d Cir. 2007) (holding recusal not required
29 despite opinion of Committee to the contrary). Ultimately, the responsibility for determining
30 what constitutes misconduct under the statute is the province of the Judicial Council of the
31 Circuit subject to such review and limitations as are ordained by the statute and by these rules.

32
33 Even where specific, mandatory rules exist -- for example, governing the receipt of gifts
34 by judges, outside earned income and financial disclosure obligations -- the distinction between
35 the misconduct statute and the specific, mandatory rules must be borne in mind. For example, an
36 inadvertent, minor violation of any one of these rules, promptly remedied when called to the
37 attention of the judge, might still be a violation but might not rise to the level of misconduct
38 under the statute; by contrast, a pattern of such violations of the Code might well rise to the level
39 of misconduct.

40
41 An allegation can meet the statutory standard even though the judge’s alleged conduct did
42 not occur in the course of the performance of official duties. The Code of Conduct for United
43 States Judges expressly covers a wide range of extra-official activities, and some of these
44 activities may constitute misconduct. For example, allegations that a judge participated in
45 fundraising for a charity or a partisan political event are cognizable under the Act.

46
47 On the other hand, judges are entitled to some leeway in extra-official activities. For
48 example, misconduct may not include a judge being repeatedly and publicly discourteous to a

1 spouse (not including physical abuse) even though this might cause some reasonable people to
2 have diminished confidence in the courts. The Rule states that conduct of this sort is covered
3 only when it might lead to a “substantial and widespread” lowering of such confidence.
4

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

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

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

42 Because of the special need to protect judges’ independence in deciding what to say in an
43 opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a
44 non-frivolous allegation that a judge’s language in a ruling reflected an improper motive. If the
45 judge’s language was relevant to the case at hand -- for example a statement that a claim is
46 legally or factually “frivolous” -- then the judge’s choice of language is presumptively merits-
47 related and excluded, absent evidence apart from the ruling itself suggesting an improper motive.
48 If, on the other hand, the challenged language does not seem relevant on its face, then an

1 additional inquiry under Rule 11 is necessary.
2

3 With regard to Rule 3(b)(2)(B), a complaint of delay in a single case is excluded as
4 merits-related. Such an allegation may be said to challenge the correctness of an official action
5 of the judge -- in other words, assigning a low priority to deciding the particular case. But, by the
6 same token, an allegation of a habitual pattern of delay in a significant number of unrelated cases,
7 or an allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-
8 related.
9

10 Rule 3(c) relates to disability and provides only the most general definition, recognizing
11 that a fact-specific approach is the only one available.
12

13 Subsections (e) through (i) provide technical definitions clarifying the application of the
14 Rules to the various kinds of courts covered.
15

16
17 **Rule 4. Covered Judges.**
18

19 **A complaint under these Rules may concern the actions or capacity only of judges of**
20 **United States courts of appeals, judges of United States district courts, judges of United**
21 **States bankruptcy courts, United States magistrate judges, and judges of the courts**
22 **specified in 28 U.S.C. § 363.**
23

24 **Commentary on Rule 4**
25

26 This Rule tracks the Act. Rule 8(c) and (d) contain provisions as to the handling of
27 complaints against persons not covered by the Act, such as other court personnel, or against both
28 covered judges and non-covered persons.
29

30
31 **ARTICLE II. INITIATION OF A COMPLAINT**
32
33

34 **Rule 5. Identification of a Complaint.**
35

36 **(a) Identifying a Complaint. Subject to Rule 7, where information known to a chief**
37 **circuit judge constitutes reasonable grounds for inquiry into possible misconduct or**
38 **disability on the part of a covered judge and no complaint containing such information has**
39 **been filed under Rule 6, a chief circuit judge may conduct an inquiry, as he or she deems**
40 **appropriate, into the accuracy of such information. If, after such an inquiry, the chief**
41 **circuit judge finds that there is probable cause to believe that misconduct has occurred or a**
42 **disability exists, the chief circuit judge may informally seek a resolution satisfactory to the**
43 **chief circuit judge, if feasible, and, if failing to obtain such a resolution, may identify a**
44 **complaint and, by written order stating the reasons, begin the review provided in Rule 11.**
45 **If the evidence of misconduct is clear and convincing and no informal resolution has been**
46 **achieved or is feasible, the chief circuit judge must identify a complaint. A chief circuit**
47 **judge may not decline to identify a complaint because the person or persons making such**
48 **allegations have not filed a complaint under Rule 6.**

(b) Complaints that Do Not Comply with Rule 6(d). Complaints filed under Rule 6 that do not comply with the requirements of Rule 6(d) must be considered under this Rule.

Commentary to Rule 5

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

The phrase “Subject to Rule 7” in subsection (a) is intended to establish that only: (i) the chief circuit judge of the home circuit of a potential subject judge, or (ii) the chief circuit judge of a circuit in which misconduct is alleged to have occurred in the course of official business while the potential subject judge was sitting by designation, shall have the power or a duty under this Rule to identify a complaint.

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

Therefore, Rule 5(a) does not require that the evidence be clear and convincing before a complaint may be identified. A chief circuit judge is free to identify a complaint if he or she has knowledge of facts or circumstances strong enough to support a reasonable belief that there are grounds for identifying a complaint. However, where the evidence is clear and weighty, and no informal resolution has been obtained, the identification of a complaint is mandatory.

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

When a complaint is identified, a written order stating the reasons for the identification must be provided; this begins the process articulated in Rule 11. Rule 11 provides that once the chief circuit judge has identified a complaint, the chief circuit judge, subject to the

1 disqualification provisions of Rule 25, will perform, with respect to that complaint, all functions
2 assigned to the chief circuit judge for the determination of complaints filed by a complainant.
3

4 In high-visibility situations, it may be desirable for the chief circuit judge to identify a
5 complaint without first seeking an informal resolution (and then, if the circumstances warrant,
6 dismiss or conclude the identified complaint without appointment of a special committee) in
7 order to assure the public that the allegations have not been ignored.
8

9 A chief circuit judge's decision not to identify a complaint under Rule 5 is not appealable
10 and is subject to Rule 3(b)(2)(A), which excludes merits-related complaints from the definition
11 of misconduct.
12

13 Subsection (a) concludes by stating that a chief circuit judge may not decline to identify a
14 complaint solely on the basis that the unfiled allegations could be raised by one or more persons
15 in a filed complaint, but none of these persons has opted to do so.
16

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

23 **Rule 6. Filing a Complaint.**

24
25 **(a) Brief Statement of Facts. A complaint must contain a concise statement setting**
26 **forth with particularity the facts on which the claim of misconduct or disability is based.**
27 **The statement of facts should include:**

- 28 **(1) a statement of what occurred;**
- 29 **(2) the time and place of the occurrence or occurrences;**
- 30 **(3) any information that would assist an investigator in checking the facts.**
- 31 **(4) in the case of an allegation of disability, any facts forming the basis of that**
32 **allegation not included in the above.**

33 **(b) Form. Complaints may be filed on a form reproduced in the appendix to these**
34 **Rules or a form designated by the rules of the judicial council in the circuit in which the**
35 **complaint is filed. The complaint form is to be made available on each court of appeals**
36 **website, and may be obtained from the clerk of the court of appeals, district court, or**
37 **bankruptcy court within the circuit. Failure to use the complaint form is not grounds for**
38 **rejecting or dismissing the complaint so long as the information described in (a) is**
39 **provided.**

40 **(c) Legibility; Number of Copies. Complaints should be typewritten if possible. If**
41 **not typewritten, they must be legible. An illegible complaint will be returned to the**
42 **complainant with a request to resubmit it in legible form, failing which the complaint will**
43 **not be considered. If the complaint is about a single judge of the court of appeals, the**
44 **complainant must provide three copies of the complaint, the statement of facts, and any**
45 **documents submitted. If it is about a single district judge or magistrate judge, four copies**
46 **must be provided; if about a single bankruptcy judge, five copies. If the complaint is about**
47 **more than one judge, copies must be provided for the clerk of the court, the chief judge of**
48 **the circuit, and each subject judge. Complaints under this Rule should be in an envelope**

1 marked “Complaint of Misconduct” or “Complaint of Disability.” The name of the subject
2 judge must not appear on the envelope.

3 (d) Signature. The form must be signed and the truth of the statements verified in
4 writing under penalty of perjury. The complainant’s address must also be provided.
5 Failure to comply with this subsection will not be grounds for rejecting a complaint, but
6 further review shall occur only under Rule 5(b).

7
8 Commentary to Rule 6
9

10 The Rule is adapted from the Illustrative Rules and is self-explanatory.
11
12

13 **Rule 7. Where to Initiate Complaints.**
14

15 (a) Where to File. Complaints against judges of United States courts of appeals,
16 judges of United States district courts, judges of United States bankruptcy courts, or
17 United States magistrate judges must be filed with the clerk of the United States Court of
18 Appeals for the judicial circuit in which the subject judge holds office. Complaints against
19 judges of the United States Court of International Trade or United States Court of Federal
20 Claims must be filed with the respective clerks of those courts. Complaints against judges
21 of the United States Court of Appeals for the Federal Circuit must be filed with the Circuit
22 Executive of that court. Where appropriate, the term “clerk of the court of appeals” or
23 “clerk,” as used in these Rules, includes all the officers mentioned.

