The Judicial Conference Committee
on Judicial Conduct and Disability

Digest of Authorities on the Judicial Conduct and Disability Act (Digest)

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STANDING TO FILE A COMPLAINT

Anyone may file a complaint alleging that a judge has engaged in misconduct or is disabled. Under the Judicial Conduct and Disability Act (the Act), traditional standing requirements do not apply.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . may file . . . a written complaint."

Rules for Judicial-Conduct and Judicial-Disability Proceedings (the Rules)

Rule 3(c)(1): "A 'complaint' is . . . a document that, in accordance with Rule 6, is filed by, or on behalf of, any person, including a document filed by an organization."

Commentary to Rule 3: "Under the Act, a 'complaint' may be filed by 'any person' or 'identified' by a chief circuit judge. Under Rule 3(c)(1), complaints may be submitted by or on behalf of any person, including a document filed by a professional organization. Traditional standing requirements do not apply. Individuals or organizations may file a complaint even if they have not been directly injured or aggrieved."

Orders

Judicial Conference

In re Complaints of Judicial Misconduct, 9 F.3d 1562, 1564, 1567 (U.S. Jud. Conf. 1993) (decided before 2008 Rules were enacted): Complainants have standing under the Act to file complaints alleging misconduct in the subject judge's handling of certain litigation even though they were not parties to, or involved in, the underlying proceedings. The fact that many complaints have been entertained in the absence of traditional standing "denot[es] the common understanding of the circuits in implementing the Act . . . that traditional standing requirements do not apply." Also, the 1990 amendment to the Judicial Conduct and Disability Act permitting chief judges to identify complaints "clearly signals Congress' assumption that . . . complainants should not have to overcome standing requirements." Because a proceeding under the Act "is not a judicial proceeding subject to the Article III requirement of a case or controversy," a complainant "need not satisfy the requirements of standing imposed in judicial proceedings by Article III in order to maintain a complaint of judicial misconduct."

Federal Circuit

In re Complaint of Judicial Misconduct, No. 37 (Fed. Cl. Jan. 7, 2002) (decided before 2008

Rules were enacted): "Although neither a party nor a witness" in the underlying case, a physician/attorney "is a 'person' who may file a complaint of judicial misconduct" (*see In re Complaints of Jud. Misconduct*, 9 F.3d at 1567) alleging that a special master showed "rank incivility and gratuitous disdain for members of the [medical] profession" in rejecting a medical opinion supportive of compensation under the National Childhood Vaccine Injury Act.

ADDITIONAL RESOURCES

Legislative History

H.R. Rep. No. 96-1313, at 10 (1980): In discussing a proposal that later became the Judicial Conduct and Disability Act, a House committee report stated that, under the proposal (later recodified as 28 U.S.C. § 351(a)), "any person" could file a complaint alleging judicial misconduct. The report further explained that a "person" would include "corporations, associations, firms, partnerships, societies, unions, councils, joint stock companies, the United States government, as well as individuals (both citizen and aliens)."

Law Review Articles

Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 108–09 (1993): Mentioned a proceeding under the Act in which a police officer filed a complaint against a federal judge alleging the judge used a disrespectful tone in demanding that an eighty-year-old man in a wheelchair remove his cap in the courtroom.

CLAIM PRECLUSION/SERIAL FILING OF COMPLAINTS

A complainant is not necessarily barred from reasserting claims brought in a previous judicial misconduct proceeding.

AUTHORITIES

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 11(c)(2): "A complaint must not be dismissed solely because it repeats allegations of a previously dismissed complaint if it also contains material information not previously considered and does not constitute harassment of the subject judge."

Commentary to Rule 11: "[T]he investigative nature of the process prevents the application of claim preclusion principles where new and material evidence becomes available. However, it also recognizes that at some point a renewed investigation may constitute harassment of the subject judge and should not be undertaken, depending of course on the seriousness of the issues and the weight of the new evidence."

Orders

Judicial Conference

In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 563, 568 (U.S. Jud. Conf. 2008) (decided before 2008 Rules were enacted): The Committee noted that a judicial misconduct complaint containing factual issues involved in an earlier misconduct complaint is not barred by the principle of claim preclusion where the three basic purposes of claim preclusion (need for finality, conservation of judicial resources, and prevention of harassment) are not served by applying it, and because judicial misconduct proceedings are administrative and managerial in character. The Committee observed as follows:

> "When there is a reason for continuing or reinstating a proceeding that is legitimate and not intended to harass or punish, the nature of the administrative, self-regulatory process requires that the new proceeding be completed. This is particularly important where, as here, credible evidence is presented that the subject judge hindered the original proceeding."

First Circuit

In re Complaint No. 01-10-90018 (1st Cir. C.J. Oct. 19, 2010): A complaint is not cognizable under the Act when the complainant presents charges against the same judge that are virtually identical to those presented by that complainant in a previously dismissed complaint and the complainant offers no new evidence or information supporting the complaint's allegations of bias on the part of the subject judge.

Third Circuit

In re Complaint of Judicial Misconduct, Nos. 03-08-90106, 03-09-90009 (3d Cir. Jud. Council May 28, 2009): Complaint allegations that were previously resolved through formal action by the U.S. Judicial Conference (which at the time found no reason to inquire further into the allegations and made no finding of judicial misconduct) and were more recently reaffirmed by the Conference's Executive Committee should be dismissed under Rule 20(b)(1)(A)(iv).

Fifth Circuit

In re Complaint, Nos. 05-10-90223 through 05-10-90226 (5th Cir. C.J. Nov. 19, 2010): When a complainant's allegations against a judge are identical to those he made in a prior complaint, the complaint is subject to dismissal as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii).

Ninth Circuit

In re Complaint of Judicial Misconduct, No. 09-90250 (9th Cir. C.J. Nov. 29, 2010): Where a complainant alleged that a judge engaged in a cover-up of witness tampering by the complainant's opponent in a civil case, the complaint was precluded because "the exact same claim was rejected on appeal [in the civil action]" and "the judge's actions 'therefore cannot constitute past or future misconduct.'"

In re Complaint of Judicial Misconduct, No. 10-90023 (9th Cir. C.J. Nov. 16, 2010): Where a complainant previously filed two materially identical complaints against the same judge, the current complaint, which ignores the chief judge's dismissal of the earlier complaints as merits-related and lacking in objectively verifiable factual foundation, must be summarily dismissed.

Eleventh Circuit

In re Complaint of _____ against _____, United States District Judge, No. 11-10-90066 (11th Cir. C.J. Aug. 24, 2010): When a judicial misconduct complaint repeats the allegations of a previously dismissed complaint, it is appropriate to dismiss those allegations and address only those allegations of a different nature that have not previously been considered.

In re Complaint of _____ against _____, United States Magistrate Judge, No. 11-10-90058 (11th Cir. C.J. Aug. 6, 2010): Allegations in a judicial misconduct complaint that repeat the allegations of a previously dismissed complaint should be dismissed.

CODE OF CONDUCT FOR UNITED STATES JUDGES

The Judicial Conduct and Disability Act was not designed as an enforcement mechanism for the Code of Conduct for United States Judges (the Code). The Act and the Code are separate sources of authority, administered within the judiciary by separate committees of the Judicial Conference of the United States. The Code, a Judicial Conference product, is the authoritative text on judicial ethics in the Third Branch, setting forth the standards of conduct with which all judges should comply. The Act, a statutory scheme, is implemented in accordance with the Judicial Conference Rules for Judicial-Conduct and Judicial-Disability Proceedings, which apply the term "misconduct" to any behavior "prejudicial to the effective and expeditious administration of the business of the courts." Although Code provisions can be read as indicating the types of behavior that might qualify as misconduct under the Act and Rules, not every action at variance with the Code will so qualify.

Unlike the Code of Conduct, the Act establishes an administrative complaint process. That process gives circuit judicial councils constituted under 28 U.S.C. § 332 (or equivalent bodies in national courts within the Act's purview) various options for addressing a judge's misconduct or disability in a manner that restores the "effective and expeditious" administration of court business.

AUTHORITIES

Rules for Judicial-Conduct and Judicial-Disability Proceedings

> Commentary to Rule 4: "The phrase 'prejudicial to the effective and expeditious administration of the business of the courts' is not subject to precise definition. . . ." Although the Code of Conduct for United States Judges may be informative, its main precepts are highly general; the Code is in many potential applications aspirational rather than a set of disciplinary rules. "[U]ltimately the responsibility for determining what constitutes cognizable misconduct is determined by the Act and these Rules, as interpreted and applied by judicial councils, subject to review and limitations prescribed by the Act and these Rules."

Code of Conduct for United States Judges

> Commentary to Canon 1: "The Code . . . may . . . provide standards of conduct for application in proceedings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. §§ 332(d)(1), 351–364). Not every violation of the Code should lead to disciplinary action. Whether disciplinary action is appropriate, and the degree of discipline, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the improper activity, the intent of the judge, whether there is a pattern of improper activity, and the effect of the improper activity on others or on the judicial system. Many of the restrictions in the Code are necessarily cast in general terms, and judges may reasonably differ in their interpretation."

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. 11-01 (U.S. Jud. Conf. Dec. 1, 2011): The Committee publicly reprimanded a bankruptcy judge for their membership, spanning thirty-three years, in a club that invidiously discriminated against women and African Americans, a practice that had continued in the twenty-one years since the judge had urged the club to diversify. According to the Committee, the judge's membership created a perception that the judge's impartiality was impaired and was inconsistent with Canon 2A and Canon 2C of the Code of Conduct for United States Judges. Citing Rule 3(h)(2) of the 2008 Rules (current Rule 4(a)(7)), the Committee found that the judge's membership in the club was misconduct under the Judicial Conduct and Disability Act because it had "a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people."

First Circuit

In re Complaint, No. 01-09-90006 (1st Cir. C.J. July 10, 2009): A limited inquiry showed that the subject judge did not, as alleged, contravene a provision of the Code of Conduct by engaging in improper ex parte communication and violating complainant's right to be heard. The complaint, which claimed violations of the Code, was dismissed because it "did not allege conduct that violates the misconduct statute." The circuit chief judge explained that "[e]ven if the judge's conduct infringed on the Code—which it did not—not every violation of the code warrants disciplinary action" under the Act.

In re Complaint, No. 385 (1st Cir. C.J. Sept. 27, 2004) (decided before 2008 Rules were enacted): "A violation of the Code of Conduct for United States Judges does not, ipso facto, violate the statutory standard of misconduct." In this instance, a subject judge's action of rolling of the eyes and looking up at the ceiling, if it occurred as alleged, might be at odds with the Code of Conduct but would not be "the type of bias or prejudicial behavior intended to be addressed" by the Act.

Second Circuit

In re Charge of Judicial Misconduct, 02-21-90017 (2d Cir. C.J. Jan. 10, 2022): A complaint alleged judicial misconduct in connection with a judge's ownership of a condominium and the judge's election to the board of the condominium association, and alleged that the judge violated the confidentiality of misconduct proceedings by emailing a potential witness and disclosing the existence of the complaint. The chief circuit judge considered whether the judge's conduct violated Canon 2(B) (a judge should not "lend the prestige of the judicial office to advance the private interests of others") and whether the conduct rose to the level of misconduct under the Act. The chief circuit judge concluded that, based on the record, no reasonable person could view the subject judge's conduct as rising to that standard. Additionally, while finding that the judge may have technically violated the confidentiality provisions of Rule 23, the chief circuit judge explained that the violation does not "rise to the

level of misconduct under the Act."

In re Charges of Judicial Misconduct, Nos. 02-16-90101; 02-16-90104 (2d Cir. C.J. May 22, 2017): A magistrate judge wrote a character reference letter for a defendant with whom the judge had worked at the U.S. Attorney's Office and whom the judge referred to as "my friend for nearly 40 years." The letter was not on official letterhead or signed with a judicial title but did mention that its author is on the bench. The sentencing judge weighed the strong character references in sentencing the defendant. The complaint alleged that the magistrate judge violated Canon 2B by submitting an unsolicited character letter to the sentencing judge and that the sentencing judge violated Canon 3B by failing to take any action on that violation. After the complaint was filed, the magistrate judge wrote to the chief circuit judge and explained that they had inadvertently violated the Code, provided the reasons why they mistakenly believed their conduct was permissible, apologized to the complainant and the court, and promised to never engage in the conduct again. The chief circuit judge found that the reference letter violated Canon 2B, the magistrate judge had taken appropriate corrective action by "acknowledging the violation, apologizing for the violation, and pledging to refrain from similar conduct in the future." Order at 8. Accordingly, the complaint against the magistrate judge was concluded based on voluntary corrective action. As to the sentencing judge, the chief circuit judge found no evidence of "intentional or willful violation of Canon 3B(5), or of a pattern of improper activity, or that the District Judge's handling of the letter had any effect on others or the judicial system" and that, therefore, any violation of Canon 3B(5) would not rise to the level of misconduct under the Act. Order at 11.

In re Charge of Judicial Misconduct, Nos. 01-8532, 01-8533, 01-8534, 01-8535 (2d Cir. C.J. Jan. 29, 2002) (decided before 2008 Rules were enacted): Even if inconsistent with the Code of Conduct, the subject judges' inclusion of a false statement in a footnote of a decision disbarring complainant—if the inclusion occurred as alleged—would not be misconduct under the Act, because it would not be "prejudicial to the effective and expeditious administration of the business of the courts." The Act is not designed to enforce the Code of Judicial Conduct, and "judicial discipline under the Act is not, and was never meant to be, coextensive with judicial ethics as embodied in the Canons" (quoting *In re Charge of Judicial Misconduct*, 62 F.3d 320 (9th Cir. 1995)).