24 (b) Transfer; Misconduct in Another Circuit. If a complaint alleges misconduct in
25 the course of official business while the subject judge was sitting on a court by designation
26 under 28 U.S.C. §§ 291-293 and 294(d), the complaint may be filed or identified with the
27 clerk of the court of appeals of that circuit or the subject judge’s home circuit. The
28 proceeding will continue in the circuit of the first filed or identified complaint. However,
29 the judicial council of the circuit in which the complaint was first filed or identified may
30 transfer the complaint to the subject judge’s home circuit or circuit where the alleged
31 misconduct occurred, as the case may be.
32

33 Commentary to Rule 7
34

35 Title 28 U.S.C. § 351 states that complaints are to be filed with “the clerk” of the court of
36 appeals. However, in many circuits, this role is filled by circuit executives. Accordingly, the
37 term “the clerk” as used throughout these Rules applies to circuit executives.
38

39 Section 351 uses the term “the circuit” in a way that suggests that either the home circuit
40 of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper
41 venue for complaints. With an exception for judges sitting by designation, the Rule requires the
42 identifying or filing of a misconduct or disability complaint in the circuit in which the judge
43 holds office, largely based on the administrative perspective of the Act. Given the Act’s
44 emphasis on the future conduct of the business of the courts, the circuit in which the judge holds
45 office is the appropriate forum because that circuit is likely best able to influence a judge’s future
46 behavior in constructive ways.
47

1
2
3 **Rule 9. Time for Filing or Identifying a Complaint.**
4

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

8
9 **Commentary to Rule 9**

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

14
15 **Rule 10. Abuse of the Complaint Procedure.**
16

17 **(a) Abusive Complaints. A complainant who has filed repetitive, harassing, or**
18 **frivolous complaints, or has otherwise abused the complaint procedure, may be restricted**
19 **from filing further complaints. After giving the complainant an opportunity to show cause**
20 **in writing why his or her ability to file further complaints should not be limited, a judicial**
21 **council may prohibit, restrict, or impose conditions on the complainant's use of the**
22 **complaint procedure. On written request of the complainant, the judicial council may**
23 **revise or withdraw any prohibitions, restrictions or conditions imposed.**

24 **(b) Orchestrated Complaints. Where large numbers of essentially identical**
25 **complaints from different complainants are received and appear to be part of an**
26 **orchestrated campaign, the judicial council may, on the recommendation of the chief**
27 **circuit judge, issue a written order instructing the clerk of the court of appeals to accept**
28 **only one or more of such complaints for filing and to refuse to accept subsequent**
29 **complaints. A copy of the order shall be sent to the complainants whose complaints were**
30 **not accepted.**

31
32 **Commentary on Rule 10**
33

34 This Rule is adapted from the Illustrative Rules.
35

36 Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further
37 complaints by a single complainant who has abused the complaint procedure. In some instances,
38 however, the complaint procedure may be abused in a different manner, for which the remedy
39 provided in Rule 10(a) may not be appropriate. Some circuits have been inundated with
40 submissions of dozens or hundreds of essentially identical complaints against the same judge or
41 judges, all submitted by different complainants. In many of these instances, persons with
42 grievances against a particular judge or judges used the Internet or other technology to
43 orchestrate mass complaint-filing campaigns against them. If each complaint submitted as part
44 of such a campaign were accepted for filing and processed according to these Rules, there would
45 be a serious drain on court resources without any benefit to the adjudication of the underlying
46 merits.
47

1 A judicial council may respond to such mass filings under Rule 10(b) by declining to
2 accept repetitive complaints for filing, regardless of the fact that the complaints are nominally
3 submitted by different complainants. Where the first complaint or complaints have been
4 dismissed on the merits, when further, essentially identical submissions follow, the judicial
5 council may issue a second order noting that these are identical or repetitive complaints, directing
6 the clerk not to accept these complaints or any further such complaints for filing, and directing
7 the clerk or the circuit executive to send each putative complainant copies of both orders.
8
9

10
11 **ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF CIRCUIT JUDGE**
12

13 **Rule 11. Review by the Chief Circuit Judge.**
14

15 **(a) Purpose of Chief Circuit Judge’s Review.** When a complaint is filed or is
16 identified by the chief circuit judge, the chief circuit judge, subject to Rule 25, must review
17 the complaint and determine whether it should be:

- 18 (1) dismissed;
19 (2) concluded on the ground that voluntary corrective action has been taken;
20 (3) concluded because intervening events have made action on the complaint no
21 longer necessary; or
22 (4) referred to a special committee.

23 **Where a complaint contains information constituting evidence of misconduct or disability,**
24 **but the complainant does not claim it as such, a chief circuit judge, after notice to the**
25 **subject judge, must treat the complaint as alleging such misconduct or disability.**

26 **(b) Inquiry by Chief Circuit Judge.** In determining what action to take under Rule
27 11(a), the chief circuit judge may conduct a limited inquiry. The chief circuit judge, or a
28 designee, may communicate orally or in writing with the complainant, the subject judge,
29 and any others who may have knowledge of the matter and review transcripts or other
30 relevant documents. In conducting such an inquiry, the chief circuit judge may not
31 determine any reasonably disputed issue.

32 **(c) Dismissal.** A complaint must be dismissed in whole or in part to the extent that
33 the chief circuit judge concludes that the complaint:

- 34 (1) alleges conduct that, even if true, is not prejudicial to the effective and
35 expeditious administration of the business of the courts or does not indicate a
36 mental or physical disability resulting in inability to discharge the duties of
37 judicial office;
38 (2) is directly related to the merits of a decision or procedural ruling;
39 (3) is frivolous, lacking sufficient evidence to raise an inference that misconduct
40 has occurred or a disability exists, or contains allegations that are incapable of
41 being established through investigation;
42 (4) has been filed in the wrong circuit under Rule 7; or
43 (5) is otherwise not appropriate for consideration under the Act.

44 **A complaint may not be dismissed solely because it repeats allegations of a previously**
45 **dismissed complaint if it contains material information not previously considered and does**
46 **not constitute harassment of the subject judge.**

47 **(d) Corrective Action.** The chief circuit judge may conclude the complaint
48 proceeding in whole or in part if an informal resolution under Rule 5 satisfactory to the

1 chief circuit judge was reached before the complaint was filed under Rule 6, or if the chief
2 circuit judge determines that appropriate voluntary corrective action that acknowledges
3 and remedies the problems raised by the complaint has been voluntarily taken by the
4 subject judge.

5 (e) Intervening Events. The chief circuit judge may conclude the complaint
6 proceeding in whole or in part if the chief circuit judge determines that intervening events
7 render some or all allegations of the complaint moot or remedial action impossible.

8 (f) Appointment of Special Committee. If some or all of the complaint is not
9 dismissed or concluded, the chief circuit judge must promptly appoint a special committee
10 to investigate the complaint or relevant portion thereof and to make recommendations to
11 the judicial council. Before appointing a special committee, the chief circuit judge must
12 invite the subject judge to respond to the complaint either orally or in writing if such an
13 opportunity was not given during the limited inquiry. In the discretion of the chief circuit
14 judge, separate complaints may be joined and assigned to a single special committee;
15 similarly, a single complaint about more than one judge may be severed and more than one
16 special committee appointed.

17 (g) Notice of Chief Circuit Judge's Action; Petitions for Review.

18 (1) If the chief circuit judge disposes of the complaint under Rule 11(c), (d),
19 or (e), the chief circuit judge must prepare a supporting memorandum that
20 sets forth the reasons for the disposition. Except as authorized by 28 U.S.C.
21 § 360, the memorandum must not include the name of the complainant or of
22 the subject judge. The order and the supporting memorandum, which may
23 be one document, must be provided to the complainant, the subject judge,
24 and the Judicial Conference Committee on Judicial Conduct and Disability.
25 The complainant and subject judge must be notified of the right to petition
26 the judicial council for review of the decision under (g)(2) of this Rule. If a
27 petition for review is filed as provided in Rule 18(a), the chief circuit judge
28 must promptly transmit all materials obtained in connection with the inquiry
29 under Rule 11(b) to the clerk of the court of appeals for transmittal to the
30 judicial council.

31 (2) If the chief circuit judge disposes of a complaint under Rule 11(c), (d), or
32 (e), the complainant or subject judge may petition the judicial council of the
33 circuit for review of that disposition, as provided in Rule 18.

34 (3) If a special committee is appointed, the chief circuit judge must notify the
35 complainant and the subject judge that the matter has been referred to a
36 special committee, and must inform them of the membership of the
37 committee. A copy of the order appointing the special committee shall be
38 sent to the Judicial Conference Committee on Judicial Conduct and
39 Disability.

40 (h) Public Availability of Chief Circuit Judge's Decision. The chief circuit judge's
41 decision must be made public to the extent, at the time, and in the manner provided in Rule
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Subsection (a) lists the actions available to a chief circuit judge in reviewing a complaint. This subsection provides that where a complaint has been filed under Rule 6, the ordinary

1 doctrines of waiver do not apply. A chief circuit judge must identify as a complaint any
2 misconduct or disability issues raised by the factual allegations of the complaint even if the
3 complainant makes no such claim with regard to those issues. For example, an allegation limited
4 to misconduct in fact-finding that mentions periods during a trial when the judge was asleep must
5 be treated as a complaint regarding disability. Some formal order giving notice of the expanded
6 scope of the proceeding must be given to the subject judge.

7
8 Subsection (b) describes the nature of the chief circuit judge's inquiry. It is based largely
9 on the Breyer Committee Report. See Breyer Report, 239 F.R.D. at 243-45. The Act states that
10 dismissal is appropriate "when a limited inquiry . . . demonstrates that the allegations in the
11 complaint lack any factual foundation or are conclusively refuted by objective evidence." 28
12 U.S.C. § 352(b)(1)(B). At the same time, however, section 352(a) states that "[t]he chief judge
13 shall not undertake to make findings of fact about any matter that is reasonably in dispute."
14 These two statutory standards should be read together, so that a matter is not "reasonably" in
15 dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability,
16 that they lack any reliable factual foundation, or that they are conclusively refuted by objective
17 evidence.

18
19 In conducting a limited inquiry under subsection (b), the chief circuit judge must avoid
20 determinations of reasonably disputed issues, including reasonably disputed issues as to whether
21 the facts alleged constitute misconduct or disability, which are ordinarily left to a special
22 committee and the judicial council. An allegation of fact is ordinarily not "refuted" simply
23 because the subject judge denies it. The limited inquiry must reveal something more in the way
24 of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is
25 literally the complainant's word against the subject judge's -- there is simply no other significant
26 evidence of what happened or of the complainant's unreliability -- then there must be a special
27 committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the
28 meaning of the Act.

29
30 However, dismissal following a limited inquiry may occur where the complaint refers to
31 transcripts or to witnesses and when the chief circuit judge determines that the transcripts and
32 witnesses all support the subject judge. For example, consider a complaint alleging that the
33 subject judge said X, where the complaint mentions, or it is independently clear, that five people
34 may have heard what the judge said. The chief circuit judge is told by the judge complained
35 against and one witness that the judge did not say X, and the chief circuit judge dismisses the
36 complaint without questioning the other four possible witnesses. In this example, the matter
37 remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is
38 appropriate, but if potential witnesses who are reasonably accessible have not been questioned,
39 then the matter remains reasonably in dispute.

40
41 Similarly, under (c)(1), if it is clear that the conduct alleged, even if it did happen, does
42 not constitute misconduct or disability, the complaint should be dismissed. If that issue is
43 reasonably in dispute, however, dismissal under (c)(1) is inappropriate.