Third Circuit

In re Complaint of Judicial Misconduct, No. 04-26 (3d Cir. C.J. Dec. 29, 2009): The chief circuit judge conducted a limited inquiry into a complaint alleging that a judge violated the Code of Conduct because the judge was a member in a general partnership that accepted a loan from a county official who might come before the court and the judge was allegedly serving as the official's attorney. The chief circuit judge looked to the Code of Conduct, including Canon 2 (on avoiding "impropriety and the appearance of impropriety" and acting "in a manner that promotes public confidence in the integrity and impartiality of the judiciary") and Canon 5 (on regulating extra-judicial activities to minimize the risk of conflict with judicial duties, and, in particular, refraining from business that exploits the judicial position or involves frequent transactions with persons likely to come before the court). Because violation of the Code does not necessarily rise to the level of misconduct, the

circuit chief judge concluded that (1) the extra-judicial conduct at issue was an "isolated transaction" that would not lead to a "'substantial and widespread' lowering of confidence in the courts among reasonable people"; (2) the subject judge took sufficient corrective action by repaying the loan, terminating the business relationship with the county official, and dissolving the partnership; (3) a conversation between the subject judge and the county official was a matter of personal friendship and created no appearance of impropriety; and (4) the judge was not serving as the county official's lawyer or otherwise practicing law.

Fourth Circuit

In the Matter of Judicial Complaints, Nos. 04-21-90039, 04-21-90119 (4th Cir. Jud. Council July 29, 2022): Following a special committee investigation, the Judicial Council found that a separation agreement the subject judge entered with a former employer just before the subject judge's appointment to the bench undermined public confidence in the integrity and impartiality of the judiciary. The Judicial Council explained that the separation agreement raised significant concerns under Canons 1, 2, and 4A(5), and the Ethics Reform Act. While agreeing that this misconduct was serious, the Judicial Council departed from the special committee's recommendation and imposed a public, rather than private, reprimand. The Judicial Council noted that the separation payment was a topic of public concern in local newspapers and that "[t]his public concern requires a public response." Order at 14. In the interest of transparency, the Judicial Council publicly reprimanded the subject judge.

Fifth Circuit

In re Complaint of Judicial Misconduct, No. 05-17-90078 (5th Cir. C.J. Aug. 1, 2017): A complaint alleged, *inter alia*, that a judge committed misconduct by reporting the complainant to the state bar, testifying as a witness in the state court disciplinary proceeding, and allowing the state bar to pay for flights, a hotel, car rental, and meals. In dismissing the complaint, the chief circuit judge explained that the referral to disciplinary authorities is consistent with the Code, as Canon 3B(5) provides that a judge should take appropriate action upon learning that a lawyer may have violated the rules of professional conduct, including reporting the conduct to appropriate authorities. Canon 3B(5) permitted the judge to testify in response to a subpoena. As to the payment of expenses in connection with the judge's testimony, the order explained that Canon 4H permits a judge to accept reimbursement for the "actual cost of travel, food, and lodging" for "law-related and extrajudicial activities permitted by this Code if the source of the payments does not give the appearance of influencing the judge in the judge's duties or otherwise give the appearance of impropriety." Because the judge's testimony was permitted under Canon 3B(5), reimbursement of the judge's expenses was permissible under Canon 4H. Accordingly, the allegations were dismissed as frivolous and insufficient to raise an inference that misconduct occurred.

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 04-6-351-17 (6th Cir. C.J. May 23, 2005) (decided before 2008 Rules were enacted): Absent a specific allegation of impropriety, or a

clear violation of the Code of Conduct, neither of which are found in this matter, the subject judge's service on the board of trustees of FREE, "a bona fide educational organization that conducts no litigation and takes no official positions on legal or public policy issues," is not misconduct under the Act. The complaint based on the judge's board service is dismissed because it "lack[s] sufficient evidence to raise an inference that misconduct has occurred," 28 U.S.C. § 352(b)(1)(A)(iii), and because, as shown by a limited inquiry, its allegations of misconduct "lack any factual foundation or are conclusively refuted by objective evidence," 28 U.S.C. § 352(b)(1)(B).

Seventh Circuit

In re Complaint of Judicial Misconduct, Nos. 07-20-90044 through 07-20-90046 (7th Cir. Jud. Council June 22, 2020): Complaints alleged that a judge's law review article could be understood as an attack on the integrity of the chief justice. The Judicial Council explained that while Canon 4 permits, and even encourages, judges to write and speak on legal topics, these activities should not detract from the dignity of office. Judges should "write and speak in ways that will not interfere with their work as judges" and "should not interfere with public perceptions that the judges will approach the cases before them fairly and impartially." Order at 7. The Judicial Council found that the "vast majority" of the subject judge's article pertained to substantive criticism of Supreme Court decisions, which are within the boundaries of appropriate discourse. However, there were a few sentences that could be understood as an attack on the integrity of the chief justice and on Republican party positions that could call into question the subject judge's impartiality on matters with partisan or ideological concerns. The Judicial Council found that those portions of the article "do not promote public confidence in the integrity and impartiality of the judiciary" even if not addressed by specific rules of judicial conduct. Order at 9. The Judicial Council found that the problematic portions of the article amounted to misconduct, publicly reprimanded the subject judge, and directed the subject judge to publicly acknowledge that parts of the article went too far and to disavow any intention to malign the justices of the Supreme Court.

In re Complaint Against a Judicial Officer, 07-15-90073 (7th. Cir. Jud. Council June 1, 2016): A complaint alleged that a judge's appointment to the Board of Trustees at a state university was misconduct. In reviewing the complaint, the chief circuit judge concluded that the appointment did not violate Canon 4B(1), which provides that a judge should not serve on an organization that is regularly involved in litigation before the court. However, the chief judge found that the complaint implicated Canon 4F, which provides that a governmental appointment is appropriate "only if it concerns the law, the legal system, or the administration of justice," and appointed a special committee to investigate. In concluding the complaint based on corrective action after the judge agreed to stop hearing cases brought by the State, the Judicial Council noted that, as provided in the Commentary to Rule 4, the Code "is in many respects aspirational, and that it is possible to depart from the Code without necessarily engaging in" misconduct. The Judicial Council found that "[t]he use of the word 'should' in Part C of the Compliance section shows that its approach is one of those aspirational norms. Other ways to allow public service while ensuring expeditious and ethical handling of judicial business are possible[.]"

In re Complaint Against a Judicial Officer, No. 06-7-352-48 (7th Cir. C.J. Mar. 9, 2007) (decided before 2008 Rules were enacted): A procedural ruling made by the subject judge during a brief ex parte proceeding devoted only to procedural matters was not alleged to have "affected the merits" of complainant's case. As a result, the proceeding did not appear to have violated Canon 3A(4) of the Code of Conduct. In any event,

> "to the extent that there is uncertainty about the scope of Canon 3A(4), a proceeding under the . . . Act is not the way to achieve resolution. That should be done under the auspices of the Committee on Codes of Conduct. It is never 'judicial misconduct' to take one view rather than another of an unresolved issue. The Commentary to Canon 1 observes, with respect to the Code as a whole: 'Many of the proscriptions in the Code are necessarily cast in general terms, and it is not suggested that disciplinary action is appropriate where reasonable judges might be uncertain as to whether or not the conduct is proscribed.'. . . [E]lucidation of the Canon . . . is not a ground for a proceeding under the 1980 Act."

Ninth Circuit

In re Charge of Judicial Misconduct, 62 F.3d 320, 322 (9th Cir. C.J. 1995) (decided before 2008 Rules were enacted): On a complaint alleging that a judge treated complainant discourteously (repeatedly interrupting him during oral argument) in violation of Canon 3(A)(3) of the Code of Conduct, and communicated ex parte in violation of Canon 3(A)(4) by speaking with another judge, a review showed no misconduct because none of the actions at issue had been "prejudicial to the effective and expeditious administration of the business of the courts." As the circuit chief judge noted, the Code of Conduct Canons are "aspirational goals." They do not control the outcome of a complaint under the Act, because "[t]he Act is not designed to enforce the Code of Judicial Conduct" and "[t]he Act's legislative history suggests that Congress intended that judicial councils consider the Code of Conduct, but not be bound by it." The Act, moreover, embodies "a standard for discipline that is significantly lower than, and conceptually different from, the ideals embodied in the Canons."

Tenth Circuit

In re Charge of Judicial Misconduct, 91 F.3d 1416, 1417–18 (10th Cir. Jud. Council 1996) (decided before 2008 Rules were enacted): According to special-committee findings adopted by the circuit judicial council, (1) the subject judge was not seeking to use the prestige of their judicial office to influence a deputy district attorney when the judge attempted to persuade that official to release an arrestee; and (2) although the subject judge's actions might nonetheless have engendered an appearance of impropriety in violation of Code of Conduct Canon 2B, they did not amount to misconduct under the Act and under a rule then in effect.

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, No. DC-21-90051 (D.C. Cir. C.J. Nov. 16, 2021); *In the Matter of a Charge of Judicial Misconduct or Disability*, No. DC-

21-90051 (D.C. Cir. Jud. Council Feb. 14, 2022): A complaint alleged that the subject judge's service as a member of the D.C. Judicial Nomination Commission ("Commission") was misconduct because, *inter alia*, it was improper political activity and caused the subject judge to have improper influence over the lawyers appearing before him. The statute creating the Commission requires an active or retired judge from the D.C. district court to serve on the Commission. After the complaint was filed, the subject judge sought an advisory opinion from the Codes Committee. A majority of the Codes Committee concluded that the judge's service was permissible and did not constitute impermissible political activity. In light of the Codes Committee's opinion, the chief circuit judge dismissed the complaint on the ground that the conduct complained of did not constitute misconduct. The complainant filed a petition for review. A majority of the Judicial Council affirmed the chief judge's dismissal of the complaint, while two council members dissented and one member concurred in the denial of the petition and joined part of the dissent. The dissent would have found that, notwithstanding the Codes Committee's opinion, the subject judge's service on the Commission constitutes impermissible political activity, would not impose a sanction on the subject judge, and would only conclude the proceeding if the judge would take corrective action by resigning from the Commission or ceasing to hear cases while serving on it.

In the Matter of a Charge of Judicial Misconduct or Disability, No. 95-14, 83 F.3d 701 (D.C. Cir. Jud. Council June 18, 1996) (decided before 2008 Rules were enacted): In a complaint against a judge on the court's "Special Division," the judicial council found no appearance of impropriety, and therefore no basis for a complaint that the judge should have disqualified themself from participating in the selection of an appointee to an Independent Counsel position (created at the instance of the Attorney General), even though, as complainant had argued, the judge was a friend of a Senator who had urged the establishment of the position, and the Senator employed the judge's spouse as a receptionist. While not meaning to "suggest that every violation of Canons 2 and 3 amounts to 'conduct prejudicial to the effective and expeditious administration of the business of the courts,'" the circuit judicial council found in legislative history "some indication" that judicial councils "should be guided in part by the Canons" in determining whether a judge committed misconduct within the meaning of the Act. *Id.* at 703–04. In a concurring opinion, three members of the council wrote to "underscore"—as "implicit in the Council's opinion"—that, in assessing a misconduct complaint, "the judicial council may base its decision on whether [the judge] has violated one of these general canons." *Id.* at 705.

Court of Federal Claims

DECIDED UNDER PREVIOUS RULES:

In re Complaint of Judicial Misconduct, No. 37 (Ct. Fed. Cl. C.J. Jan. 7, 2002): Though faulted by the complainant as "rank incivility," language in a judge's decision rejecting the complainant's expert opinion was merely criticism and did not amount to misconduct. And although the Code of Conduct—in particular, Canon 3A(3))—demands that a judge be respectful and courteous, a violation of the Code does not necessarily constitute judicial misconduct.

ADDITIONAL RESOURCES

Legislative History

S. Rep. No. 96-362, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4323: "[I]t is the intention of the committee that the judicial council may consider, but is not bound by . . . the Code of Judicial Conduct for the United States Judges, as approved by the Judicial Conference of the United States."

LIMITED INQUIRY

In determining how to handle a complaint, the chief judge may conduct a limited inquiry. To this end, the chief judge may communicate with the complainant, the subject judge, and anyone else who may know about the matter under consideration. The chief judge may also examine the record and/or transcript. During the inquiry, the chief judge must not determine any reasonably disputed matter, but the chief judge can determine if the complaint lacks sufficient evidence to raise an inference that misconduct occurred.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(a): "The chief judge shall expeditiously review any complaint received under section 351(1) or identified under section 351(b). In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining—

(1) whether appropriate corrective action has been or can be taken without the necessity for a formal investigation; and

(2) whether the facts stated in the complaint are either plainly untrue or are incapable of being established though investigation.

For this purpose, the chief judge may request the judge whose conduct is complained of to file a written response to the complaint. Such response shall not be made available to the complainant unless authorized by the judge filing the response. The chief judge or his or her designee may also communicate orally or in writing with the complainant, the judge whose conduct is complained of, and any other person who may have knowledge of the matter, and may review any transcripts or other relevant documents. The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute."

28 U.S.C. § 352(b)(1): "After expeditiously reviewing a complaint under subsection (a), the chief judge, by written order stating his or her reasons, may—

(1) dismiss the complaint—

(A) if the chief judge finds the complaint to be—
(i) not in conformity with section 351(a);

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

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

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

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Commentary to Rule 5: "Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed, the chief judge has the power in his or her discretion to begin an appropriate inquiry. A chief judge's decision whether to informally seek a resolution and/or to identify a complaint is guided by the results of that inquiry."

Rule 11(b): "In conducting [a limited] inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee's report."

Rule 11(f): "If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council."

Rule 11(g)(2): "If the chief judge disposes of a complaint under Rule 11(c), (d), or (e), the chief judge must prepare a supporting memorandum that sets forth the reasons for the disposition. If the complaint was initiated by identification under Rule 5, the memorandum must so indicate. Except as authorized by 28 U.S.C. § 360, the memorandum must not include the name of the complainant or of the subject judge. The order and memoranda incorporated by reference in the order must be promptly sent to the complainant, the subject judge, and the Committee on Judicial Conduct and Disability."

Commentary to Rule 11: "[A] matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence."

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

"[I]f potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute."

"The chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry[.]"