44
45 The chief circuit judge is not required to act solely on the face of the complaint. Rule
46 11(b) allows the chief circuit judge to determine whether the facts alleged in the complaint are
47 frivolous, lack sufficient evidence to raise an inference of misconduct or disability, or are

1 incapable of being established through investigation, but also states that the chief circuit judge
2 may not determine a reasonably disputed issue.

3
4 Essentially, the standard articulated in subsection (b) is that used to decide motions for
5 summary judgment pursuant to Fed. R. Civ. P. 56. A summary judgment proceeding does not
6 involve resolving genuine issues of material fact. A material fact is one that “might affect the
7 outcome of the suit under the governing law,” and a dispute is “genuine” if “the evidence is such
8 that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty
9 Lobby, 477 U.S. 242, 248 (1986). Similarly, the chief circuit judge may not resolve a genuine
10 issue concerning a material fact or the existence of misconduct or disability when conducting a
11 limited inquiry pursuant to subsection (b).

12
13 Subsection (c) describes the grounds on which a complaint may be dismissed. These are
14 adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 239-
15 45. Subsection (c)(1) permits dismissal of an allegation that, even if true, does not constitute
16 misconduct or disability under the statutory standard. The proper standards are set out in Rule 3
17 and discussed in the Commentary to that Rule. Subsection (c)(2) permits dismissal of complaints
18 related to the merits of a decision by a subject judge, also governed by Rule 3 and accompanying
19 Commentary.

20
21 Subsection (c)(3) implements the statutory standard allowing dismissal of complaints that
22 are “frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred.”
23 28 U.S.C. § 352(b)(1)(A)(iii). The standard is intended, among other things, to cover situations
24 where no evidence is offered or identified, or the only identified source is unavailable. For
25 example, a complaint alleges that an unnamed attorney told the complainant that the judge did X.
26 The subject judge denies it. The chief circuit judge requests that the complainant (who does not
27 purport to have observed the judge do X) identify the unnamed witness, or that the unnamed
28 witness come forward so that the chief circuit judge can learn the unnamed witness’s account.
29 The complainant responds that he has spoken with the unnamed witness, that the unnamed
30 witness is an attorney who practices in federal court, and that the unnamed witness is unwilling
31 to be identified or to come forward. The allegation is then properly dismissed as incapable of
32 being established through investigation.

33
34 Another example would be a complainant who alleges an impropriety and asserts that he
35 knows of it because it was observed and reported to him by a person who is identified. The
36 judge denies that the event occurred. When contacted, the source also denies it. In such a case,
37 the chief circuit judge’s proper course of action may well turn on whether the source had any role
38 in the allegedly improper conduct. If the complaint were based on a lawyer’s statement that he or
39 she had had an improper ex parte contact with a judge, the lawyer’s denial of the impropriety
40 might not be taken as wholly persuasive, and it would be appropriate to conclude that a real
41 factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and
42 the disinterested party denied that the statement had been made, there would be no value in
43 opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint
44 as frivolous because there is no support for the allegation of misconduct.

45
46 If, however, the situation involves a reasonable dispute over credibility, the matter should
47 proceed. For example, the complainant alleges an impropriety and alleges that he or she
48 observed it and there were no other witnesses; the subject judge denies that the event occurred.

1 Unless the complainant’s allegations are facially incredible, there is evidence of the complainants
2 unreliability, or the allegations are so improbable or lacking indicia of reliability as to be
3 insufficient to support a finding of misconduct or disability, a special committee must be
4 appointed because there is a factual question that is reasonably in dispute.
5

6 Dismissal is also appropriate when a complaint is filed so long after an alleged event that
7 memory loss, death, or changes to unknown residences prevent a proper investigation.
8

9 Subsection (c) also indicates that the investigative nature of the process prevents the
10 application of claim preclusion principles where new and material evidence becomes available.
11 However, it also recognizes that at some point a renewed investigation may constitute
12 harassment of the subject judge and should be foregone, depending of course on the seriousness
13 of the issues and the weight of the new evidence.
14

15 Rule 11(d) implements the Act’s provision for dismissal if “voluntary appropriate
16 corrective action” has been taken. It is largely adapted from the Breyer Report, 239 F.R.D. 244-
17 45. The Act authorizes the chief circuit judge to conclude the proceedings if “appropriate
18 corrective action has been taken.” 28 U.S.C. § 352(b)(2). Under the Rule, action taken after the
19 complaint is filed is “appropriate” when it acknowledges and remedies the problem raised by the
20 complaint. Because the Act deals with the conduct of judges, the emphasis is on correction of
21 the judicial conduct that was the subject of the complaint. Terminating a complaint based on
22 corrective action is premised on the implicit understanding that voluntary self-correction or
23 redress of misconduct or a disability is preferable to sanctions. The chief circuit judge may
24 facilitate this process by giving the subject judge an objective view of the appearance of the
25 judicial conduct in question and by suggesting appropriate corrective measures. Moreover, when
26 corrective action is taken under Rule 5 satisfactory to the chief circuit judge before a complaint is
27 filed, that informal resolution will be sufficient to cause the conclusion of a subsequent
28 complaint based on the identical conduct.
29

30 “Corrective action” must be voluntary action taken by the subject judge. A remedial
31 action directed by the chief circuit judge or by an appellate court without the participation of the
32 subject judge in formulating the directive or without the subject judge’s subsequent agreement to
33 such action does not constitute the requisite voluntary corrective action. Neither the chief circuit
34 judge nor an appellate court has authority under the Act to impose a formal remedy or sanction;
35 only the judicial council can impose a formal remedy or sanction under 28 U.S.C. § 354(a)(2).
36 Compliance with a previous council order may serve as corrective action allowing conclusion of
37 a later complaint about the same behavior.
38

39 Where a judge’s conduct has resulted in identifiable, particularized harm to the
40 complainant or another individual, appropriate corrective action should include steps taken by
41 that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from
42 a case, and a pledge to refrain from similar conduct in the future. While the Act is generally
43 forward-looking, any corrective action should, to the extent possible, serve to correct a specific
44 harm to an individual, if such harm can reasonably be remedied. In some cases, corrective
45 action may not be “appropriate” to justify conclusion of a complaint unless the complainant or
46 other individual harmed is meaningfully apprised of the nature of the corrective action in the
47 chief circuit judge’s order, in a direct communication from the judge complained against, or
48 otherwise.

1
2 Voluntary corrective action should be proportionate to any plausible allegations of
3 misconduct in the complaint. The form of corrective action should also be proportionate to any
4 sanctions that a judicial council might impose under Rule 20(b), such as a private or public
5 reprimand or a change in case assignments. In other words, minor corrective action will not
6 suffice to dispose of a serious matter.

7
8 Rule 11(e) implements section 352(b)(2) of the Act, which permits the chief circuit judge
9 to “conclude the proceeding,” if “action on the complaint is no longer necessary because of
10 intervening events,” such as a resignation from judicial office. Ordinarily, however, stepping
11 down from an administrative post such as chief circuit judge, judicial council member, or court
12 committee chair does not constitute an event rendering unnecessary any further action on a
13 complaint alleging judicial misconduct. As long as the subject of the complaint performs judicial
14 duties, a complaint alleging judicial misconduct must be addressed.

15
16 If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee
17 must be appointed. Rule 11(f) states that a subject judge must be invited to respond to the
18 complaint before a special committee is appointed, if no earlier response was invited.

19
20 Subject judges, of course, receive copies of complaints at the same time that they are
21 referred to the chief circuit judge, and they are free to volunteer responses to them. Under Rule
22 11(b), the chief circuit judge may request a response if it is thought necessary. However, many
23 complaints are clear candidates for dismissal even if their allegations are accepted as true, and
24 there is no need for the subject judge to devote time to a defense.

25
26 The Act requires that the order dismissing a complaint or concluding the proceeding
27 contain a statement of reasons and that a copy of the order be sent to the complainant. 28 U.S.C.
28 § 352(b). Rule 24, dealing with availability of information to the public, contemplates that the
29 order will be made public, usually without disclosing the names of the complainant or the judge
30 involved. If desired for administrative purposes, more identifying information can be included in
31 a non-public version of the order.

32
33 When complaints are disposed of by chief circuit judges, the statutory purposes are best
34 served by providing the complainant with a full, particularized, but concise explanation, giving
35 reasons for the conclusions reached. See also the Commentary to Rule 24, dealing with public
36 availability.

37
38 Rule 11(g) also provides that the complainant and subject judge must be notified, in the
39 case of a disposition by the chief circuit judge, of the right to petition the judicial council for
40 review. A copy of a chief circuit judge’s order and memorandum, which may be one document,
41 disposing of a complaint must be sent by the clerk to the Judicial Conference Committee on
42 Judicial Conduct and Disability.

ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE

Rule 12. Composition of Special Committees.

(a) **Membership.** Except as provided in (e), a special committee appointed pursuant to Rule 11(f) must consist of the chief circuit judge and equal numbers of circuit and district judges. If the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district judge members of the committee must be from districts, where possible, other than the district of the subject judge. In the case of the courts named in 28 U.S.C. § 363, the committee must be selected from the judges serving on the subject judge's court.

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

(c) **Bankruptcy Judge or Magistrate Judge as Advisor.** If the judicial officer complained about is a bankruptcy judge or magistrate judge, the chief circuit judge may designate a bankruptcy judge or magistrate judge, as the case may be, to serve as an advisor to the committee. The chief circuit judge must designate such an advisor if, within fourteen days of notification of the appointment of the committee, the subject bankruptcy judge or magistrate judge requests that an advisor be designated. Except for the Court of Federal Claims special masters appointed pursuant to 42 U.S.C. § 300aa-12(c), the advisor must be from a district other than the district of the subject bankruptcy judge or subject magistrate judge. The advisor will not vote but will have the other privileges of a member of the committee.

(d) **Provision of Documents.** The chief circuit judge must certify to each other member of the committee and to the advisor, if any, copies of the complaint form and statement of facts in whole or relevant part, and any other documents on file pertaining to the complaint or to the relevant part referred to the special committee.

(e) **Continuing Qualification of Committee Members.** A member of a special committee who was qualified to serve at the time of appointment may continue to serve on the committee even though the member relinquishes the position of chief circuit judge, active circuit judge, or active district judge, as the case may be, but only if the member continues to hold office under Article III, Section 1, of the Constitution of the United States, or pursuant to 28 U.S.C. § 171.

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

(g) **Voting.** All actions by a committee shall be by vote of a majority of all members of the committee.

DRAFT 12/13/07

1 This Rule is adapted from the Act and the Illustrative Rules.
2

3 Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-
4 case basis. The question of committee size is one that should be weighed with care in view of
5 the potential for consuming the members' time; a large committee should be appointed only if
6 there is a special reason to do so.
7

8 Although the Act requires that the chief circuit judge be a member of each special
9 committee, 28 U.S.C. § 353(a)(1), it does not require that the chief circuit judge preside.
10

11 Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena
12 powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be
13 issued on behalf of judicial councils by the clerk of the court of appeals "at the direction of the
14 chief judge of the circuit or his designee." Rule 12(b) allows the chief circuit judge, when
15 designating someone else as presiding officer, to make an explicit delegation of the authority to
16 direct the issuance of subpoenas related to committee proceedings.
17

18 Rule 12(c) provides that the chief circuit judge may appoint a bankruptcy judge or
19 magistrate judge as an advisor to a special committee, either sua sponte or at the request of the
20 subject judge.
21

22 The Rule provides that the advisor will have all the privileges of a member of a
23 committee except a vote. The advisor may therefore participate in all deliberations of the
24 committee, may question witnesses at hearings, and may write a separate statement to accompany
25 the report of the special committee to the judicial council.
26

27 Rule 12(e) provides that a member of a special committee who remains an Article III
28 judge may continue to serve on the committee even though the member's status otherwise
29 changes. Thus, a committee that originally consisted of the chief circuit judge and an equal
30 number of circuit and district judges, as required by the law, may continue to function even
31 though changes of status alter that composition. This provision reflects the belief that stability of
32 membership will contribute to the quality of the work of such committees.
33

34 Stability of membership is also the principal concern animating Rule 12(f), which deals
35 with the case in which a special committee loses a member before its work is complete. The
36 Rule would permit the chief circuit judge to determine whether a replacement member should be
37 appointed. Generally, appointment of a replacement member is desirable in these situations
38 unless the committee has conducted evidentiary hearings before the vacancy occurs. However,
39 cases may arise in which a committee is in the late stages of its work, and in which it would be
40 difficult for a new member to play a meaningful role. The Rule preserves the collegial character
41 of the committee process by prohibiting a single surviving member from serving as a committee
42 and by providing that a committee of two surviving members will, in essence, operate under a
43 unanimity rule.
44

45 Rule 12(g) provides that actions of a special committee will be by vote of a majority of all
46 the members. All the members of a committee should participate in committee decisions. In that
47 circumstance, it seems reasonable to require that committee decisions be made by a majority of
48 the membership, rather than a majority of some smaller quorum.

Rule 13. Conduct of an Investigation.

(a) **Extent and Methods of Special Committee Investigation.** Each special committee must determine the extent and methods of the investigation it deems appropriate in light of the allegations of the complaint. If, in the course of the investigation, the committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the scope of the complaint, the committee must refer the new matter to the chief circuit judge for action under Rule 5 or Rule 11.

(b) **Criminal Conduct.** If the committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by 28 U.S.C. §§ 351-364 in an effort to avoid compromising any criminal investigation. However, the committee has final authority regarding the timing and extent of its investigation and formulation of its recommendations.

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

(d) **Delegation.** The authority to exercise the committee's subpoena powers may be delegated to the presiding officer. In the case of failure to comply with such subpoena, the judicial council or special committee may institute a contempt proceeding consistent with 28 U.S.C. § 332(d).

Commentary on Rule 13

This Rule is adapted from the Illustrative Rules.

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

One of the difficult questions that can arise is the relationship between proceedings under the Act and criminal investigations. Rule 13(b) assigns responsibility for coordination to the special committee in cases in which criminal conduct is suspected, but gives the committee the authority to determine the appropriate pace of its activity in light of any criminal investigation. A special committee may be barred from disclosing some information to a prosecutor or grand jury under the Act. This provision is discussed in the Commentary to Rule 23.

Rule 13(d) permits the committee, in its discretion, to delegate any of its duties to subcommittees, individual committee members, or staff. This is consistent with the general principle, expressed in Rule 13(a), that each special committee will determine the methods of

1 conducting the investigation that are appropriate in light of the allegations of the particular
2 complaint. The ultimate duty of adopting a report may not be delegated. Rule 13(d) suggests
3 that, where the chief circuit judge designates someone else as presiding officer of a special
4 committee, the presiding officer also be delegated the authority to direct the clerk of the court of
5 appeals to issue subpoenas related to committee proceedings. That is not intended to imply,
6 however, that the decision to use the subpoena power is exercisable by the presiding officer
7 alone. Under Rule 13(d), the committee must decide whether to delegate that decision-making
8 authority.
9

10 **Rule 14. Conduct of Hearings by Special Committee.**

11
12
13 **(a) Purpose of Hearings.** The committee may hold hearings to take testimony and
14 receive other evidence, to hear argument, or both. If the committee is investigating
15 allegations against more than one judge, it may, in its discretion, hold joint or separate
16 hearings.

17 **(b) Committee Evidence.** Material, non-redundant evidence must be obtained by
18 the committee in the form it deems appropriate, subject to the requirements of Rule 15. In
19 the committee's discretion, evidence may be obtained by committee members, staff, or
20 both. Witnesses offering testimonial evidence may include the complainant and the subject
21 judge.

22 **(c) Counsel for Witnesses.** Whether witnesses, other than the subject judge, who
23 has the right to counsel, may have counsel present when they testify is left to the discretion
24 of the special committee.

25 **(d) Witness Fees.** Witness fees must be paid as provided in 28 U.S.C. § 1821.

26 **(e) Oath.** All testimony taken at such a hearing must be given under oath or
27 affirmation.

28 **(f) Rules of Evidence.** The Federal Rules of Evidence do not apply to special
29 committee hearings.

30 **(g) Record and Transcript.** A record and transcript must be made of any hearing
31 held.
32

33 **Commentary on Rule 14**

34
35 This Rule is adapted from section 353 of the Act and the Illustrative Rules.
36

37 Rule 14 is concerned with the conduct of fact-finding hearings. Special committee
38 hearings will normally be held only after the investigative work has been completed and the
39 committee has concluded that there is sufficient evidence to warrant a formal fact-finding
40 proceeding. Special committee proceedings are primarily inquisitorial rather than adversarial.
41 Accordingly, the Federal Rules of Evidence do not apply to such hearings. Inevitably, a hearing
42 will have something of an adversary character. Nevertheless, that tendency should be moderated
43 to the extent possible. Even though a proceeding will commonly have investigative and hearing
44 stages, committee members should not regard themselves as prosecutors one day and judges the
45 next. Their duty -- and that of their staff -- is at all times to be impartial seekers of the truth.
46

47 Rule 14(b) contemplates that material evidence will be obtained by the committee, and
48 presented in the form of affidavits, live testimony, etc. Staff or others who are organizing the

1 hearings should regard it as their role to present evidence representing the entire picture. With
2 respect to testimonial evidence, the subject judge should normally be called as a committee
3 witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena
4 powers are available, subject to the normal testimonial privileges. Although Rule 15(b) affords
5 the statutory right of the subject judge to call witnesses on his or her own behalf, exercise of this
6 right should not usually be necessary.

7
8
9 **Rule 15. Rights of Subject Judge.**

10
11 **(a) Notice.** The subject judge is entitled to written notice of the appointment of a
12 special committee under Rule 11(f) and, written notice of expansion of the scope of an
13 investigation under Rule 13(a). The subject judge must be given notice in writing of any
14 hearing under Rule 14, its purposes, the names of any witnesses whom the committee
15 intends to call, and the text of any statements that have been taken from such witnesses.
16 The subject judge may suggest additional witnesses to the committee. The subject judge
17 must be sent the report of the special committee at the time it is filed with the judicial
18 council.

19 **(b) Presentation of Evidence.** At any hearing held pursuant to Rule 14, the subject
20 judge has the right to present evidence, and to compel the attendance of witnesses and the
21 production of documents. At the request of the subject judge, the chief circuit judge or the
22 judge's designee must direct the clerk of the court of appeals to issue a subpoena to a
23 witness in accordance with 28 U.S.C. § 332(d)(1). The subject judge must be afforded the
24 opportunity to cross-examine committee witnesses, in person or by counsel.

25 **(c) Presentation of Argument.** The subject judge may submit written argument to
26 the special committee, and must be given a reasonable opportunity to present oral
27 argument at an appropriate stage of the investigation.

28 **(d) Attendance at Hearings.** The subject judge must have the right to attend any
29 hearing held pursuant to Rule 14 and to receive copies of the transcript and any documents
30 introduced, as well as to receive copies of any written arguments submitted by the
31 complainant to the committee.

32 **(e) Representation by Counsel.** The subject judge may choose to be represented by
33 counsel in the exercise of any of the rights enumerated in this Rule. The costs of such
34 representation may be borne by the United States as provided in Rule 20(e).

35
36 **Commentary on Rule 15**

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

39
40 The Act states that these Rules must contain provisions requiring that “the judge whose
41 conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by
42 counsel) at proceedings conducted by the investigating panel, to present oral and documentary
43 evidence, to compel the attendance of witnesses or the production of documents, to cross-
44 examine witnesses, and to present argument orally or in writing.” 28 U.S.C. § 358(b)(2). To
45 implement this provision, Rule 15(d) gives the judge the right to attend any hearing for the
46 purpose of receiving evidence of record or hearing argument under Rule 14.
47

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

7
8
9 **Rule 16. Rights of Complainant in Investigation.**

10
11 (a) **Notice.** The complainant is entitled to written notice of the investigation as
12 provided in Rule 11(g)(3). When the special committee's report to the judicial council is
13 filed, the complainant must be notified of the filing. The judicial council may, in its
14 discretion, provide a copy of the report of a special committee to the complainant.

15 (b) **Opportunity to Provide Evidence.** A representative of the committee must
16 interview the complainant if the committee determines that the complainant may have
17 evidence that does not already exist in writing.

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

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

23 (e) **Cooperation.** In the exercise of discretion under this Rule, a special committee
24 may take into account the degree of the complainant's cooperation in preserving the
25 confidentiality of the proceedings, including the identity of the subject judge.

26
27 **Commentary on Rule 16**

28
29 This Rule is adapted from the Act and the Illustrative Rules.