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

Orders

Judicial Conference

In re Opinion of Judicial Conference Comm. to Review Circuit Council Conduct & Disability Orders, 449 F.3d 106, 115 (U.S. Jud. Conf. 2006) (Winter, J., dissenting) (decided before 2008 Rules were enacted): When issues are "reasonably in dispute," a chief judge must appoint a special committee. In this matter, the disputed issues included the subject judge's assertion that they withdrew a bankruptcy reference and stayed a state court conviction because they considered the debtor's representation to the state court deficient, as well as their argument that a meeting they held with a probationer was not an improper ex parte contact even though they discussed a separate legal action in the absence of the other parties to that action.

Second Circuit

In re Charge of Judicial Misconduct, No. 09-90074-jm (2d Cir. C.J. Dec. 23, 2010: Complainant's generalized allegations that the subject judge was biased and hostile at trial lack sufficient evidence to raise an inference of misconduct when "[t]he transcript does not evidence particular hostility or favoritism toward any party."

Fourth Circuit

In the Matter of Judicial Complaints under 28 U.S.C. § 351, Nos. 04-09-90045 & 04-09-90046 (4th Cir. C.J. Nov. 9, 2009): Although a complaint alleged that a judge denied the complainant the right to represent himself in a criminal case because of his handicap, the allegation was unsupported in a record showing that the judge properly advised the complainant of the risks of self-representation, and that the latter did not renew his request for self-representation when the arraignment resumed after new counsel was appointed.

Fifth Circuit

In re Complaint of Judicial Misconduct, 05-18-90033 (5th Cir. C.J. Jan. 10, 2019): A complaint alleged that a district judge had improperly lobbied a county judge to help the complainant's former law firm get a contract with the county. The complaint named

numerous witnesses and claimed that certain emails supported the allegations. The chief circuit judge conducted a limited inquiry and was unable to corroborate any of the claims. In particular, the transcripts identified by the complaint did not support the allegations; the complainant was unable to produce the emails in question; and three witnesses denied the allegations and a fourth died prior to the filing of the complaint. Thus, the limited inquiry "was unable to locate any information that would support the charge" and the complaint was dismissed.

Seventh Circuit

In re Complaint Against a Judge, 07-22-90030 (7th Cir. C.J. June 28, 2022): A complaint alleged that a judge was a close friend of a defendant in a case before the judge and that the judge had engaged in ex parte communications with the defendant during the case. The chief judge conducted a limited inquiry and invited the judge to respond to the allegations. The judge explained that there was a friendship with the defendant in the mid-1990s but that the two had not been close since. The judge acknowledged two email exchanges that did not bear on the case. Based on the limited inquiry, the chief circuit judge dismissed the complaint, finding that the "limited inquiry demonstrates that the allegations of judicial misconduct 'are conclusively refuted by objective evidence.'"

Eighth Circuit

In re Complaint of John Doe, 08-20-90054 (8th Cir. C.J. July 19, 2022): A complaint alleged that a judge was biased in favor of the judge's former client and law partner. The chief circuit judge requested a response from the judge, who advised that he never socialized with the attorney and does not consider him a close personal friend. The chief circuit judge conducted a limited inquiry and asked the complainant to provide any evidence to support the allegations within 30 days. The complainant failed to provide the information. Therefore, the chief circuit judge found that "[b]ecause of this failure of proof and based on the district judge's categorical denial of those allegations, there is no 'reasonably disputed issue'" and the complaint was dismissed as lacking sufficient evidence to raise an inference that misconduct had occurred.

In re Complaint of John Doe, No. 08-08-90038 (8th Cir. C.J. Sept. 3, 2008): An allegation that a judge made a prejudicial and highly inflammatory comment regarding a criminal defendant must be dismissed when the transcript shows that the judge was simply clarifying the prosecutor's argument, not expressing prejudicial bias against the defendant. Similarly, an allegation that the judge allowed the jurors in the complainant's case to require him to testify before considering a not-guilty verdict was unsupported by a transcript showing that the judge's comments to the jury actually reinforced the defendant's right not to testify.

Tenth Circuit

In re Charge of Judicial Misconduct, No. 10-10-90025 (10th Cir. C.J. Sept. 24, 2010): Where it is alleged that a judge showed bias in comments made about a witness at trial, the

allegation fails when review of the transcript shows that the judge's comments, which were made outside the hearing of the witness and the jury, evidenced no bias or improper motive.

Eleventh Circuit

In re Complaint of Judicial Misconduct, 11-16-90045 (11th. Cir. C.J. Nov. 2, 2016): A complaint alleged that a judge entered the jury room during a criminal trial to "berate and cuss the jurors out," and that the transcript of an evidentiary hearing contained a statement from an attorney that supported this allegation, along with other allegations. The chief circuit judge conducted a limited inquiry into the allegation about the jury. As part of the inquiry, the chief circuit judge wrote to all twelve jurors and was able to interview six of them. All six jurors denied the allegations and recalled that the subject judge entered the jury room to thank the jurors for their service. As a result, this portion of the complaint was dismissed because the limited inquiry demonstrated that the allegations lacked factual foundation and were conclusively refuted by the evidence.

ADDITIONAL RESOURCES

Breyer Committee Report

Recommendations Aimed Primarily at Enhancing Chief Judges' and Council Members' Ability to Apply the Act, Recommendation 3 at 115: "Chief judges and special committees have distinct roles. The chief judge's role is to determine whether there is any support—usually witnesses or information in the record—for the allegations in the complaint. A special committee's role is to explore fully the evidence that supports and that refutes the allegations, to resolve conflicts of evidence and credibility of witnesses, and to propose findings of fact and recommend conclusions to the judicial council."

Committee Standards for Assessing Compliance with the Act, Standard 9 at 151: "The chief judge should therefore keep in mind that the determination whether to identify a complaint is fundamentally different than the ultimate determination whether to appoint a special committee. The threshold is much lower. If an identified complaint is ultimately dismissed without appointment of a special committee, that does not mean that the complaint should not have been identified in the first place."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 4(e): "If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee . . . to investigate the complaint and make recommendations to the judicial council."

DISMISSAL—INCAPABLE OF BEING ESTABLISHED THROUGH INVESTIGATION

A chief judge may dismiss a complaint if he or she concludes that the complaint is based on allegations that are incapable of being established through investigation. Dismissal on this basis is appropriate when the allegations in a complaint are supported only by unidentified or unavailable sources.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(a)(2): "The chief judge shall expeditiously review any complaint received under section 351(a) or identified under section 351(b). In determining what action to take, the chief judge may conduct a limited inquiry for the purpose of determining . . . (2) whether facts stated in the complaint are either plainly untrue or are incapable of being established through investigation."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 11(c)(1)(E): "A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint . . . is based on allegations which are incapable of being established through investigation."

Commentary to Rule 11: "Rule 11(c)(1)(E) is intended, among other things, to cover situations when no evidence is offered or identified, or when the only identified source is unavailable."

Orders

Third Circuit

In re Complaint of Judicial Misconduct, Nos. 03-08-90106, 03-09-90009 (3d Cir. Jud. Council May 28, 2009): Where a complaint included allegations involving the statements, actions, and intent of now-deceased witnesses, the complaint had to be dismissed under Rules 9 and 11(c)(1)(E) of the Rules for Judicial-Conduct and Judicial-Disability Proceedings because a fair and accurate investigation would have been impracticable.

In re Complaint of Judicial Misconduct or Disability, No. 06-15 (3d Cir. C.J. Aug. 7, 2006) (decided before 2008 Rules were enacted): Where a complainant offered a car salesman's statement as corroboration of allegations of corruption but provided no explanation of the circumstances under which the statement was made, no information about how the salesman might have obtained the alleged information, and no information about how he could be contacted, and also left unexplained any connection between the alleged cash bribe and the purchase of the automobiles, the accusation was "based on conjecture and innuendo."

Fifth Circuit

No. 05-18-90033 (5th Cir. C.J. Jan. 10, 2019): Allegations that a judge exerted improper influence over a county judge were incapable of being established through further investigation and were therefore dismissed. The complainant identified various witnesses and claimed that certain emails stored on two computers formerly in his possession supported his allegations. A limited inquiry failed to corroborate or verify the existence of any evidence in support of the allegations.

No. 07-05-351-0119 (5th Cir. C.J. Aug. 9, 2007) (decided before 2008 Rules were enacted): An unsworn allegation that a stranger in Chicago claiming to be the judge's "associate" tried to solicit a bribe from complainant was inherently unverifiable.

No. 06-05-351-0063 (5th Cir. C.J. Dec. 6, 2006) (decided before 2008 Rules were enacted): Allegations by a complainant that "someone" told him that the subject judge "want[ed] to make sure that [he would] never be able to earn a living in New Orleans" had to be dismissed as conclusory.

Nos. 03-05-372-0038, 03-05-372-0039 (5th Cir. C.J. Jan. 29, 2003) (decided before 2008 Rules were enacted): Complainant's allegation that the subject judges sought to force him to settle his case was incapable of being established through investigation where the complainant's attorneys, who were the sole alleged witnesses, did not support the allegation.

Seventh Circuit

In re Complaint against a Judicial Officer, No. 07-10-90055 (7th Cir. C.J. Oct. 4, 2010): An allegation in a misconduct complaint that a judge accepted a bribe in an envelope received from another party to a civil suit is both implausible and incapable of being established, because the complainant "does not relate how he knew that the envelope contained something of value, as opposed to a legal document," and because, "more than eight years after the events—it would be impossible to determine what was in any particular envelope handed to a judge."

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, No. 04-01 (D.C. Cir. C.J. May 17, 2004) (decided before 2008 Rules were enacted): Allegations that a judge used unsubstantiated charges of contempt and threats of contempt citations to induce individuals to take certain positions were unsupported by specific evidence and incapable of being established through investigation, because they were based only on an anecdote related by an unnamed source.

ADDITIONAL RESOURCES

Breyer Committee Report

> Committee Standards for Assessing Compliance with the Act, Standard 6 at 149: "Arguably, the only situation in which dismissal on this basis is appropriate is the situation of the unidentified or unavailable source. . . . If the only witness to alleged misconduct refuses to submit to examination and cross-examination, and there is no other significant evidence, the matter cannot proceed."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

> Rule 4(c)(3) of the Illustrative Rules provided that a complaint could be dismissed as frivolous if its charges were wholly unsupported or its factual claims were either plainly untrue or incapable of being established through investigation. By contrast, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, which replaced the Illustrative Rules, distinguish among dismissals based on (1) allegations that are frivolous, (2) allegations lacking sufficient evidence to raise an inference of misconduct, and (3) allegations incapable of being established through investigation.

See also Dismissal—Lacking any Factual Foundation or Conclusively Refuted by Objective Evidence.

DISMISSAL—LACKING ANY FACTUAL FOUNDATION OR CONCLUSIVELY REFUTED BY OBJECTIVE EVIDENCE

Where a chief circuit judge, after a limited inquiry, determines that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence, the chief judge must dismiss the complaint. Dismissal on this basis is warranted where, for example, the transcripts and witnesses referenced in the complaint are uniformly supportive of the subject judge.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(a)(2): "In determining what action to take [on a complaint], the chief judge may conduct a limited inquiry for the purpose of determining . . . whether the facts stated in the complaint are . . . plainly untrue. . . . The chief judge shall not undertake to make findings of fact about any matter that is reasonably in dispute."

28 U.S.C. § 352(b)(1)(B): The chief judge . . . may dismiss the complaint "when a limited inquiry conducted under subsection (a) demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 11(c)(1)(D): "A complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint . . . is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists."

Commentary to Rule 11: "[D]ismissal following a limited inquiry may occur when the complaint refers to transcripts or to witnesses and the chief judge determines that the transcripts or witnesses all support the subject judge. . . . A complaint warranting dismissal under Rule 11(c)(1)(D) is illustrated by the following example. Consider a complainant who alleges an impropriety and asserts that he knows of it because it was observed and reported to him by a person who is identified. The judge denies that the event occurred. When contacted, the source also denies it. In such a case, the chief judge's proper course of action may turn on whether the source had any role in the allegedly improper conduct. If the complaint was based on a lawyer's statement that he or she had an improper ex parte contact with a judge, the lawyer's denial of the impropriety might not be taken as wholly persuasive, and it would be appropriate to conclude that a real factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and that disinterested party denied that the statement had been made, there would be no value in opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint under Rule 11(c)(1)(D)."

Orders

First Circuit

In re Complaint, No. 01-10-90001 (1st Cir. Jud. Council Dec. 14, 2010): Complainants, who were defendants in a trademark infringement proceeding in which the subject judge presided, alleged that the judge was biased against them. Although they sought to infer a relationship between the judge and the plaintiffs' local counsel based on past history and various actions taken in the case, those inferences were not supported by any evidence that the complainants supplied or by anything in the transcript or other parts of the case record. Their allegations were therefore dismissed as factually unsupported under 28 U.S.C. § 352(b)(1)(B).

In re Complaint No. 471, No. 01-07-90010 (1st Cir. Jud. Council June 30, 2008): Where the complainant provided no facts suggesting that the subject judge harbored animus or exhibited bias against him based on his disability or on any other basis, a complaint alleging that the judge was biased against him as a disabled litigant was appropriately dismissed on grounds that it lacked evidence of misconduct.

In re Complaint, No. 01-09-90019 (1st Cir. C.J. Feb. 2, 2010): Although complainant alleged that the subject judge denied him a meaningful opportunity to present his case, the allegation was "conclusively refuted" by audio recordings of the hearings in question.

In re Complaint, No. 455 (1st Cir. C.J. June 1, 2007) (decided before 2008 Rules were enacted): A complaint was unsupported by evidence where "[n]either the complaint nor the reviewed case materials, including the docket and relevant court orders, contain[ed] any facts corroborating the allegation that either the district judge or the magistrate judge [both of whom were named in the complaint] was biased in handling the complainant's case."

In re Complaint, No. 432 (1st Cir. C.J. June 12, 2006) (decided before 2008 Rules were enacted): Allegations that a judge colluded with a plaintiff's attorney or engaged in improper ex parte communications in a case were unfounded where "the complainant provide[d] no indication of the specifics of the alleged collusion, nor any information concerning the alleged communications."

In re Complaint, No. 320 (1st Cir. C.J. Jan. 14, 2002) (decided before 2008 Rules were enacted): In dismissing, for lack of sufficient factual foundation, allegations in a complaint that a judge had engaged in an unspecified pattern of verbal abuse against the complainant, the chief judge noted:

> "As opposed to identifying any specific judicial misstatements, the unsworn remarks of alleged witnesses purportedly verifying the judge's verbal misconduct are equally vague and merely demonstrate sympathy for the complainant. (One witness allegedly said 'what can you do' to the complainant after an instance of harassment while another said 'I know [the judge] has been picking on you.') Apart from the form in which these quotes were submitted, the unspecific content of the statements serves only to weaken the persuasiveness of the complainant's allegation of verbal abuse."

Regarding an allegation that the subject judge had been biased against the complainant in issuing show cause orders in seven of the complainant's cases, the chief judge found the record "devoid of facts that would tend to substantiate any claim that the show cause order[s] reflected judicial bias or prejudice toward the complainant."

Second Circuit

In re Charge of Judicial Misconduct, No. 09-90074-jm (2d Cir. C.J. Dec. 23, 2010): An allegation that a judge had improperly discussed a qualified immunity defense with counsel for the complainant's opponent in a civil rights action lacked any factual foundation or was conclusively refuted when the transcript showed that the only pertinent discussions occurred when the opponent's counsel moved for judgment as a matter of law on the basis of qualified immunity (which was denied) and the judge discussed the jury charge with all counsel at the conclusion of the trial.

In re Charge of Judicial Misconduct, No. 02-08-90120-jm (2d Cir. C.J. June 5, 2009): An allegation that a judge improperly coerced settlement in a case lacked any factual foundation inasmuch as all other settlement conference participants (who were contacted in the chief judge's limited inquiry) did not support the complainant's account. Similarly, an allegation that the subject judge: (1) encouraged the complainant's client to discharge him, and (2) selected a replacement attorney in his place lacked any factual foundation when the client's hearing testimony and the judge's on-the-record statements cited by the complainant were not supportive.

In re Charge of Judicial Misconduct, Nos. 07-9023, 07-9024, 07-9031 (2d Cir. C.J. Aug. 28, 2007) (decided before 2008 Rules were enacted): Where an audio recording of an oral argument revealed that none of the subject judges used a pejorative term to refer to the complainant as alleged in the complaint, the complaint lacked any factual foundation and was conclusively refuted by objective evidence. As the chief judge concluded, "the objective evidence . . . conclusively refutes the inflammatory accusation made by the Complainant."

In re Charge of Judicial Misconduct, Nos. 06-9038, 06-9050, 06-9052, 06-9054, 06-9057, 06-9061, 07-9002 (2d Cir. C.J. Mar. 19, 2007) (decided before 2008 Rules were enacted): A complaint alleging that a judge either instructed the Marshals Service to intimidate the complainant or intended to have that result was insufficient to raise an inference of misconduct. Following a limited inquiry, the chief judge concluded that "[n]o evidence of any improper instruction or intent has been provided, and the events described by the Complainant do not suggest that any such evidence exists."

Fourth Circuit

In the Matter of a Judicial Complaint, No. 04-9010 (4th Cir. C.J. June 21, 2004) (decided before 2008 Rules were enacted): A complaint alleging that a judge "orchestrated a reduced sentence for a criminal defendant in exchange for a written waiver of appeal rights in order to insulate the judge's alleged improprieties from appellate review" lacked any factual foundation. As part of the chief judge's limited inquiry, the three corroborating individuals

identified by the complainant were required to respond in writing about any knowledge they might have with regard to the sentencing stipulation at issue and the subject judge's involvement in defining the terms of the stipulation. A review of the individuals' affidavits disclosed that the stipulation "resulted solely from negotiation between the parties, and the respondent judge's only involvement was to approve the stipulation after it was jointly presented by the parties."

Fifth Circuit

No. 05-18-90033 (5th Cir. C.J. Jan. 10, 2019): An allegation that a record of complainant's criminal trial showed that the judge was biased against him and tried to keep the name of complainant's former firm from the jury was dismissed as lacking sufficient evidence to raise an inference of misconduct. A limited inquiry and review of the transcript did not provide support for complainant's allegation.

No. 07-05-351-0075 (5th Cir. C.J. May 30, 2007) (decided before 2008 Rules were enacted): A complaint alleging that a judge conspired with a court reporter to omit from the transcript of proceedings the judge's communication with the jury was dismissed because "[n]either the hearsay testimony of complainant's purported juror-witness, nor complainant's contention that only twenty minutes elapsed from the time the judge spoke to the jurors until they brought in a guilty verdict" supported complainant's position that the judge improperly sought to sway the jurors by telling them something entirely different from the jury instruction agreed upon by the judge and counsel in open court. The chief judge noted that the record did not "reflect the content or location of any communication the judge made to the jury at this point."

Nos. 06-05-351-0028, 06-050351-0029 (5th Cir. C.J. June 30, 2006) (decided before 2008 Rules were enacted): A complaint was dismissed based on a lack of evidence for allegations that misconduct occurred when (1) a magistrate judge who was a spectator during a trial "would at times come out of the courtroom and discuss ongoing testimony with the Government accusers," and (2) a district judge who presided at the trial entered the jury room during deliberations and shortly before the jury returned a guilty verdict against the complainant. The chief judge noted that "[w]hat complainant's witnesses claim to have seen is not inconsistent with the judges' explanations and, under the circumstances, there is insufficient evidence to support a claim that any irregularities occurred."

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 08-6-351-14 (6th Cir. C.J. Feb. 12, 2009): An allegation that all the complainant's civil rights cases were inappropriately assigned to the subject judge was subject to dismissal because it was unsupported by any evidence, and was affirmatively refuted by court records showing that the court's random assignment plan was followed and that only three of eight cases filed by the complainant during a twenty-month period were assigned to that judge.

In re Complaint of Judicial Misconduct, No. 07-6-351-80 (6th Cir. C.J. July 1, 2008): A complainant's allegations of racial bias and retaliatory motive on the part of a magistrate judge and a district judge were dismissed as "inherently incredible" when the allegations were based on the complainant's assertions (which he himself contradicted) that he had not been served with the magistrate judge's report and recommendation and the district judge's subsequent order denying the complainant's motion to compel discovery in his civil rights action.

In re Complaint of Judicial Misconduct, No. 07-6-351-26 (6th Cir. C.J. Dec. 20, 2007): When it was alleged that a bankruptcy judge improperly used the judicial office to persuade a state judge presiding in the bankruptcy judge's divorce case to recuse himself, the chief judge conducted a limited factual inquiry into the circumstances surrounding the recusal decision, including discussions with counsel for both parties in the divorce case and offering the complainant an opportunity to identify supporting witnesses and documents. Because the inquiry revealed only that counsel for the bankruptcy judge had raised, in the presence of opposing counsel, a perceived problem with the judge originally assigned to the divorce case, the allegation concerning the judge's own behavior was dismissed for lack of credible evidence.

In re Complaint of Judicial Misconduct, No. 06-6-351-57 (6th Cir. C.J. Mar. 28, 2007) (decided before 2008 Rules were enacted): A complaint alleging that a judge who presided over the complainant's criminal trial ate lunch with the prosecutor and the jurors on the last day of trial lacked any factual foundation. Documentary evidence was provided to show that the subject judge had actually attended on that day a bar association luncheon that the prosecutor and jurors could not have attended.

In re Complaint of Judicial Misconduct, No. 04-6-351-32 (6th Cir. C.J. Aug. 31, 2004) (decided before 2008 Rules were enacted): A complaint alleging that a district judge assigned to the complainant's habeas corpus case had engaged in misconduct in the assignment of magistrate judges to the case was conclusively refuted by objective evidence. With respect to the allegation that a magistrate judge other than the one originally assigned to the case had prepared the report and recommendation adopted by the district judge in denying his habeas petition, a review of the docket sheet revealed that visiting magistrate judges were assigned to the case during the several-month period between the original magistrate judge's retirement from office (which occurred shortly after the report and recommendation was filed) and the district judge's ruling in the case. Those assignments, the chief judge concluded, were "merely incidental and had no effect on the outcome of the case."

In re Complaint of Judicial Misconduct, No. 01-6-372-85 (6th Cir. C.J. Jan. 27, 2002), *aff'd* (6th Cir. Jud. Council June 6, 2002) (decided before 2008 Rules were enacted): A complaint alleging that a judge demonstrated bias against the complainant by imposing sanctions on him because he filed several motions seeking to obtain a transcript of testimony in his prisoner civil rights case was both merits-related and wholly without foundation. The judge's order denying the complainant's transcript request explained that the law made no provision for installment payments for trial transcripts and that five prior requests of that nature by the complainant had been denied.

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-10-90047 (7th Cir. C.J. Aug. 6, 2010): An allegation that the subject judge dismissed the complainant's lawsuit in retaliation for an appeal taken in an earlier case was conclusively refuted when the chief judge's review of the complaint in the underlying action showed that it was in fact "unintelligible" as the subject judge had ruled.

In re Complaint Against a Judicial Officer., No. 07-08-90113 (7th Cir. C.J. Jan. 14, 2009): Where a complaint alleged that the subject judge behaved uncivilly toward the complainant in court, the chief judge dismissed the allegations as "conclusively refuted by objective evidence" when a review of the relevant transcripts showed consistently civil remarks by the judge and the judge denied making the statements attributed to the judge by the complainant. Also, the allegation that the judge was biased against the complainant was dismissed when the transcripts showed "not a hint of bias" but instead a consistently helpful manner.

In re Complaint Against a Judicial Officer, No. 06-7-352-48 (7th Cir. Jud. Council Mar. 9, 2007) (decided before 2008 Rules were enacted): A complainant's allegations that a judge assigned to his habeas corpus case had engaged in ex parte communications with the opposing side on a particular date was conclusively refuted by objective evidence when a review of the docket showed no ex parte communication on the date in question—only "the acts of clerical personnel setting a future time at which a motion would be presented in open court."

In re Complaint Against Two Judicial Officers, No. 07-7-352-19 (7th Cir. C.J. May 31, 2007) (decided before 2008 Rules were enacted): Allegations in a complaint that a judge had insulted the complainant and threatened her son with incarceration lacked "'sufficient evidence to raise an inference that misconduct has occurred.'" According to the chief judge, the subject judge "had no idea" what the complainant had in mind, the complainant did not include in her complaint any details about the alleged threats (e.g., where the events occurred or who said what to whom), and the complainant's son did not appear to be a defendant in a pending criminal prosecution before the subject judge.

Eighth Circuit

In re Complaint of John Doe, No. 06-040 (8th Cir. C.J. Dec. 4, 2006) (decided before 2008 Rules were enacted): Allegations in a complaint that a magistrate judge who presided in pretrial proceedings in the complainant's civil suit was biased, said the complainant did not have a case before the case was heard, and dismissed the suit without questioning any of the complainant's witnesses, were conclusively refuted by objective evidence. A review of the docket sheet revealed that a district judge had dismissed the suit with prejudice after the subject magistrate judge advised that the case was settled following a settlement conference.

In re Complaint of John Doe, No. 04-027 (8th Cir. C.J. July 7, 2004), *aff'd* (8th Cir. Jud. Council Oct. 1, 2004) (decided before 2008 Rules were enacted): A complaint was without merit insofar as it alleged that the judge who presided in the complainant's supervised release

revocation hearing had "humiliated and demeaned" the complainant by placing a piece of cardboard on an overhead projector in the courtroom in a way that created a partition allowing the judge to see the complainant only from the neck up. The chief judge observed that the subject judge, in responding to the complaint, explained that the folder was intended to improve the overhead projector's projection quality and submitted photographs showing that the file folder did not block the judge's view of the complainant. The chief judge also noted that the complainant did not allege that he had raised the file folder issue during the hearing.

Ninth Circuit

In re Complaint of Judicial Misconduct, No. 09-90162 (9th Cir. C.J. Oct. 14, 2010): In reviewing an allegation that a magistrate judge tried, through bullying and angry responses to his questions, to coerce the complainant to enter a guilty plea and pay a fine, the chief judge deemed the charges to be "utterly without foundation" based on an audio recording showing that the subject judge was polite throughout the plea hearing and made no attempt to coerce a plea.

In re Complaint of Judicial Misconduct, No. 08-89035 (9th Cir. C.J. Dec. 12, 2008): Where a complainant alleged that a judge was condescending toward him and exhibited partiality toward the opposing party's attorney at a hearing, the allegations lacked factual foundation in light of an audio recording showing the judge to be both courteous and non-biased for or against either side at the hearing.

In re Charge of Judicial Misconduct, No. 06-89096 (9th Cir. C.J. Feb. 6, 2007), *aff'd sub nom. In re Complaint of Judicial Misconduct* (9th Cir. Jud. Council Apr. 23, 2007) (decided before 2008 Rules were enacted): A complaint alleging that a judge made improper rulings in the complainant's cases, as well as accepted bribes, conspired with others to obtain control of the complainant's cases, tampered with the dates of certain motions and orders in furtherance of the alleged conspiracy, and had a conflict of interest because the judge was a named defendant in some of the cases, was wholly unsupported. The chief judge found that the relevant case records contained no substantiation for the complainant's allegations, and the complainant failed to supply any objectively verifiable proof (e.g., witness names, recorded documents, transcripts) supporting his allegations of bribery, conspiracy, conflict of interest, and record tampering.

In re Charge of Judicial Misconduct, No. 06-89124 (9th Cir. C.J. June 12, 2007) (decided before 2008 Rules were enacted): Where a complaint alleged that a court's initiation of disciplinary proceedings against the complainant's attorney resulted from a judge's erroneous statements at oral argument regarding the attorney's disciplinary history and from the repetition of those statements in a published judicial opinion, the circuit chief judge found that the allegations lacked any factual foundation or were conclusively refuted by objective evidence. The chief judge's limited inquiry revealed that the statements in the opinion were quoted directly from a party's signed statement and that the court's institution of proceedings against the complainant was not triggered by either the judge's statements at oral argument or the published opinion.