30
31 In accordance with the view of the process as fundamentally administrative and
32 inquisitorial, these Rules do not give the complainant the rights of a party to litigation, and leave
33 the complainant's role largely to the discretion of the special committee. However, Rule 16(b)
34 provides that, where a special committee has been appointed, the complainant will be
35 interviewed by a representative of the committee. Such an interview may be in person or by
36 telephone, and the representative of the committee may be either a member or staff.

37
38 Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend
39 proceedings of the special committee except when testifying or presenting oral argument. A
40 special committee may exercise its discretion to permit the complainant to be present at its
41 proceedings, or to permit the complainant, individually or through counsel, to participate in the
42 examination or cross-examination of witnesses.

43
44 The Act authorizes an exception to the normal confidentiality provisions where the
45 judicial council in its discretion provides a copy of the report of the special committee to the
46 complainant and to the subject judge. 28 U.S.C. § 360(a)(1). However, the Rules do not entitle
47 the complainant to a copy of the special committee's report.
48

1 In exercising their discretion regarding the role of the complainant, the special committee
2 and the judicial council should protect the confidentiality of the complaint process. As a
3 consequence, subsection (e) provides that a special committee may consider the degree to which
4 a complainant has cooperated in preserving the confidentiality of the proceedings in determining
5 what role beyond the minimum required by these Rules should be given to that complainant.
6

7
8 **Rule 17. Special Committee Report.**

9
10 **The committee must file with the judicial council a comprehensive report of its**
11 **investigation, including findings and recommendations for council action. The report must**
12 **be accompanied by a statement of the vote by which it was adopted, any separate or**
13 **dissenting statements of committee members, and the record of any hearings held pursuant**
14 **to Rule 14. A copy of the report and accompanying statement must be sent to the Judicial**
15 **Conference Committee on Judicial Conduct and Disability.**
16

17 **Commentary to Rule 17**

18
19 This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for
20 sending a copy of the special committee report and accompanying statement to the Judicial
21 Conference Committee is new.
22

23
24
25 **ARTICLE V. JUDICIAL COUNCIL REVIEW**

26
27 **Rule 18. Petitions for Review of Chief Circuit Judge Dispositions Under Rule 11(c), (d), or**
28 **(e).**

29
30 **(a) Petitions for Review.** A complainant or subject judge aggrieved by an order of
31 the chief circuit judge under Rule 11(c), (d), or (e) may petition the judicial council of the
32 circuit for review of the order. A judicial council may, by rules promulgated under 28
33 U.S.C. § 358, refer a petition for review filed under this Rule to a panel of no less than five
34 members of the council, at least two of whom must be district judges.

35 **(b) Time; Form; Where to File.** A petition for review must be filed in the office of
36 the clerk of the court of appeals within thirty-five days of the date of the clerk's letter to the
37 complainant and subject judge transmitting the chief circuit judge's order. The petition
38 should be in letter form, addressed to the clerk of the court of appeals, and in an envelope
39 marked "Misconduct Petition" or "Disability Petition" but without the name of the subject
40 judge. The letter should begin "I hereby petition the judicial council for review of . . .,"
41 should be typewritten or otherwise legible, and be signed. The letter should state the
42 reasons why the petition should be granted.

43 **(c) Receipt and Distribution of Petition.** On receipt of a petition for review filed
44 within the time allowed and in proper form under these Rules, the clerk of the court of
45 appeals must acknowledge receipt of the petition and send a copy to the complainant and
46 subject judge, as the case may be. The clerk must promptly distribute to each member of
47 the judicial council, or relevant panel thereof, except for any member disqualified under
48 Rule 25, or make available in the manner provided by local rule, copies of the complaint,

1 all materials obtained by the chief circuit judge in connection with the chief circuit judge's
2 inquiry, the chief circuit judge's order disposing of the complaint, any memorandum in
3 support of the chief circuit judge's order, the petition for review, and an appropriate
4 ballot. The clerk must send the petition for review to the Judicial Conference Committee
5 on Judicial Conduct and Disability. Copies of the materials obtained by the chief circuit
6 judge are not to be sent to the Judicial Conference Committee unless requested.

7 (d) Receipt of Untimely Petition. The clerk must refuse to accept a petition that is
8 received after the deadline set forth in (b).

9 (e) Receipt of Timely Petition not in Proper Form. On receipt of a petition filed
10 within the time allowed but in a form that is improper to a degree that would substantially
11 impair its consideration by the judicial council, including a document that is ambiguous
12 about whether a petition for review is intended, the clerk must acknowledge receipt of the
13 petition, call the petitioner's attention to the deficiencies, and give the petitioner the
14 opportunity to correct the deficiencies within twenty-one days of the date of the clerk's
15 letter or within the original deadline for filing the petition, whichever is later. If the
16 deficiencies are corrected within the time allowed, the clerk will proceed in accordance
17 with paragraphs (a) and (c) of this Rule. If the deficiencies are not corrected, the clerk
18 must reject the petition.

19
20 Commentary on Rule 18

21 Rule 18 is adapted largely from the Illustrative Rules.

22
23 Subsection (a) permits a subject judge, as well as the complainant, to petition for review
24 of a chief judge's order dismissing a complaint under Rule 11(c), or concluding that appropriate
25 corrective action or intervening events have remedied or mooted the problems raised by the
26 complaint pursuant to Rule 11(d) or (e). Although ostensibly vindicated, a chief circuit judge's
27 order may include language disagreeable to the subject judge. For example, an order may
28 dismiss a complaint, but state that the subject judge did in fact engage in misconduct.
29 Accordingly, a subject judge may wish to object to the content of the order and is given the
30 opportunity to petition the judicial council of the circuit for review.

31
32 Subsection (b) contains a time limit of thirty-five days to file a petition for review. It is
33 important to establish a time limit on petitions for review of chief circuit judges' dispositions in
34 order to provide finality to the process. If the complaint requires an investigation, the
35 investigation should proceed; if it does not, the subject judge should know that the matter is
36 closed.

37
38 The standards for timely filing under the Federal Rules of Appellate Procedure should be
39 applied to petitions for review. See Fed. R. App. P. 25(a)(2)(A) and 25(a)(2)(C).

40
41 Rule 18(e) provides for an automatic extension of the time if a person files a petition that
42 is rejected for failure to comply with formal requirements.

43
44
45
46 **Rule 19. Judicial Council Disposition of Petitions for Review.**

Rule 20. Judicial Council Consideration of Reports and Recommendations of Special Committees.

(a) **Rights of Subject Judge.** Within twenty-one days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present argument through counsel, written or oral as determined by the council. The judge may not otherwise communicate with council members about the matter.

(b) **Judicial Council Actions.** Subject to the rights of the subject judge in Subsection (a), the judicial council, acting on the basis of the report and recommendations of, and record before, the special committee, may:

(1) **dismiss the complaint because:**

(A) the claimed conduct, even if the claim is true, is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;

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

(C) the facts on which the complaint is based have not been established; or

(D) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351-364.

(2) **conclude the proceeding because appropriate corrective action has already been taken to remedy the problem identified in the complaint, or intervening events make such action unnecessary.**

(3) **in its discretion, refer the complaint to the Judicial Conference of the United States with the council's recommendations for action. A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct:**

(A) that might constitute ground for impeachment; or

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

(4) **take remedial action to ensure the effective and expeditious administration of the business of the courts, including but not limited to:**

(A) censuring or reprimanding the subject judge, either by private communication or by public announcement;

(B) ordering that, for a fixed temporary period, no new cases be assigned to the subject judge;

(C) in the case of a magistrate judge, ordering the chief judge of the district court to take action specified by the council, including the initiation of removal proceedings pursuant to 28 U.S.C. § 631(i) or 42 U.S.C. § 300aa-12(c)(2);

(D) in the case of a bankruptcy judge, removing the judge from office pursuant to 28 U.S.C. § 152(e);

(E) in the case of a circuit or district judge, requesting the judge to retire

1 voluntarily with the provision (if necessary) that ordinary length-of-
2 service requirements will be waived; and

3 (F) in the case of a circuit or district judge who is eligible to retire but
4 does not do so, certifying the disability of the judge under 28 U.S.C. § 372(b)
5 so that an additional judge may be appointed.

6 (5) take any combination of actions described in (b)(1)-(4) of this Rule that is
7 within its power.

8 (c) **Inadequate Basis for Decision.** If the judicial council finds that the report,
9 recommendations, and record of a special committee provide an inadequate basis for
10 decision, it may return the matter to the committee for further investigation and a new
11 report or conduct such further investigation as the council deems appropriate. If the
12 judicial council decides to conduct additional investigation, the subject judge must be given
13 adequate prior notice in writing of that proposed decision and of the general scope and
14 purpose of the additional investigation. The judicial council's conduct of the additional
15 investigation must be generally in accordance with the procedures and powers set forth in
16 Rules 13 through 16 for the conduct of an investigation by a special committee.

17 (d) **Council Vote.** Council action must be taken by a majority of those members of the
18 council who are not disqualified, except that a decision to remove a bankruptcy judge from
19 office requires a majority vote of all the members of the council.

20 (e) **Recommendation for Fee Reimbursement.** On the request of a subject judge, the
21 judicial council may, if the complaint has been finally dismissed or concluded under (b)(1)
22 or (2) of this Rule, recommend that the Director of the Administrative Office of the United
23 States Courts award reimbursement, from funds appropriated to the Judiciary, for those
24 reasonable expenses, including attorneys' fees, incurred by that judge during the
25 investigation, including a successful defense or prosecution of a proceeding under Rule
26 21(a) or (b), which would not have been incurred but for the requirements of the Act and
27 these Rules.