Tenth Circuit

In re Charge of Judicial Misconduct, No. 2007-10-372-12 (10th Cir. C.J. May 24, 2007) (decided before 2008 Rules were enacted): A complaint alleging racial bias on the part of two district judges and political influence on their rulings, and claiming that one of the judges told federal law enforcement authorities to harm the complainant and the complainant's family, were "wholly unsupported or lacking sufficient evidentiary support." Through a limited inquiry, the chief judge obtained a categorical denial of the allegation from the latter judge and confirmation of the same from the U.S. Marshal's office.

In re Charge of Judicial Misconduct, No. 2007-10-372-09 (10th Cir. C.J. Mar. 9, 2007) (decided before 2008 Rules were enacted): An allegation in a complaint that a judge had a conflict of interest in the complainant's case because a law clerk who had worked for the judge during the case later became a member of the U.S. Attorney's Office and filed a brief in the case was wholly unsupported. According to the chief judge, "[r]eview of pertinent court records contradict[ed] this claim and demonstrate[d] that it is plainly untrue."

Eleventh Circuit

In re Complaint under the Judicial Conduct and Disability Act of 1980, No. 06-0087 (11th Cir. C.J. Apr. 3, 2007), *aff'd* (11th Cir. Jud. Council July 9, 2007) (decided before 2008 Rules were enacted): Allegations that a judge tampered with the record in a case and directed a deputy clerk and a court reporter to falsify the trial record and alter the trial transcripts were unsupported. Following a limited inquiry, the chief judge concluded that, at worst, "there were some anomalies in the way that a few documents were docketed by persons in the clerk's office, but there was no evidence of any intention to mislead the Court of Appeals or any other entity."

Federal Circuit

In re Complaint of Judicial Misconduct, No. 27 (Fed. Cir. Apr. 25, 1989), *aff'g* (Fed. Cir. C.J. Feb. 16, 1989) (decided before 2008 Rules were enacted): In affirming a chief judge's dismissal of a misconduct complaint alleging that a judge had acted as a lawyer for his fiancée, the court observed:

> "The filing of a complaint of judicial misconduct is a serious matter. Under no circumstances should it be done unless the complainant knows facts sufficient to warrant the conclusion that the judge involved has . . . 'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.' Far more than the unsupported and conjectural allegations in the complaint in this case is required to support a complaint of judicial misconduct. Such a complaint should not be filed in the absence of specific facts supporting the charge, in the hope that something may turn up if a special committee is appointed" (internal citations omitted).

ADDITIONAL RESOURCES

Breyer Committee Report

> Committee Standards for Assessing Compliance with the Act, Standard 5 at 148–49: Noted that a subject judge's denial of misconduct does not in and of itself warrant dismissal because "[a] straight-up credibility determination, in the absence of other significant evidence, is ordinarily for the circuit council, not the chief judge."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

> Rule 4(c)(3) of the Illustrative Rules provided that a complaint could be dismissed as frivolous because it made charges that were wholly unsupported or alleged facts that were either plainly untrue or incapable of being established through investigation. By contrast, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, which replaced the Illustrative Rules, distinguish among dismissals based on (1) allegations that are frivolous, (2) allegations lacking sufficient evidence to raise an inference of misconduct, and (3) allegations incapable of being established through investigation.

See also Limited Inquiry; Dismissal—Complaint Lacking Sufficient Evidence; Dismissal—Incapable of Being Established.

DISMISSAL—COMPLAINT LACKING SUFFICIENT EVIDENCE TO INFER MISCONDUCT

Where a chief circuit judge finds insufficient evidence on which to infer judicial misconduct or disability based on the allegations in a complaint, the complaint must be dismissed.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(b)(1)(A)(iii): The chief judge may dismiss a complaint if he or she "finds the complaint to be . . . lacking sufficient evidence to raise an inference that misconduct has occurred."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 11(c)(1)(D): "A complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint . . . is based on allegations lacking sufficient evidence to raise an inference that misconduct has occurred or that a disability exists."

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

Orders

Second Circuit

In re Charge of Judicial Misconduct, No. 09-90112-jm (2d Cir. C.J. Dec. 23, 2010): A complaint that generally alleges bias, partisanship, and complicity on the part of the subject judge—specifically as to the judge's line of questioning, objections and interjections, frank expression of views on the merits of arguments and claims, and warnings to the parties about the future conduct of discovery—but without a supported allegation of improper motive or purpose "lack[s] sufficient evidence to raise an inference that misconduct has occurred."

In re Charge of Judicial Misconduct, No. 02-08-90135-jm (2d Cir. C.J. Apr. 29, 2009): A complainant's bald allegations that the subject judge should have recused from his civil

rights case because the judge was "consumed and obsessed with extreme hatred" toward him and wanted to protect the judge's former state court judge colleagues are "wholly conclusory and unsupported by anything in the record."

In re Charge of Judicial Misconduct, No. 08-9011-jm (2d Cir. C.J. June 26, 2008): An allegation in a complaint that a judge delayed acting on a complainant's habeas petition because the judge is biased against pro se litigants and sex offenders is wholly conclusory and unsupported where the complainant points only to the delay itself to support the charge of improper motive.

Third Circuit

In re Complaint of Judicial Misconduct or Disability, No. 03-09-90118 (3d Cir. C.J. Nov. 9, 2010): A complainant's unsupported allegations that a bankruptcy judge (1) conspired with a bankruptcy trustee to permit conversion of bankruptcy estate assets and subsequently cover up evidence of that wrongdoing, (2) willfully misread and/or falsified court records and "fabricated bogus legal authority" in order to reach decisions favorable to the bankruptcy trustee, (3) acted in a manner intended to punish and intimidate the complainant (who was a pro se litigant in bankruptcy proceedings before the judge), and (4) engaged in blackmail and extortion on the trustee's behalf, are subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

In re Complaint of Judicial Misconduct or Disability, Nos. 03-10-90048 & 03-10-90049 (3d Cir. C.J. Oct. 5, 2010): There is no basis for a finding of judicial misconduct based on allegations in a complaint that one judge made a practice of holding transcripts for several days prior to release, and that another judge "must be aware" of the practice and permitted it due to bias against the complainant. No factual support was provided for the complainant's suspicion that the one judge may have improperly altered transcripts before releasing them, and the only support for the allegation against the other judge was a citation to a decision in another case that (in the complainant's opinion) demonstrates bias in favor of insurance companies.

In re Complaint of Judicial Misconduct or Disability, Nos. 03-09-90080 & 03-09-90081 (3d Cir. C.J. Aug. 16, 2010): Where the complainant, without specificity or support, alleges that one judge conspired with a prosecutor and may be disabled due to medication taken for a purported heart condition, that a second judge was involved in various improper activities (including false transactions with a credit card), and that both judges engaged in ex parte conduct and acted against the complainant in her Title VII suit to "aggressively defend[] a known sexual predator and a privately held corporation," her complaint is subject to dismissal as "unsupported by any evidence that would raise an inference that misconduct occurred."

Fourth Circuit

In the Matter of a Judicial Complaint under 28 U.S.C. § 351, No. 04-10-90025 (4th Cir. C.J. Mar. 24, 2010): Allegations that a judge exhibited bias and prejudice against African American defendants, sentenced white defendants more leniently, and conspired with a local

law enforcement officer in sentencing the complainant's brother do not give rise to an inference of judicial misconduct since no evidence of the alleged conspiracy was provided and the hearing transcripts do not show that the judge used abusive or derogatory language toward the complainant's brother.

In the Matter of a Judicial Complaint under 28 U.S.C. § 351, No. 04-08-90027 (4th Cir. C.J. June 20, 2008): A complainant's claims that a judge participated in kidnapping, torture, murder, and other terrorist acts to force the complainant to surrender his birthright in the United States "lack any factual support and are facially incredible."

Fifth Circuit

In re Complaint, No. 05-11-90002 (5th Cir. C.J. Dec. 20, 2010): Allegations in a complaint that a judge was "very argumentative and hostile . . . challenging everything" the complainant's attorney said or tried to present in a bankruptcy case, were subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii) because judicial bias is not established by "expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display" (quoting from *Liteky v. United States*, 510 U.S. 540, 555–56 (1994)).

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 06-09-90169 (6th Cir. C.J. Dec. 20, 2010): Allegations that a judge's rulings and actions in a bankruptcy case reflected bias against the complainant, and that the judge was paid to rule against the complainant's companies, is racist, and committed perjury and fraud, were inherently incredible and, thus, subject to dismissal without either a limited inquiry or an investigation by a special committee. No supporting evidence was submitted other than copies of the affidavit of bias and prejudice that the complainant filed in the bankruptcy case and the judge's opinion denying the complainant's motions to disqualify.

Seventh Circuit

In re Complaint, No. 07-10-90044 (7th Cir. C.J. July 19, 2010): Where a state prisoner is told by a prison nurse that a medical report showing he does not have cancer makes it likely that his civil action against the prison authorities for failure to treat his cancer will be dismissed, and he infers from this that the judge in his case is conspiring with the defendants to rule against him even though no such ruling has been made, his complaint against the judge is subject to dismissal because the nurse's prediction "does not supply the slightest reason to believe" that the judge is guilty of misconduct.

In re Complaint, No. 07-09-90092 (7th Cir. C.J. Oct. 29, 2009): Where a complainant alleges that the judge in his criminal case timed the proceedings on a given day so that an illegal search of his home could be conducted while he was in court, and the only evidence cited for this allegation is an email from an unknown sender stating unsupported "facts," the complaint is subject to dismissal.

In re Complaint, No. 07-09-90090 (7th Cir. C.J. Sept. 25, 2009): A complaint alleging that a judge employed fraud and duress to persuade the complainant to settle his employment discrimination case is subject to dismissal when the only evidence cited is the fact that the judge represented that similar cases settle for $15,000–$20,000 and the damages demanded in the case amounted to one decillion dollars (i.e., many orders of magnitude greater than the entire world's wealth). The complainant did not offer any reason to think that the judge misrepresented the facts; instead he objected to the judge suggesting any potential recovery, whether true or false.

In re Complaint, No. 07-08-90100 (7th Cir. C.J. Oct. 31, 2008): Where a complaint alleging that a district judge is incompetent and biased against black litigants is based solely on the fact that several of the judge's decisions were reversed on appeal and that black litigants who lost in the district court prevailed on appeal, the evidence presented is insufficient to raise an inference of improper behavior.

Eighth Circuit

In re Complaint of John Doe, No. 08-10-90052 (8th Cir. C.J. Dec. 15, 2010): An allegation that a judge conspired with counsel for the defendant in the complainant's civil action is wholly unsupported and speculative when based solely on the fact that the defendant's motion to dismiss was filed before the complaint in the action was served and the record showed that the action was closely related to another case against the same defendant.

In re Complaint of John Doe, No. 08-09-90007 (8th Cir. C.J. Apr. 1, 2009): Unsupported allegations of "appearance of impropriety" and "obvious ex-parte contact" on the part of a judge must be dismissed under 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D). It is not an improper ex parte contact when counsel for one party appears before a judge at a hearing that the other party improperly fails to attend.

In re Complaint of John Doe, No. 08-08-90030 (8th Cir., C.J. Sept. 3, 2008): A complaint containing "vituperative allegations of racial bias, conspiracy, and intentional constitutional violations . . . including incredible assertions that the judge falsified court records and took bribes" is subject to dismissal as "lacking sufficient evidence to raise an inference that misconduct has occurred."

Ninth Circuit

In re Complaint of Judicial Misconduct, No. 10-90044 (9th Cir. Jud. Council Sept. 30, 2010): Allegations that a judge habitually fails to provide reasons in their decisions and fails to follow appellate court directives are not supported by citation to two appellate decisions in which the judge's rulings were reversed. Reversal of a judge's rulings on appeal is not evidence that the judge is mentally disabled.

In re Complaint of Judicial Misconduct, Nos. 09-90272, 09-90273, 09-90274 & 09-90275 (9th Cir. C.J. Oct. 13, 2010): Where a complainant has not provided objectively verifiable

proof to support his "convoluted and largely incoherent" allegations of conspiracy against four judges, the complaint must be dismissed.

In re Complaint of Judicial Misconduct, 569 F.3d 1093 (9th Cir. C.J. 2009) (No. 08-90172): Where a complainant alleges that a judge colluded with prison officials to deny his right of access to the courts but offers nothing beyond "vague insinuations" to support the claim, the complaint must be dismissed as lacking "the kind of objectively verifiable proof that we require."

Tenth Circuit

In re Charge of Judicial Misconduct, No. 10-10-90028 (10th Cir. Jud. Council Dec. 3, 2010), *aff'g* No. 10-10-90028 (10th Cir. C.J. Oct. 20, 2010): Where a complainant alleges that a judge is biased and has delayed, failed, or refused to rule, but the complainant offers no evidence for these allegations apart from the content of the judge's rulings, the allegations are completely unsupported and do not give rise to a reasonable inference of misconduct.

In re Charge of Judicial Misconduct, Nos. 10-10-90051 & 10-10-90052 (10th Cir. C.J. Dec. 8, 2010): A complaint alleging that the subject judges are biased and prejudiced against the complainant and refuse to rule on a pending pleading fails for lack of supporting evidence when no support for the allegations is offered or apparent, and the allegations are based solely on the complainant's conjecture.

In re Charge of Judicial Misconduct, Nos. 10-10-90046 & 10-10-90047 (10th Cir. C.J. Nov. 23, 2010): Where a complainant alleges that certain judges must have been personally involved in the creation or maintenance of a sealed docket sheet and hidden documents, the complaint must be dismissed unless the claims are supported by factual allegations or evidence "sufficient to give rise to an inference of misconduct by the subject judges."

Eleventh Circuit

In re Complaint of _____ Against United States Magistrate Judge _____ and United States District Judge _____, No. 11-10-90104 (11th Cir. C.J. Dec. 16, 2010): A complainant offered no credible facts or evidence to substantiate his claims that the judges named in his complaint concealed relevant facts, failed to address arguments, and otherwise acted in a prejudicial and unlawful manner in the orders they issued in his underlying case. Accordingly, the complaint was based on allegations lacking sufficient evidence to raise an inference of misconduct and, thus, subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

In re Complaint of _____ Against United States Magistrate Judge _____ and United States District Judge _____, No. 11-10-90105 (11th Cir. C.J. Dec. 16, 2010): A complainant offered no credible facts or evidence to substantiate his claims that the judges named in his complaint lied, included misleading statements, and showed prejudice toward him in their actions in his underlying case. Accordingly, the complaint was based on allegations lacking sufficient evidence to raise an inference of misconduct and, thus, subject to dismissal under 28 U.S.C. § 352(b)(1)(A)(iii).

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, No. DC-10-90068 (D.C. Cir. C.J. Sept. 10, 2010): Although a complainant alleged that a judge furthered a conspiracy among judges and prosecutors involved in his criminal prosecution in another state, no specific evidence was provided to support the conspiracy allegation or demonstrate that the judge acted improperly. The complaint was therefore dismissed as "lack[ing] any evidence to raise an inference that misconduct has occurred" under 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D).

ADDITIONAL RESOURCES

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 5 at 148–49: Noted that a subject judge's denial of misconduct does not in and of itself warrant dismissal because "[a] straight-up credibility determination, in the absence of other significant evidence, is ordinarily for the circuit council, not the chief judge."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 4(c)(3) of the Illustrative Rules provided that a complaint could be dismissed as frivolous if its charges were wholly unsupported or its factual claims were either plainly untrue or incapable of being established through investigation. By contrast, the Rules for Judicial-Conduct and Judicial-Disability Proceedings, which replaced the Illustrative Rules, distinguish among dismissals based on (1) allegations that are frivolous, (2) allegations lacking sufficient evidence to raise an inference of misconduct, and (3) allegations incapable of being established through investigation.

See also Limited Inquiry; Dismissal—Incapable of Being Established; Dismissal—Lacking any Factual Foundation or Conclusively Refuted by Objective Evidence.

DISMISSAL—NOT IN CONFORMITY WITH THE STATUTE

To be in conformity with the statute, a complaint must either allege that a covered judge has engaged in conduct within its scope or that the judge is unable to discharge all the duties of office by reason of mental or physical disability. Only conduct having a prejudicial effect on the administration of the business of the courts constitutes misconduct within the scope of the statute.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

28 U.S.C. § 352(b)(1)(A)(i): The chief judge may "dismiss the complaint if the chief judge finds the complaint to be not in conformity with section 351(a)."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 11(c)(1)(A) : "A complaint may be dismissed in whole or in part to the extent that the chief judge concludes that the complaint alleges conduct that, even if true, is not prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in the inability to discharge the duties of judicial office."

Commentary to Rule 11(c)(1)(A): Under Rule 11(c)(1)(A), "if it is clear that the conduct or disability alleged, even if true, is not cognizable under these Rules, the complaint should be dismissed. If that issue is reasonably in dispute, however, dismissal under 11(c)(1)(A) is inappropriate."

Orders

Second Circuit

In re Charge of Judicial Misconduct, No. 91-8500 (2d Cir. Jud. Council Oct. 3, 1990) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge had committed perjured in a matter unrelated to the judge's own judicial duties. The judicial council dismissed the complaint as outside the scope of the statute authorizing judicial discipline. *But see* Rule 4(a)(7) (recognizing that conduct occurring outside a subject judge's official duties may constitute misconduct where it causes "a substantial and widespread lowering of public confidence in the courts among reasonable people").

Third Circuit

In re Complaint of Judicial Misconduct or Disability, No. 06-04 (3d Cir. C.J. Jan. 26, 2006) (decided before 2008 Rules were enacted): Complainant alleged that a judge who had recently been nominated to a different federal position failed to identify complainant's motion to recuse in the judge's answer to a Senate Committee's questionnaire in connection with the new position. The chief judge determined that the subject judge had asked for a list of all cases in which the judge had considered a recusal request and that a mistake in the court's computer coding system permitted complainant's case to be excluded. In addition, the subject judge had amended their answer to the Committee's question to include complainant's case. Concluding that the subject judge had done nothing to call into question the integrity of the judiciary, the chief judge determined that the conduct alleged did not fall within the scope of the statute and dismissed the complaint pursuant to 28 U.S.C. § 352(b)(1)(A)(i) and (iii).

Fourth Circuit

In the Matter of a Judicial Complaint, No. 04-10-90101(4th Cir. C.J. Oct. 13, 2010): The complaint referred to a judge, stated that complainant was suing a pharmaceutical company and a disability services agency, and attached medical records. Although the clerk requested that complainant file a statement specifying the facts on which the complaint was based, the complainant failed to comply. The complaint was therefore dismissed for failure to state a claim under the Act pursuant to 28 U.S.C. § 352(b)(1)(A)(i).

In the Matter of a Judicial Complaint, No. 90-9028 (4th Cir. C.J. Nov. 5, 1990) (decided before 2008 Rules were enacted): Complainant alleged that the subject judge inappropriately questioned his right to park in a restricted parking space. Because this alleged conduct neither impeded the business of the courts nor adversely affected the judicial system, the chief judge concluded that it was not the kind of "misconduct" that Congress intended to address when it passed the judicial misconduct statute. The complaint was dismissed as not in conformity with the statute.

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-08-90071 (7th Cir. C.J. Nov. 19, 2007): Complainants contended that the subject judge took an unsupported legal position while an officer of the Executive Branch, but did not contend that the judge engaged in any inappropriate action as a judge. Acknowledging that it is possible in principle for crimes committed in a non-judicial capacity to reveal unfitness for judicial service, the chief judge noted that the allegations against the subject judge did not describe criminal conduct, but concerned only the future judge's view on the scope of federal regulatory authority. Because taking an allegedly incorrect view of federal regulatory authority does not demonstrate unfitness for judicial office, the complaint was dismissed under 28 U.S.C. §352(b)(1)(A)(i) as failing to allege conduct within the scope of the judicial misconduct statute.

Ninth Circuit

In re Complaint of Judicial Misconduct, 366 F.3d 963 (9th Cir. Jud. Council 2004) (decided before 2008 Rules were enacted): A former court employee filed a misconduct complaint alleging that the subject judges abused their authority, denied her due process, and had conflicts of interest in upholding her termination. The judicial council denied complainant's petition for review, leaving intact the chief judge's dismissal, on the basis that neither the chief judge nor the council had jurisdiction over the complaint under the Judicial Conduct and Disability Act, because a routine personnel decision is an administrative function that does not directly implicate the effective and expeditious administration of the courts. (The circuit chief judge, by contrast, had proceeded under the Act, dismissing the complaint under 28 U.S.C. § 352(b)(1)(A)(iii) for failing to allege misconduct and for lack of evidence.)

In re Charge of Judicial Misconduct, No. 83-8037 (9th Cir. C.J. Mar. 5, 1986) (decided before 2008 Rules were enacted): After analyzing the legislative history of the Judicial Conduct and Disability Act of 1980, the chief judge dismissed an allegation that the subject judge had committed perjured on the witness stand, in litigation unrelated to the judge's judicial office, as not in conformity with the Act. The chief judge concluded that "the judge was not acting in [an] official capacity; [the judge] testified as a private citizen on a subject wholly unrelated to [the] judicial functions." *But see* Rule 4(a)(7) (recognizing that conduct occurring outside a subject judge's official duties may constitute misconduct where it causes "a substantial and widespread lowering of public confidence in the courts among reasonable people").

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, 85 F.3d 701, 706 (D.C. Cir. Jud. Council 1996) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge, a member of the court of appeals "Division to Appoint Independent Counsels," should have recused from selection of an independent counsel because of a close friendship with the Senator who had called for the appointment and the judge's spouse's employment with that Senator. The judicial council affirmed the complaint's dismissal based on complainant's failure to allege conduct prejudicial to the effective and expeditious administration of the business of the court, and noted that the outcome was not inconsistent with the Code of Conduct for United States Judges. In so deciding, the council expressed its agreement with the chief judge's conclusion that the ties between the subject judge and the Senator could not have affected the Attorney General's decision to appoint an independent counsel, and that the person appointed was, by all indications, neither unqualified nor biased.(Three council members, writing separately in concurrence, sought to emphasize that conduct at variance with the Code of Judicial Conduct can form the basis of a complaint under the Judicial Conduct and Disability Act.)

In the Matter of a Charge of Judicial Misconduct or Disability, 39 F.3d 374, 376 (D.C. Cir. C.J. 1994) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge, as a member of the court of appeals "Division to Appoint Independent Counsels," engaged in ex parte communications with two Senators, who improperly influenced the subject judge's selection of an independent counsel. After comparing the differing ethical

standards for adjudication authority under Article III of the Constitution and appointment authority under Article II, the chief judge determined that there was no ethical bar to consulting with others in the exercise of appointment authority. Because the complainants failed to allege conduct prejudicial to the effective and expeditious administration of the business of the courts, the complaint was dismissed as not in conformity with the judicial misconduct statute.

ADDITIONAL RESOURCES

Legislative History

S. Rep. No. 96-362, at 3, *reprinted in* 1980 U.S.C.C.A.N. at 4317: "Complaints relating to the conduct of a member of the judiciary which are not connected with the judicial office or which do not affect the administration of justice are without jurisdiction and therefore outside the scope of this legislation."

125 Cong. Rec. S15, 385 (daily ed. Oct. 30, 1979) (statement of Sen. Thurmond): "It should be stressed that Congress's concern . . . was focused on a judge's judicial conduct and not primarily on personal extrajudicial behavior. It was for this reason that [a] separate standard for misbehavior, 'conduct prejudicial to the administration of justice by bringing the judicial office into disrepute,' was deleted by the Senate Judiciary Committee for fear that such a general disrepute standard directly embodied in the statute could be used to intrude into a judge's personal life unrelated to his or her judicial conduct."

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 3 at 147: "Needless to say, the fact that a judge's alleged conduct occurred off the bench and had nothing to do with the performance of official duties, absolutely does not mean that the allegation cannot meet the statutory standard. The Code of Conduct for U.S. Judges expressly covers a wide range of extra-official activities. Allegations that a judge personally participated in fundraising for a charity or attended a partisan political event—conduct having nothing to do with official duties—are certainly cognizable."

"Nevertheless, many might argue that judges are entitled to some zone of privacy in extra-official activities into which their colleagues ought not venture. Perhaps the statutory standard of misconduct could be construed in an appropriate case to have such a concept implicitly built-in. Thus, for example, a chief judge might decline to investigate an allegation that a judge habitually was nasty to her husband, yelling and making a scene in public (as long as there was no allegation of criminal conduct such as physical abuse), even though this might embarrass the judiciary, on the ground that such matters do not constitute misconduct. Complaints raising such issues are so rare as to obviate the need for ground rules for them in advance."

Law Review Articles

Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, 149 F.R.D. 375, 404 n.97 (1993): Asserts that there should "normally be a distinction between behavior in the judicial capacity and personal conduct of the judge as a citizen." Nonetheless, there may be some actions a federal judge takes, as a citizen, that would impact "the effective and expeditious administration of the business of the courts." For example, "a large number of judges becom[ing] intoxicated at a bar of ill repute" may rise to the level of misconduct. The article discusses cases where a subject judge voiced a personal opinion to a newspaper, gave a public speech on a political issue, was rude to the complainant in a public parking lot, or allegedly smoked marijuana with an affiant, among other examples, as situations where a subject judge's behavior might constitute misconduct.

Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 73–75 (1993): Discusses two instances of a subject judge's alleged pre-bench perjury and two other instances of conduct that occurred before a subject judge's appointment to the federal bench.

See also Misconduct—Conduct Occurring Outside Official Duties.

MERITS-RELATED—DELAY OR FAILURE TO RULE

Individual instances in which a ruling or other judicial action is delayed are, in general, not cognizable in judicial misconduct proceedings. If a complaint is based on delay by a judge in a particular case, it must be dismissed as merits-related unless the judge had an improper motive or a pattern of delay. (When a judge fails to rule, the appropriate recourse for a litigant may be through a petition for a writ of mandamus.)

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

28 U.S.C. § 352(b)(1)(A)(ii): A chief judge may dismiss a complaint that is "directly related to the merits of a decision or procedural ruling."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(b)(2): Misconduct does not include "an allegation about delay in rendering a decision or ruling, unless the allegation concerns an improper motive in delaying a particular decision or habitual delay in a significant number of unrelated cases."

Commentary to Rule 4: "[A] complaint of delay in a single case is excluded as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, *i.e.*, assigning a low priority to deciding the particular case. But, an allegation of a habitual pattern of delay in a significant number of unrelated cases, or an allegation of deliberate delay in a single case arising out of an improper motive, is not merits-related."

Orders

First Circuit

In re Complaint, No. 393 (1st Cir. Jud. Council May 19, 2005) (decided before 2008 Rules were enacted): The complainant alleged improper delay with regard to recusal, reconsideration, and venue change. The record indicated that the recusal motion was decided the day after it was filed, that the motion for reconsideration was decided in roughly a month, and that no request for venue change was ever filed. The judicial council affirmed dismissal of the complaint, noting the lack of evidence that the subject judge engaged in any delay, much less "the type of egregious or habitual delay necessary for a claim of judicial misconduct."

In re Complaint, No. 468 (1st Cir. C.J. Aug. 28, 2007) (decided before 2008 Rules were enacted): A delay of "up to 10 months for the complainant's first motion for contempt and

8 months since the hearing on defendants' motion to dismiss" was likely due to complainant's successive filings and the need for responsive filings, and did not constitute misconduct.

In re Complaint, No. 399 (1st Cir. C.J. Jan. 27, 2005) (decided before 2008 Rules were enacted): "Delay presents a proper subject for a judicial misconduct complaint only in those extraordinary circumstances where the delay is 'habitual,' or motivated by improper animus or prejudice on the part of the judge."