28 (f) **Council Action.** Council action must be by written order. Unless the council finds
29 that, for extraordinary reasons, it would be contrary to the interests of justice, the order
30 must be accompanied by a memorandum setting forth the factual determinations on which
31 it is based and the reasons for the council action. The memorandum must not include the
32 name of the complainant or of the subject judge. The order and the supporting
33 memorandum must be provided to the complainant, the subject judge, and the Judicial
34 Conference Committee on Judicial Conduct and Disability. The complainant and the
35 judge must be notified of any right to review of the judicial council's decision as provided
36 in Rule 21(b).
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39 **Commentary on Rule 20**

40 This Rule is largely adapted from the Illustrative Rules.

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43 Within twenty-one days after the filing of the report of a special committee, the subject
44 judge may address a written response to all of the members of the judicial council. The subject
45 judge must also be given an opportunity to present oral argument to the council, personally or
46 through counsel. The subject judge may not otherwise communicate with council members
47 about the matter.
48

1 If the judicial council decides to conduct an additional investigation, the subject judge
2 must be given adequate prior notice in writing of that decision and of the general scope and
3 purpose of the additional investigation. The conduct of the investigation will be generally in
4 accordance with the procedures set forth in Rules 13 through 16 for the conduct of an
5 investigation by a special committee. However, if hearings are held, the council may limit
6 testimony or the presentation of evidence to avoid unnecessary repetition of testimony and
7 evidence before the special committee.
8

9 Council action must be taken by a majority of those members of the council who are not
10 disqualified, except that a decision to remove a bankruptcy judge from office requires a majority
11 of all the members of the council as required by 28 U.S.C. § 152(e). However, it is inappropriate
12 to apply a similar rule to the less severe actions that a judicial council may take under the Act. If
13 some members of the council are disqualified in the matter, their disqualification should not be
14 given the effect of a vote against council action.
15

16 With regard to Rule 20(e), the judicial council, on the request of the subject judge, may
17 recommend to the Director of the Administrative Office of the United States Courts that the
18 subject judge be reimbursed for reasonable expenses, including attorneys' fees, incurred. The
19 judicial council has the authority to recommend such reimbursement where, after investigation
20 by a special committee, the complaint has been finally dismissed or concluded under subsection
21 (b)(1) or (2) of this Rule. It is contemplated that such reimbursement may be provided for the
22 successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one
23 that results in a Rule 20(b)(1) or (2) dismissal or conclusion.
24

25 Rule 20(f) requires that council action normally be supported with a memorandum of
26 factual determinations and reasons and that notice of the action be given to the complainant and
27 the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject
28 judge include notice of any right to petition for review of the council's decision under Rule
29 21(b).
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33 **ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT** 34 **AND DISABILITY**

35 **Rule 21. Committee on Judicial Conduct and Disability.**

36
37
38 **(a) Review by Committee. The Committee on Judicial Conduct and Disability will**
39 **consist of seven members. It will consider and dispose of all petitions for review under (b)**
40 **of this Rule, in conformity with the Committee's jurisdictional statement. The**
41 **Committee's disposition of petitions for review will ordinarily be final. However, the**
42 **Judicial Conference of the United States, in its sole discretion, may review any such**
43 **Committee decision. The Judicial Conference's authority in this regard does not give a**
44 **complainant or subject judge a right to such review.**

45 **(b) Reviewable Matters.**

46 **(1) A complainant or subject judge may petition the Committee for review of an**
47 **order of a judicial council entered:**

48 **(A) pursuant to Rule 20(b)(1), (2), (4) or (5); or**

1 (B) pursuant to Rule 19(b)(1) or (4), if one or more members of the judicial
2 council dissented from the order on the ground that a special committee
3 should be appointed under Rule 11(f). In such a case, the Committee's
4 review will be limited to the issue of whether a special committee should be
5 appointed.

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

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

27 (d) Additional Investigation. Absent extraordinary circumstances, the Committee
28 will not conduct an additional investigation. However, the Committee may return the
29 matter to the judicial council with directions to undertake an additional investigation.
30 Should the Committee conduct an additional investigation, it will exercise the powers of the
31 Judicial Conference under 28 U.S.C. § 331.

32 (e) Oral Argument; Personal Appearance. There will ordinarily be no oral
33 arguments or personal appearances before the Committee. In its discretion, the Committee
34 may permit written submissions from the complainant or subject judge.

35 (f) Committee Decisions. Committee decisions under this Rule shall be transmitted
36 promptly to the Judicial Conference of the United States. Other distribution will be by the
37 Administrative Office at the direction of the Committee chair. Such orders must be
38 maintained as public documents by the Administrative Office and by the clerk of the court
39 for the circuit or court named in 28 U.S.C. § 363 in which the complaint arose.

40 (g) Finality. All orders of the Judicial Conference or of the Committee (when the
41 Conference does not exercise its power of review) are final and conclusive.

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This Rule is largely self-explanatory.

Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of

1 such dispositions by the Conference. However, there is no right to such review in any party.

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

11
12 Rule 21(c) provides for review only by Committee members from circuits other than that
13 of the subject judge. To avoid tie votes, the Committee will decide petitions for review by
14 rotating panels of five when only six members are qualified. If only four members are qualified,
15 the Chief Justice must appoint an additional judge to consider that petition for review.

16
17
18 **Rule 22. Procedures for Review.**

19
20 (a) **Filing a Petition for Review.** A petition for review of a decision of the judicial
21 council may be filed by sending a brief written statement to the Judicial Conference
22 Committee on Judicial Conduct and Disability, addressed to:

23 **Judicial Conference Committee on Judicial Conduct and Disability**
24 **Attn: Office of General Counsel**
25 **Administrative Office of the United States Courts**
26 **One Columbus Circle, NE**
27 **Washington, D.C. 20544**

28 **The Administrative Office shall send a copy of the petition to the complainant or subject**
29 **judge, as the case may be.**

30 (b) **Form and Contents of Petition for Review.** No particular form is required. The
31 petition must contain a short statement of the basic facts underlying the complaint, the
32 history of its consideration before the appropriate judicial council, a copy of the decision of
33 the judicial council, and the grounds on which the petitioner seeks review. The petition for
34 review must specify the date and docket number of the order of the judicial council for
35 which review is sought. The petitioner may attach any documents or correspondence
36 arising in the course of the proceeding before the judicial council or its special committee
37 that the petitioner deems essential or useful to the prompt disposition of the review
38 petition. A petition should not normally exceed twenty pages, plus necessary attachments.

39 (c) **Time.** A petition must be submitted within sixty-three days of the date of the
40 order for which review is sought.

41 (d) **Copies.** Five copies of the petition for review must be submitted, at least one of
42 which must be signed by the petitioner or his or her attorney. If the petitioner submits a
43 signed declaration of inability to pay the expense of duplicating the petition, the
44 Administrative Office must accept the original petition and must reproduce copies at its
45 expense.

46 (e) **Action on Receipt of Petition for Review.** The Administrative Office must
47 acknowledge receipt of a petition for review submitted under this Rule, and must notify the
48 chair of the Judicial Conference Committee on Judicial Conduct and Disability. The

1 **Administrative Office must distribute the petition to the members of the Committee for**
2 **their deliberation.**

3
4 **Commentary on Rule 22**

5
6 Rule 22 is self-explanatory.
7

8
9
10 **ARTICLE VII. MISCELLANEOUS RULES**

11
12
13 **Rule 23. Confidentiality.**

14
15 (a) **General Rule.** The consideration of a complaint by the chief circuit judge, a
16 special committee, the judicial council, or the Judicial Conference Committee on Judicial
17 Conduct and Disability is confidential. Information about such consideration must not be
18 disclosed by any judge or employee of the judicial branch or by any person who records or
19 transcribes testimony except in accordance with these Rules. However, in extraordinary
20 circumstances, a chief circuit judge may disclose the existence of a proceeding under these
21 Rules where necessary to maintain public confidence in the federal judiciary's ability to
22 redress misconduct or disability.

23 (b) **Files.** All files related to complaints must be separately maintained with
24 appropriate security precautions to ensure confidentiality.

25 (c) **Disclosure in Decisions.** Except where otherwise provided in Rule 24, written
26 decisions of the chief circuit judge, the judicial council, or Judicial Conference Committee
27 on Judicial Conduct and Disability, and dissenting opinions or separate statements of
28 members of the council or Committee, may contain such information and exhibits as the
29 authors deem appropriate, and such information and exhibits may be made public.

30 (d) **Availability to Judicial Conference.** On request of the Judicial Conference or its
31 Committee on Judicial Conduct and Disability, the clerk of a court of appeals must furnish
32 any records related to a complaint that are requested.

33 (e) **Availability to District Court.** In the event that the judicial council directs the
34 initiation of proceedings for removal of a magistrate judge under Rule 20(b)(4)(C), the
35 clerk of the court of appeals must provide to the chief judge of the district court copies of
36 the report of the special committee and any other documents and records that were before
37 the judicial council at the time of its determination. On request of the chief judge of the
38 district court, the judicial council may authorize release to that chief judge of any other
39 records relating to the investigation.

40 (f) **Impeachment Proceedings.** If the Judicial Conference determines that
41 consideration of impeachment may be warranted, it must transmit the record of all
42 relevant proceedings to the Speaker of the House of Representatives.

43 (g) **Consent of Subject Judge.** Any materials from the files may be disclosed to any
44 person on the written consent of both the subject judge and the chief circuit judge. In any
45 such disclosure, the chief circuit judge may require that the identity of the complainant, or
46 of witnesses in an investigation conducted by a special committee or the judicial council,
47 not be revealed.

48 (h) **Disclosure in Special Circumstances.** The Judicial Conference, its Committee

1 on Judicial Conduct and Disability, or a judicial council may authorize disclosure of
2 information about the consideration of a complaint, including the papers, documents, and
3 transcripts relating to the investigation, to the extent that such disclosure is justified by
4 special circumstances and is not prohibited by the Act. Such disclosure may be made to
5 Judiciary researchers engaged in the study or evaluation of experience under the Act and
6 related modes of judicial discipline, but only where such study or evaluation has been
7 specifically approved by the Judicial Conference or by the Judicial Conference Committee
8 on Judicial Conduct and Disability. Appropriate steps must be taken to protect the
9 identities of the judge complained against, the complainant, and witnesses from public
10 disclosure, and other appropriate safeguards to protect against the dissemination of
11 confidential information may be imposed.

12 (i) Disclosure of Identity by Subject Judge. Nothing in this Rule precludes the
13 subject judge from acknowledging that he or she is the judge referred to in documents
14 made public pursuant to Rule 24.

15 (j) Assistance and Consultation. Nothing in this Rule precludes the chief circuit
16 judge or judicial council, for purposes of acting on a complaint filed under the Act, from
17 seeking the assistance of qualified staff, or from consulting other judges who may be
18 helpful in the process of complaint disposition.

19
20 Commentary on Rule 23

21
22 Rule 23 was adapted from the Illustrative Rules.

23
24 The Act applies a rule of confidentiality to “papers, documents, and records of
25 proceedings related to investigations conducted under this chapter” and states that they may not
26 be disclosed “by any person in any proceeding,” with enumerated exceptions. 28 U.S.C. §
27 360(a). Three questions arise: Who is bound by the confidentiality rule, what proceedings are
28 subject to the rule, and who is within the circle of people who may have access to information
29 without breaching the rule?