In re Complaint, Nos. 375, 378 (1st Cir. C.J. Apr. 28, 2004) (decided before 2008 Rules were enacted): Complainant alleged that the subject judge "unreasonably delayed for five months in responding to the complainant's request for a temporary restraining order, despite the urgency of the complainant's requests, and improperly neglected to issue a default judgment or hold a trial." The chief judge concluded that "these facts alone do not, without more, suggest the type of extreme or repetitious delay that would suggest judicial impropriety within the meaning of the statute. Nor does the complainant present a single fact indicating that the few noted instances of delay were 'improperly motivated' or the product of any improper animus toward the complainant."

Second Circuit

In re Charge of Judicial Misconduct, No. 11-90089 (2d Cir. C.J. May 6, 2013): A complaint alleged undue delay in ruling on complainant's Rule 60(b) motions and a general pattern of delay in proceedings before the judge. Even assuming all of the delays "were truly undue," seven delays in three unrelated cases over almost twenty years did not constitute "habitual delay in a significant number of unrelated cases." Order at 5. Additionally, looking to the most recent Civil Justice Reform Act report showed that the subject judge had an average number of cases pending more than three years and no motions pending beyond six months. Accordingly, the allegation about delay was dismissed as lacking sufficient evidence.

In re Charge of Judicial Misconduct, No. 10-90064 (2d Cir. C.J. Aug. 5, 2010): Although the complaint alleged that the subject judge intentionally delayed in ruling on a magistrate judge's report and recommendation, the record indicated that the delay was caused by a misplaced file. In addition, the subject judge's expression of regret and explanation belied any allegation of deliberateness, and the complaint did not allege any improper purpose for the delay. The complaint was dismissed as merits-related.

In re Charge of Judicial Misconduct, No. 06-0006 (2d Cir. C.J. Aug. 9, 2006) (decided before 2008 Rules were enacted): The complaint alleged unnecessary delay in habeas corpus proceedings, but failed to allege purposeful delay based on any improper motive. The complaint was dismissed for failing to raise an inference that misconduct had occurred. The chief judge noted that, for a litigant, the proper method of addressing delay is to ask the court to act and, if the court does not act, to request a writ of mandamus from the court of appeals.

Third Circuit

In re Complaint of Judicial Misconduct or Disability, No. 09-90057 (3d Cir. C.J. Aug. 16, 2010): Citing 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 3(h)(3)(B) (current Rule 4(b)(2)), the chief judge dismissed allegations of improper delay in civil proceedings as merits-related. To the extent that improper motive was alleged, that allegation was dismissed as unsupported by any evidence that would raise an inference that misconduct had occurred.

In re Complaint of Judicial Misconduct or Disability, No. 09-90100 (3d Cir. C.J. Aug. 16, 2010): A complaint of delay did not constitute cognizable misconduct. Any allegation of improper motive for the alleged delay was dismissed because complainant provided no support for such an allegation.

In re Complaint of Judicial Misconduct or Disability, No. 08-90111 and 03-08-90040 (3d Cir. C.J. Aug. 4, 2009): A complaint was dismissed as frivolous and as unsupported by evidence where its underlying allegation was that the subject judge had shown bias by delaying a ruling by less than a month. Citing Rule 3(h)(3)(B), the chief judge noted that allegations of delay do not constitute cognizable misconduct absent evidence of improper motive or habitual delay.

In re Complaint of Judicial Misconduct or Disability, No. 05-08 (3d Cir. C.J. Mar. 28, 2005) (decided before 2008 Rules were enacted): A complaint alleging excessive delay in resolving a judicial misconduct complaint was dismissed as merits-related. Other than in an exceptional case, the chief judge explained, delay is not cognizable as judicial misconduct, and a misconduct complaint cannot be used to compel a ruling. The chief judge noted that what constitutes 'expeditious' review in a particular case is a procedural decision not normally subject to review in a new misconduct complaint.

Fourth Circuit

In the Matter of a Judicial Complaint Under 28 U.S.C. § 351, No. 04-20-90004 (4th Cir. C.J. Aug. 12, 2020): A complaint alleged "extraordinary delays" where the subject judge took 44 months to rule on complainant's 2255 motion and took nearly 3 years to dispose of the matter after it had been fully briefed. The complaint alleged that the subject judge delayed the proceedings with an improper motive to prejudice the complainant's ability to pursue post-conviction challenges. The allegations about the motive for delay were speculative and unsupported, as the only evidence offered was the delay itself and decision of the subject judge that the complainant disagreed with. The chief circuit judge conducted a limited inquiry and asked the subject judge to respond to the allegations. The subject judge denied delaying in ruling on the complainant's motions and noted that resolving the motions required significant work, as the orders disposing of them were 120 and 43 pages. Accordingly, the allegations were dismissed as merits-related.

In the Matter of a Judicial Complaint, No. 06-9041 (4th Cir. C.J. Oct. 23, 2006) (decided before 2008 Rules were enacted): A complainant alleged misconduct based on undue delay where the subject judge had not ruled on a habeas corpus petition after 16 months. The chief

judge concluded that the judicial complaint procedure may not be used to force a ruling and that an allegation of delay in a single case fails to state a claim of misconduct.

In the Matter of a Judicial Complaint, No. 03-9064 (4th Cir. C.J. Dec. 1, 2003) (decided before 2008 Rules were enacted): Periods of twenty months and twenty-eight months to render decisions in two matters cited by complainant did not establish habitual failure to decide matters in a timely fashion. "Depending upon the complexity of the matter and the press of other business, some cases may take longer to resolve than others."

Fifth Circuit

No. 07-05-351-0051 (5th Cir. Apr. 13, 2007) (decided before 2008 Rules were enacted): A delay of less than three weeks in a judge's consideration of a motion for leave to proceed in forma pauperis is insufficient to support a claim of misconduct.

No. 06-05-351-0076 (5th Cir. Nov. 9, 2006) (decided before 2008 Rules were enacted): A complaint alleging bias against pro se litigants as evidenced by a judge's three-month delay in ruling on a motion for an evidentiary hearing was dismissed as frivolous.

Sixth Circuit

In re Complaint of Judicial Misconduct, Nos. 07-6-351-08, 07-6-351-28 (6th Cir. C.J. June 20, 2007) (decided before 2008 Rules were enacted): A limited inquiry revealed that although the final dispositive ruling on complainant's habeas petition was delayed, the petition had received significant judicial attention during its pendency. The allegations of delay were dismissed because the complainant failed to show unreasonable or persistent delay.

In re Complaint of Judicial Misconduct, No. 05-6-351-29 (6th Cir. C.J. Nov. 15, 2005) (decided before 2008 Rules were enacted): While habitual failure to decide matters in a timely fashion may be the proper subject of a complaint, it must be demonstrated that, over a period of years, a judge has persistently and unreasonably neglected to act on a substantial number of cases before the judge. Allegations of undue delay in ruling on various motions were therefore dismissed for failure to demonstrate unreasonable and persistent delay in matters before the subject judge.

Seventh Circuit

In re Complaint Against a Judge, No. 07-22-90033 (7th Cir. C.J. June 28, 2022): An attorney complainant accused a judge of habitual delay in processing social security cases. The complaint alleged that the judge delayed ruling to coerce the parties into consenting to the magistrate judge's jurisdiction. When the complaint was filed, more than three years had passed since the case was fully briefed but no decision had been issued. After the complaint was filed, the subject judge ruled on the pending motions. The chief circuit judge conducted a limited inquiry and sought a response from the subject judge. The judge explained that, until recently, the motions were not prioritized because they did not appear in the CJRA

report, which the judge uses to track pending motions. Although the social security cases should appear on the CJRA report when the administrative record has been pending for six months, they did not due to an error in CM/ECF that improperly calculated the amount of time that the record had been pending. The error has since been corrected. Because there was no evidence that the judge acted with an improper motive, combined with the error in CM/ECF and the judge's decision to track cases differently going forward, the complaint was dismissed as conclusively refuted by objective evidence pursuant to 28 U.S.C. § 352(b)(1)(B).

In re Complaint Against a Judicial Officer, No. 07-10-9067 (7th Cir. C.J. Oct. 15, 2010): A complainant alleged that the subject judge committed misconduct by failing to rule on his requests for *forma pauperis* status and an injunction. Noting that delay in resolving suits is regrettable, the chief judge concluded that a judge's decision about which suits are most in need of attention is directly related to the merits of a decision or procedural ruling and that a complaint of delay in a single case is properly dismissed as merits-related. The complaint was therefore dismissed pursuant to 28 U.S.C. §352(b)(1)(A)(ii) and Rule 11(c)(1)(B).

In re Complaint Against a Judicial Officer, No. 07-10-9041 (7th Cir. C.J. June 22, 2010): The complaint alleged that the subject judge engaged in misconduct by taking six months to rule on a motion for summary judgment. The chief judge noted that a judge's decision to defer action is a "procedural" ruling and that any complaint "directly related to the merits of a decision or procedural ruling" must be dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 11(c)(1)(B). Accordingly, the complaint was dismissed as merits-related.

Eighth Circuit

In re Complaint of John Doe, No. 08-08-90030 (8th Cir. C.J. Sept. 3, 2008): Citing Rule 3(h)(3)(B) (current Rule 4(b)(2)), the chief judge dismissed complainant's allegations of improper delay as merits-related because there was no evidence of improper motive.

Ninth Circuit

In re Charge of Judicial Misconduct, Nos. 09-90205 and 09-90206 (9th Cir. C.J. Oct. 15, 2010): Complainant, a pro se litigant, alleged that the subject judges unduly delayed resolving a motion in her civil rights case. Because complainant provided no evidence of habitual delay or improper motive, the charges were dismissed pursuant to Rule 3(h)(3)(B) [current Rule 4(b)(2)].

In re Charge of Judicial Misconduct, Nos. 09-90223, 09-90226, and 09-90227 (9th Cir. C.J. Aug. 4, 2010): Citing Rule 3(h)(3)(B) [current rule 4(b)(2)], the chief judge dismissed a complaint alleging misconduct in the subject judge's disregard for time factors because the complainant did not allege improper motive or habitual delay.

In re Charge of Judicial Misconduct, No. 08-89036 (9th Cir. C.J. Dec. 2, 2008) (decided before 2008 Rules were enacted): Citing the Ninth Circuit's Misconduct Rule 1(f), the chief judge held that delay is not the proper subject of a misconduct complaint absent

extraordinary circumstances such as habitual delay, improperly motivated delay, or delay of such an egregious character as to constitute a clear dereliction of judicial responsibilities.

Eleventh Circuit

In re Complaint under the Judicial Conduct and Disability Act of 1980, No. 10-90068 (11th Cir. C.J. Sept. 13, 2010): A plaintiff in a civil case filed a complaint alleging undue delay in scheduling trial even though there had been regularly occurring judicial activity in the case. Noting that an allegation of delay is not cognizable misconduct under Rule 3(h)(3)(B) [current rule 4(b)(2)] unless the allegation concerns an improper motive or habitual delay, the chief judge dismissed the complaint as merits-related in that it challenged the correctness of judicial action in that particular case.

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, No. DC-10-90086 (D.C. Cir. C.J. Nov. 30, 2007): Complainant alleged that the subject judge engaged in misconduct by failing to act on complainant's motions, but did not allege improper motive or habitual delay. Citing Rule 3(h)(3)(B) [current rule 4(b)(2)], the chief judge dismissed the allegation for failure to allege cognizable misconduct.

ADDITIONAL RESOURCES

Legislative History

S. Rep. No. 96-362, at 6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4320: "Federal judges . . . should not be harassed in the legitimate exercise of their duty to interpret and apply the law."

S. Rep. No. 96-362, at 8 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4322: "It is important to point out what [the Judicial Conduct and Disability Act] does not mean; it is not designed to assist the disgruntled litigant who is unhappy with the result of a particular case."

S. Rep. No. 96-362, at 20 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4333: "[T]he decision-making functions of judges can only be reviewed through the traditional and conventional appellate process . . . [and] disciplinary measures [are not] to be taken against a judge because some might disagree with his decisions or judicial philosophy."

Related Case Law

Supreme Court

Liteky v. United States, 510 U.S. 540, 555 (1994): "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" under 28 U.S.C. § 144.

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 2 at 146:

"A complaint of delay in a single case is properly dismissed as merits-related. Such an allegation may be said to challenge the correctness of an official action of the judge, i.e., the official action of assigning a low priority to deciding the particular case in question. A judicial remedy exists in the form of a mandamus petition. But, by the same token, an allegation of an habitual pattern of delay in a number of cases, or an allegation of deliberate delay arising out of an illicit motive, is not merits-related."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 1(e): "[T]he complaint procedure may not be used to force a ruling on a particular motion or other matter that has been before the judge too long. A petition for mandamus can sometimes be used for that purpose."

Commentary to Rule 1(e): "The last two paragraphs in rule 1(e), dealing with complaints alleging bias and those alleging undue delay, are in accord with judicial council decisions in some circuits. Where actions of the council have settled questions about the use of the complaint procedure in these situations, it seems appropriate to use the rules to inform prospective complainants about what they may expect."

"The use of the complaint procedure is not limited to cases in which a judge has committed an impropriety. The phrase 'conduct prejudicial to the effective and expeditious administration of the business of the courts' is derived from 28 U.S.C. § 332(d)(1), and we do not understand the phrase to be limited to conduct that is unethical or corrupt. While we have not made an effort to define the phrase with any precision, we note that habitual failure to decide matters in a timely fashion is widely regarded as the proper subject of a complaint. Delay in a single case may be a proper subject for a complaint only in unusual cases, such as where the delay is improperly motivated or is the product of improper animus or prejudice toward a particular litigant, or, possibly, where the delay is of such an extraordinary or egregious character as to constitute a clear dereliction of judicial responsibilities suitable for discipline."