30
31 With regard to the first question, Rule 23(a) provides that judges, employees of the
32 judicial branch, and those persons involved in recording proceedings and preparing transcripts
33 are obliged to respect the confidentiality requirement. This of course includes subject judges
34 who do not consent to identification under Rule 23(i).

35
36 With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly
37 to consideration of a complaint at any stage.

38
39 With regard to the third question, there is no barrier of confidentiality among a chief
40 circuit judge, judicial council, the Judicial Conference, and the Judicial Conference Committee
41 on Judicial Conduct and Disability. Each may have access to any of the confidential records for
42 use in their consideration of a referred matter, a petition for review, or monitoring the
43 administration of the Act. It is clear that a district court may have similar access if the judicial
44 council orders the district court to initiate proceedings to remove a magistrate judge from office,
45 and Rule 23(e) so provides.

46
47 In extraordinary circumstances, a chief circuit judge may disclose the existence of a
48 proceeding under these Rules. The disclosure of such information in high-visibility or

1 controversial cases is to reassure the public that the federal judiciary is capable of redressing
2 judicial misconduct or disability. Moreover, the confidentiality requirement does not prevent the
3 chief circuit judge from “communicat[ing] orally or in writing with . . . [persons] who may have
4 knowledge of the matter,” as part of a limited inquiry conducted by the chief circuit judge under
5 Rule 11(b).

6
7 Rule 23 recognizes that there must be some exceptions to the Act’s confidentiality
8 requirement. For example, the Act requires that certain orders and the reasons for them must be
9 made public. 28 U.S.C. § 360(b). Rule 23(c) makes it explicit that memoranda supporting chief
10 circuit judge and council orders, as well as dissenting opinions and separate statements, may
11 contain references to information that would otherwise be confidential and that such information
12 may be made public. However, subsection (c) is subject to Rule 24(a) which provides the
13 general rule regarding the public availability of decisions. For example, the name of a subject
14 judge cannot be made public in a decision if disclosure of the name is prohibited by that Rule.

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

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

38
39 Rule 23(h) permits disclosure of additional information in circumstances not enumerated.
40 For example, disclosure may be appropriate to permit a prosecution for perjury based on
41 testimony given before a special committee. Another example might involve evidence of
42 criminal conduct by a judge discovered by a special committee.

43
44 Subsection (h) also permits the authorization of disclosure of information about the
45 consideration of a complaint, including the papers, documents, and transcripts relating to the
46 investigation, to Judiciary researchers engaged in the study or evaluation of experience under the
47 Act and related modes of judicial discipline. The Rule envisions disclosure of information from
48 the official record of complaint proceedings to a limited category of persons for appropriately

1 authorized research purposes only, and with appropriate safeguards to protect individual
2 identities in any published research results that ensue. In authorizing disclosure, the judicial
3 council may refuse to release particular materials when such release would be contrary to the
4 interests of justice, or that constitute purely internal communications. The Rule does not
5 envision any disclosure of purely internal communications between judges and their colleagues
6 and staff.

7
8 Under Rule 23(j), chief circuit judges and judicial councils may seek staff assistance or
9 consult with other judges who may be helpful in the process of complaint disposition; the
10 confidentiality requirement does not preclude this. The chief circuit judge, for example, may
11 properly seek the advice and assistance of another judge who the chief circuit judge deems to be
12 in the best position to communicate with the subject judge in an attempt to bring about corrective
13 action. As another example, a new chief circuit judge may wish to confer with a predecessor to
14 learn how similar complaints have been handled. In consulting with other judges, of course, the
15 chief circuit judge should disclose information regarding the complaint only to the extent the
16 chief circuit judge deems necessary under the circumstances.

17
18
19 **Rule 24. Public Availability of Decisions.**

20
21 **(a) General Rule; Specific Cases.** When final action on a complaint has been taken
22 and is no longer subject to review, all orders entered by the chief circuit judge and judicial
23 council, including any supporting memoranda and any dissenting opinions or separate
24 statements by members of the judicial council, must be made public. However:

25 **(1)** If the complaint is finally dismissed under Rule 11(c) without appointment of
26 a special committee, or if it is concluded under Rule 11(d) because of voluntary
27 corrective action, the publicly available materials must not disclose the name of
28 the subject judge without his or her consent.

29 **(2)** If the complaint is concluded because of intervening events, or dismissed at
30 any time after the appointment of a special committee, the judicial council must
31 determine whether the name of the subject judge is to be disclosed.

32 **(3)** If the complaint is finally disposed of by a privately communicated censure
33 or reprimand, the publicly available materials must not disclose either the name
34 of the subject judge or the text of the reprimand.

35 **(4)** If the complaint is finally disposed of pursuant to Rule 20(b)(4) by any
36 action other than private censure or reprimand, the text of the dispositive order
37 must be included in the materials made public, and the name of the subject
38 judge must be disclosed.

39 **(5)** The name of the complainant must not be disclosed in materials made public
40 under this Rule unless the chief circuit judge orders such disclosure.

41 **(b) Manner of Making Public.** The orders described in (a) must be made public by
42 placing them in a publicly accessible file in the office of the clerk of the court of appeals or
43 by placing such orders on the court's public website. In cases in which such orders appear
44 to have precedential value, the chief circuit judge may cause them to be published. In
45 addition, the Judicial Conference Committee on Judicial Conduct and Disability must
46 make available on the judiciary website, www.uscourts.gov, selected illustrative orders
47 described in paragraph (a), appropriately redacted, to provide additional information to
48 the public on how complaints are addressed under the Act.

1 not be disclosed. Shielding the name of the subject judge in this circumstance should encourage
2 informal disposition.
3

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

10
11 Once a special committee has been appointed, and a proceeding is concluded by the full
12 council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure of
13 the name of the subject judge.
14

15 Finally, the Rule provides that the identity of the complainant will be disclosed only if the
16 chief circuit judge so orders. Identifying the complainant when the subject judge is not identified
17 would increase the likelihood that the identity of the subject judge would become publicly
18 known, thus circumventing the policy of nondisclosure. It may not always be practicable to
19 shield the complainant's identity while making public disclosure of the judicial council's order
20 and supporting memoranda; in some circumstances, moreover, the complainant may consent to
21 public identification.
22
23

24 **Rule 25. Disqualification.**

25
26 **(a) General Rule.** Any judge is disqualified from participating in any proceeding
27 under these Rules if the judge, in his or her discretion, concludes that circumstances
28 warrant disqualification. If the complaint is filed by a judge, that judge is disqualified
29 from participation in any consideration of the complaint except to the extent that these
30 Rules provide for participation by a complainant. However, a chief circuit judge who has
31 identified a complaint under Rule 5 is not automatically disqualified from participating in
32 the consideration of the complaint.

33 **(b) Subject Judge.** A subject judge is disqualified from participating in any
34 consideration of the complaint except to the extent that these Rules provide for
35 participation by a subject judge.

36 **(c) Chief Circuit Judge not Disqualified from Considering a Petition for Review of**
37 **a Chief Circuit Judge's Order.** If a petition for review of a chief circuit judge's order
38 entered under Rule 11(c), (d), or (e) is filed with the judicial council pursuant to Rule 18,
39 the chief circuit judge is not disqualified from participating in the council's consideration
40 of the petition

41 **(d) Member of Special Committee not Disqualified.** A member of the judicial
42 council who serves on a special committee, including the chief circuit judge, is not
43 disqualified from participating in council consideration of the committee's report.

44 **(e) Subject Judge Following Appointment of a Special Committee.** On appointment
45 of a special committee, the subject judge is automatically disqualified from participation in
46 any proceeding arising under the Act or these Rules by serving on any special committee,
47 the judicial council of the circuit, the Judicial Conference of the United States, and the
48 Judicial Conference Committee on Judicial Conduct and Disability. The disqualification

1 continues until all proceedings regarding the complaint against the subject judge are
2 finally terminated, with no further right of review.

3 (f) **Substitute for Disqualified Chief Circuit Judge.** If the chief circuit judge is
4 disqualified from participating in consideration of the complaint, the duties and
5 responsibilities of the chief circuit judge under these Rules must be assigned to the circuit
6 judge in regular active service who is the most senior in date of commission of those who
7 are not disqualified. If all circuit judges in regular active service are disqualified, the
8 judicial council may determine whether to request a transfer under Rule 26, or whether, in
9 the interest of sound judicial administration, to permit the chief circuit judge to dispose of
10 the complaint on the merits. Members of the judicial council who are named in the
11 complaint may participate in this determination if necessary to obtain a quorum of the
12 judicial council.

13 (g) **Judicial Council Action where Multiple Judges are Disqualified.**
14 Notwithstanding any other provision in these Rules to the contrary, a member of the
15 judicial council who is a subject of the complaint may participate in the disposition thereof
16 if:

17 (1) participation by subject judge(s) is necessary to obtain a quorum of the
18 judicial council;

19 (2) the judicial council finds that the lack of a quorum is due to the naming of
20 one or more judges in the complaint for the purpose of disqualifying that judge
21 or judges, or to the naming of one or more judges based on their participation in
22 a decision excluded from the definition of misconduct under Rule 3(b)(2); and

23 (3) the judicial council votes that it is necessary, appropriate and in the interest
24 of sound judicial administration that such subject judges be eligible to act.

25 (4) otherwise disqualified members may participate in votes taken under (2) and
26 (3) of this subsection.

27 (h) **Disqualification of Members of the Judicial Conference Committee.** No member
28 of the Judicial Conference Committee on Judicial Conduct and Disability is disqualified
29 from participation in any proceeding under the Act or these Rules because of consultations
30 with a chief circuit judge, member of a special committee, or member of a judicial counsel
31 regarding the interpretation or application of the Act or these Rules, unless the member
32 believes that such consultation would prevent such participation from being fair-minded.
33

34 Commentary on Rule 25

35
36 Rule 25 is adapted from the Illustrative Rules.

37
38 Subsection (a) provides the general rule for disqualification. Of course, a judge is not
39 disqualified simply because the subject judge is on the same court. However, this subsection
40 recognizes that there may be cases in which an appearance of bias or prejudice is created by
41 circumstances other than an association with the subject judge as a colleague. For example, a
42 judge may have a familial relationship with a complainant or subject judge. When such
43 circumstances exist, a judge may, in his or her discretion, conclude that disqualification is
44 warranted.
45

46 Subsection (e) makes it clear that the disqualification of the subject judge relates only to
47 the subject judge's participation in any proceeding arising under the Act or these Rules as a
48 member of a special committee, judicial council, Judicial Conference, or the Judicial Conference

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1 Committee. The Illustrative Rule, based on section 359(a) of the Act, was ambiguous and could
2 have been read to disqualify a subject judge from any service of any kind on each of the bodies
3 mentioned. This was undoubtedly not the intent of the Act. Such a disqualification would be
4 anomalous in light of the Act's allowing a subject judge to continue to decide cases and to
5 continue to exercise the powers of chief circuit or district judge. It would also create a
6 substantial deterrence to the appointment of special committees, particularly where a special
7 committee is needed solely because the chief circuit judge may not decide matters of credibility
8 in his or her review under Rule 11.
9

10 While a subject judge is barred by Rule 25(b) from participating in the disposition of the
11 complaint in which he or she is named, Rule 25(e) recognizes that participation in proceedings
12 arising under the Act or these Rules by a judge who is the subject of a special committee
13 investigation may lead to an appearance of self-interest in creating substantive and procedural
14 precedents governing such proceedings, and Rule 25(e) bars such participation.
15

16 Under the Act, a complaint against the chief circuit judge is to be handled by "that circuit
17 judge in regular active service next senior in date of commission." 28 U.S.C. § 351(c). Rule
18 25(f) provides that seniority among judges other than the chief is to be determined by date of
19 commission, with the result that complaints against the chief circuit judge may be routed to a
20 former chief circuit judge or other judge who was appointed earlier than the chief circuit judge.
21 The Rules do not purport to prescribe who is to preside over meetings of the judicial council.
22 Consequently, where the presiding member of the judicial council is disqualified from
23 participating under these Rules, the order of precedence prescribed by Rule 25(f) for performing
24 "the duties and responsibilities of the chief circuit judge under these Rules" does not apply to
25 determine the acting presiding member of the judicial council. That is a matter left to the internal
26 rules or operating practices of each judicial council. In most cases the most senior active circuit
27 judge who is a member of the judicial council and who is not disqualified will preside.
28

29 Sometimes a single complaint is filed against a large group of judges. If the normal
30 disqualification rules are observed in such a case, no court of appeals judge can serve as acting
31 chief circuit judge of the circuit, and the judicial council will be without appellate members.
32 Where the complaint is against all circuit and district judges, under normal rules no member of
33 the judicial council can perform the duties assigned to the council under the statute.
34

35 A similar problem is created by successive complaints arising out of the same underlying
36 grievance. For example, a complainant files a complaint against a district judge based on alleged
37 misconduct, and the complaint is dismissed by the chief circuit judge under the statute. The
38 complainant may then file a complaint against the chief circuit judge for dismissing the first
39 complaint, and when that complaint is dismissed by the next senior judge, still a third complaint
40 is filed. The threat is that the complainant will bump down the seniority ladder until, once again,
41 there is no member of the court of appeals who can serve as acting chief circuit judge for the
42 purpose of the next complaint. Similarly, complaints involving the merits of litigation may
43 involve a series of decisions in which many judges participated or in which a rehearing en banc
44 was denied by the court of appeals, and the complaint may name a majority of the judicial
45 council as subject judges.
46

47 In recognition that these multiple-judge complaints are virtually always meritless, the
48 judicial council is given discretion to determine: (1) whether it is necessary, appropriate, and in

1 the interest of sound judicial administration to permit the chief circuit judge to dispose of a
2 complaint where it would otherwise be impossible for any active circuit judge in the circuit to
3 act, and (2) whether it is necessary, appropriate, and in the interest of sound judicial
4 administration, after appropriate findings as to need and justification are made, to permit
5 complained-against members of the judicial council to participate in the disposition of a petition
6 for review where it would otherwise be impossible to obtain a quorum.

7
8 Applying a rule of necessity in these situations is consistent with the appearance of
9 justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the
10 rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council
11 1992) (same). There is no unfairness in permitting the chief circuit judge to dispose of a patently
12 insubstantial complaint that names all active circuit judges in the circuit.

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

20
21 In the unlikely event that a quorum of the judicial council cannot be obtained to consider
22 the report of a special committee, it would normally be necessary to request a transfer under Rule
23 26.

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

28
29
30
31
32 **Rule 26. Transfer to Another Judicial Council.**

33
34 **In exceptional circumstances, a chief circuit judge or a judicial council may request**
35 **the Chief Justice to transfer a proceeding based on a complaint identified under Rule 5 or**
36 **filed under Rule 6 to the judicial council of another circuit. The request for a transfer may**
37 **be made at any stage of the proceeding before a reference to the Judicial Conference**
38 **pursuant to Rule 20(b)(3) or a petition for review filed under Rule 22. Upon receiving such**
39 **a request, the Chief Justice may refuse the request or select the transferee judicial council,**
40 **which may then exercise the powers of a judicial council under these Rules.**

41
42 **Commentary to Rule 26**

43
44 Rule 26 is new but implements the Breyer Committee's recommended use of transfers.
45 Breyer Report, 239 F.R.D. at 214-15.

46
47 Rule 26 authorizes the transfer of a complaint proceeding to another judicial council
48 selected by the Chief Justice. Such transfers may be appropriate, for example, in the case of a

1 serious complaint where there are multiple disqualifications among the original council, where
2 the issues are highly visible and a local disposition may weaken public confidence in the process,
3 where internal tensions arising in the council as a result of the complaint render disposition by a
4 less involved council appropriate, or where a complaint calls into question policies or governance
5 of the home court of appeals. The power to effect a transfer is lodged in the Chief Justice to
6 avoid disputes in a council over where to transfer a sensitive matter and to ensure that the
7 transferee council accepts the matter.

8
9 Upon receipt of a transferred proceeding, the transferee council shall determine the proper
10 stage at which to begin consideration of the complaint -- for example, reference to the transferee
11 chief circuit judge, appointment of a special committee, etc.

12
13
14 **Rule 27. Withdrawal of Complaints and Petitions for Review.**

15
16 **(a) Complaint Pending Before Chief Circuit Judge. A complaint that is before the**
17 **chief circuit judge for a decision under Rule 11 may be withdrawn by the complainant with**
18 **the consent of the chief circuit judge. The withdrawal of a complaint will not prevent a**
19 **chief circuit judge from identifying, or reduce the chief circuit judge's duty to identify, a**
20 **complaint under Rule 5 based on the withdrawn complaint.**

21 **(b) Complaint Pending before Special Committee or Judicial Council. After a**
22 **complaint has been referred to a special committee for investigation, the complaint may be**
23 **withdrawn by the complainant only with the consent of both the subject judge and either**
24 **the special committee (before its report has been filed) or the judicial council.**

25 **(c) Petitions for Review. A petition for review addressed to a judicial council under**
26 **Rule 18 or to the Judicial Conference Committee on Judicial Conduct and Disability under**
27 **Rule 22, pursuant to Rule 21(b)(1), may be withdrawn by the petitioner at any time before**
28 **action has been taken on the petition.**

29
30 **Commentary on Rule 27**

31
32 Rule 27 is adapted from the Illustrative Rules and treats the complaint proceeding, once
33 begun, as a matter of public business rather than as the property of the complainant.
34 Accordingly, the chief circuit judge or the judicial council remains responsible for addressing any
35 complaint under the Act, even a complaint that has been formally withdrawn by the complainant.

36
37 Under subsection 27(a), a complaint pending before the chief circuit judge may be
38 withdrawn if the chief circuit judge consents. Where the complaint clearly lacked merit, the
39 chief circuit judge may accordingly be saved the burden of preparing a formal order and
40 supporting memorandum. However, the chief circuit judge may, or be obligated under Rule 5, to
41 identify a complaint based on allegations in a withdrawn complaint.

42
43 If the chief circuit judge appoints a special committee, Rule 27(b) provides that the
44 complaint may be withdrawn only with the consent of both the body before which it is pending
45 (the special committee or the judicial council) and the subject judge. Once a complaint has
46 reached the stage of appointment of a special committee, a resolution of the issues may be
47 necessary to preserve public confidence. Moreover, the subject judge is given the right to insist
48 that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if

1 the proceeding were terminated by withdrawal of the complaint.
2

3 With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted
4 authority to withdraw the petition. It is thought that the public's interest in the proceeding is
5 adequately protected, because there will necessarily have been a decision by the chief circuit
6 judge and often by the judicial council as well in such a case.
7

8
9 **Rule 28. Availability of Rules and Forms.**

10
11 **These Rules and copies of the complaint form as provided in Rule 6(b) must be**
12 **available without charge in the office of the clerk of each court of appeals, district court,**
13 **bankruptcy court, or other federal court whose judges are subject to the Act. Each court**
14 **must also make these Rules and the complaint form available on the court's website, or**
15 **provide an internet link to the Rules and complaint form that are available on the**
16 **appropriate court of appeals' website.**
17

18
19 **Rule 29. Effective Date.**

20
21 **These Rules will become effective thirty days after promulgation by the Judicial**
22 **Conference of the United States.**
23
24
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26

DRAFT FOR PUBLIC COMMENT - 6/13/07

APPENDIX: COMPLAINT FORM

JUDICIAL COUNCIL OF THE _____
COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

NOTE: MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR
"JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE SUBJECT
JUDGE(S) ON THE ENVELOPE.

SEE RULE 6 FOR INFORMATION ON WHAT TO INCLUDE IN A COMPLAINT.

SEE RULE 7 FOR INFORMATION ON WHERE TO FILE A COMPLAINT.

SEE RULE 6(c) FOR THE NUMBER OF COPIES REQUIRED.

1. Complainant's name: _____

Address: _____

Daytime telephone: (___) _____

2. Subject Judge(s):

Name: _____

Court: _____

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

[] Yes [] No

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

Court:

Case Number:

Docket numbers of any appeals to the ___d/th Circuit:

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

[] Party [] Lawyer [] Neither

If a party, give the name, address, and telephone number of your lawyer:

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4. Have you filed any lawsuits against the judge?

[] Yes [] No

If “yes,” give the following information about each lawsuit:

Court:

Docket Number:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

5. On separate sheets of paper, please provide a statement of the facts on which the claim of misconduct or disability is based. For further information about what to include in your statement of facts, see Rule 6(a).

Declaration and signature:

I declare under penalty of perjury that:

_____(1) I have reviewed the Rules Governing Judicial Conduct and Disability Proceedings, and;

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

(Signature) _____

(Date) _____