MERITS-RELATED—EXISTENCE OF APPELLATE REMEDY

The existence of an appellate remedy is not relevant to whether an allegation is cognizable under the Act. The 2008 Rules clarified this principle because prior orders sometimes dismissed misconduct complaints as merits-related on the grounds that an appellate remedy was available. A complaint can be merits-related—and therefore not cognizable—even if the complainant cannot pursue an appeal, and a valid misconduct complaint will not be dismissed simply because the complainant has an appellate remedy. An appellate remedy can exist for an action that also constitutes judicial misconduct, such as improper ex parte contact. The existence of an appellate remedy does not bar a litigant from initiating a complaint alleging misconduct, but the complaint proceeding will only address the alleged misconduct and cannot provide a remedy for judicial error. When misconduct and appellate proceedings do overlap, it may be appropriate for a chief judge to defer consideration of the misconduct complaint until the appellate proceedings are concluded, to avoid inconsistent decisions.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(b)(1)(A)(ii): A chief judge may dismiss a complaint "directly related to the merits of a decision or procedural ruling."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(b)(1): Misconduct does not include "an allegation that calls into question the correctness of a judge's ruling."

Commentary to Rule 4(b)(1): "The existence of an appellate remedy is usually irrelevant to whether an allegation is merits-related. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling is merits-related even though the complainant has no recourse from that ruling. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (for example, vacating a ruling that resulted from an improper ex parte communication). However, there may be occasions when appellate and misconduct proceedings overlap, and consideration and disposition of a complaint under these Rules may be properly deferred by the chief judge until the appellate proceedings are concluded to avoid inconsistent decisions."

Orders

Third Circuit

In re Complaint of Judicial Misconduct or Disability, Nos. 08-90091 and 90092 (3d Cir. C.J. June 15, 2009): Certain allegations of a complaint previously raised in unsuccessful appeals were dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (former) Rule 3(h)(3)(A)

(current Rule 4(b)(1)) because the attack on the appellate court's rejection of those allegations was merits-related.

In re Complaint of Judicial Misconduct or Disability, No. 06-06 (3d Cir. C.J. Aug. 2, 2006) (decided before 2008 Rules were enacted): Claims of bias or other inappropriate predisposition toward complainant or his case were dismissed "as related to judicial decisions and procedural rulings since these claims can be considered through the normal case-related processes." *But see* Commentary to new Rule 4(b)(1) (explaining that "the existence of an appellate remedy is irrelevant to whether an allegation is merits-related," and describing as "not merits-related" an allegation that a subject judge used an inappropriate term to refer to a class of people or ruled against a complainant on account of the complainant's race or ethnicity).

Sixth Circuit

In re Complaint of Judicial Misconduct, 858 F.2d 331, 332 (6th Cir. Jud. Council 1988) (decided before 2008 Rules were enacted): The judicial council lacked disciplinary jurisdiction over allegations that the subject judge allowed attorneys general to violate orders requiring them to respond to habeas corpus petitions, because an appropriate judicial remedy was available. *But see* Commentary to new Rule 4 (explaining that "the existence of an appellate remedy is irrelevant to whether an allegation is merits-related.")

Eighth Circuit

In re Complaint of John Doe, No. 03-002 (8th Cir. C.J. Apr. 4, 2003) (decided before 2008 Rules were enacted): The complainant alleged that violations of confidentiality rules for the court's mediation program demonstrated bias against him. The complaint was dismissed after the chief judge determined that there was no violation of the confidentiality rules and nothing to support the allegations of bias. The chief judge held that the complainant should have used the Early Assessment Program's specified procedure to contest alleged wrongful communication from a mediator to an assigned judge, noting that "[j]udicial complaints are not appropriate and will be dismissed where the complainant has another method of redress." *But see* Commentary to new Rule 4 (explaining that "the existence of an appellate remedy is irrelevant to whether an allegation is merits-related.")

In re Complaint of John Doe, No. 00-010 (8th Cir. C.J. Jan. 9, 2001) (decided before 2008 Rules were enacted): Attorneys in a civil action before the subject judge alleged that he had engaged in disrespectful and inappropriate behavior at trial, such as showing impatience and disapproval, making disparaging facial expressions, and using inappropriate language. The attorneys appealed the subject judge's ruling and filed a misconduct complaint. Although strongly critical of the subject judge's behavior, the chief judge concluded that the conduct was not prejudicial to the effective and expeditious administration of the business of the courts in light of the appellate court's affirmance. *But see* Commentary to new Rule 4: (explaining that "the existence of an appellate remedy is irrelevant to whether an allegation is merits-related" and noting that "[a]n allegation that a judge treated litigants or attorneys in a demonstrably egregious and hostile manner while on the bench is . . . not merits-related.");

Breyer Committee Report, No. A-14 at 57–58 (asserting that the appeal process is separate from the misconduct complaint process and that this chief judge should have appointed a special committee to investigate whether the judge met the statutory standard for misconduct).

Ninth Circuit

In re Complaint of Judicial Misconduct, 425 F.3d 1179, 1193 (9th Cir. Jud. Council 2005) (decided before 2008 Rules were enacted): The judicial council determined that the subject judge's misconduct was appropriately corrected by the court of appeals, which had found an abuse of discretion, and by the judge's own action in transferring the bankruptcy proceeding to another judge. According to the dissent, however, "[m]erely reversing an erroneous judgment that is the product of misconduct does not undo the misconduct." Citing the example of a judgment procured by a bribe, the dissent argued that an appellate court's reversal "does not and cannot insulate the district judge from the consequences of [their] misconduct on the theory that the misconduct has somehow been cured."

ADDITIONAL RESOURCES

Legislative History

S. Rep. No. 96-362, at 20 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4333: "[T]he decision-making functions of judges can only be reviewed through the traditional and conventional appellate process . . . [and] disciplinary measures [are not] to be taken against a judge because some might disagree with his decisions or judicial philosophy.

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 2 at 146: "As the 1993 Barr-Willging study noted at 65ff, whether or not an allegation is merits-related has nothing to do with whether or not the complainant has an adequate appellate remedy. The merits-related ground for dismissal exists to protect judges' independence in making rulings, not to protect or promote the appellate process. A complaint alleging incorrect rulings is merits-related even though the complainant—a non-party—has no judicial recourse. By the same token, an allegation that is otherwise cognizable under the Act should not be dismissed merely because an appellate remedy appears to exist (e.g., vacating a ruling that resulted from an improper ex parte communication)."

Law Review Articles

Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 65–67 (1993): Noted "a number of arguably meritorious complaints that were dismissed as merits-related on the ground that some appellate remedy did, or might, exist" and concluded that "[i]n these matters some inquiry by the chief judge into the factual support for the complaint might have been more appropriate than a merits-related dismissal."

Richard L. Marcus, *Who Should Discipline Federal Judges, And How?* 149 F.R.D. 375, 407–08 (1993): Discussed the "fallback theory"—that judicial misconduct proceedings are not available for any matter that might be raised on appeal—and concluded that application of this theory "appears overbroad" and "can unduly narrow the ambit of the discipline process."

Related Case Law

Supreme Court

Liteky v. United States, 510 U.S. 540, 555 (1994): "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" under 28 U.S.C. § 144.

HISTORICAL NOTE

Prior to the enactment of the 2008 Rules, misconduct complaints were sometimes dismissed as merits-related on the grounds that an appellate remedy was available. The 2008 Rules, however, clarify that the availability of an appellate remedy is irrelevant to whether a complaint states a cognizable claim of misconduct or merely seeks reconsideration of a judicial decision and must be dismissed as merits-related.

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 1(b): "The law authorizes complaints about United States circuit judges, district judges, bankruptcy judges, or magistrate judges who have 'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts' or who are 'unable to discharge all the duties of office by reason of mental or physical disability.'"

"'Conduct prejudicial to the effective and expeditious administration of the business of the courts' is not a precise term. It includes such things as use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussions with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of judicial office. It does not include making wrong decisions—even very wrong decisions—in cases. The law provides that a complaint may be dismissed if it is 'directly related to the merits of a decision or procedural ruling.'"

Rule 1(e): "The complaint procedure is not intended to provide a means of obtaining review of a judge's decision or ruling in a case. The judicial council of the circuit, the body that takes action under the complaint procedure, does not have the power to change a decision or ruling. Only a court can do that."

Commentary to Rule 1: "As at least some members of Congress anticipated, a great many of the complaints that have been filed under section 372(c) have been filed by litigants disappointed in the outcomes of their cases. Some complaints allege nothing more than that the decision was in violation of established legal principles. Many of them allege that the judges are members of conspiracies to deprive the complainants of their rights, and offer the substance of the judicial decision as the only evidence of the conspiratorial behavior. A great

many of the complaints seek various forms of relief in the underlying litigation. Rule 1 is intended to provide prospective complainants with guidance about the appropriate uses of the complaint procedure. Paragraph (b) discusses cognizable subject matters, and paragraph (c) discusses cognizable persons. Paragraph (e) discusses remedies, and attempts to make it clear that the circuit council will not provide relief from a ruling or judgment of a court."

MERITS-RELATED—FAILURE TO RECUSE

An allegation that a subject judge wrongly failed to recuse, without more, is related to the merits of a judicial decision and therefore does not state a cognizable claim of misconduct. But an allegation that a judge had an improper motive for his or her failure to recuse is not merits-related and does state a cognizable claim of misconduct.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(b)(1)(A)(ii): A chief judge may dismiss a complaint that is "directly related to the merits of a decision or procedural ruling."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(b)(1): Misconduct does not include "an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse."

Commentary to Rule 4(b)(1): "Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related."

Code of Conduct for United States Judges

Canon 3(C)(1): "[A] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned. . . ."

Orders

First Circuit

In re Complaint, No. 01-09-90017 (1st Cir. C.J. Jan. 7, 2010); *In re Complaint*, No. 01-09-90017 (1st Cir. Jud. Council Sept. 14, 2010): The complainants alleged that the subject judge engaged in misconduct by failing to recuse from their bankruptcy case after they had filed an earlier misconduct complaint against the judge. In reviewing the dismissal of that allegation under 28 U.S.C. § 352(b)(1)(A)(i), the judicial council confirmed the chief judge's determination that the filing of a previous misconduct complaint does not itself require a judge's recusal and that, accordingly, no cognizable misconduct was alleged. The complaint also alleged that the subject judge's denial of the disqualification motion reflected improper bias against the complainants based on their prior misconduct complaint. A limited inquiry demonstrated that the prior misconduct complaint had been misfiled and that the subject judge was unaware of it. It also revealed that the subject judge had considered the disqualification motion and explained their reasons for denial, and that there was no information in the complaint or the reviewed record supporting the contention that the cited order was improperly motivated. The judicial council therefore affirmed dismissal of the allegation as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 11(c)(1)(B).

In re Complaint, No. 432 (1st Cir. C.J. June 12, 2006) (decided before 2008 Rules were enacted): As a general matter, a judge's error under the disqualification statute is subject to review on appeal or by mandamus, but not through judicial misconduct proceedings absent "egregious circumstances" and bad faith. As the subject judge promptly withdrew on learning of the relevant financial interest, there was no basis for concluding that the judge knowingly violated the disqualification statute, much less with the bad faith required to constitute judicial misconduct.

In re Complaint, No. 399 (1st Cir. C.J. Jan. 27, 2005) (decided before 2008 Rules were enacted): According to the chief judge, the conclusion that "a judge who wrongly failed to recuse himself had committed *misconduct*" would require that the judge go far beyond mere error in failing to recuse. Ultimately, a failure to recuse constitutes misconduct only on an extraordinary showing that the failure implicates bad faith or some other form of culpability. An assertion that the subject judge should have recused themself due to a relationship with a litigant was therefore insufficient to be an allegation of misconduct.

Second Circuit

In re Charges of Judicial Misconduct, No. 09-90135 (2d Cir. C.J. Mar. 1, 2010): The complaint alleged that the subject judge committed misconduct in failing to recuse because the judge faced harassment charges similar to those involved in the case before them and because the judge had a personal relationship with the complainant's former counsel. Noting that the complaint did not allege that the judge's failure to recuse had an illicit purpose, the chief judge dismissed the complaint as merits-related under to 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 3(h)(3)(A) (current Rule 4(b)(1)).

In re Charges of Judicial Misconduct, No. 02-08-90067 (2d Cir. C.J. May 20, 2009): A complaint alleging that the subject judge should have recused due to bias was dismissed as "directly related to the merits of a decision or procedural ruling" pursuant to 28 U.S.C. § 352 (b)(1)(A)(ii) and Rule 3(h)(3)(A) (current Rule 4(b)(1)). The suggestion of improper motive was entirely conclusory, necessarily assuming that the subject judge must harbor a retaliatory motive based on purported conduct that occurred more than twenty years earlier. To the extent that the complaint could be read more expansively as alleging that the judge deliberately failed to recuse for an improper motive, it was dismissed as lacking factual substantiation under 28 U.S.C. §§ 352 (b)(1)(A)(iii) & 352 (b)(1)(B).

In re Charges of Judicial Misconduct, 465 F.3d 532, 539 (2d Cir. Jud. Council 2006) (decided before 2008 Rules were enacted): An allegation of misconduct by virtue of a failure to recuse was dismissed based on the Special Committee's finding that the subject judge had not recalled their prior limited involvement with the defendant in the case before them. Noting that an erroneous failure to recuse is a legal error rather than judicial misconduct, the Special Committee stated that "[a] failure to recuse resulting from an innocent and reasonable memory loss is not misconduct."

Third Circuit

In re Complaints of Judicial Misconduct or Disability, No. 03-08-90111 and 03-09-90040 (3d Cir. C.J. Aug. 4, 2009): Citing 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 3(h)(3)(A), the chief judge determined that an allegation of failure to recuse, without more, was merits-related and subject to dismissal.

Fourth Circuit

In the Matter of a Judicial Complaint, No. 06-9028 (4th Cir. C.J. July 11, 2006) (decided before 2008 Rules were enacted): Complainant sought disqualification of the subject judge and reinstatement of certain motions, alleging that the subject judge should have recused after the FBI began to investigate the theft of cash admitted into evidence in complainant's case. Dismissing the complaint as merits-related, the chief judge cautioned that the judicial complaint procedure cannot be used to have a judge disqualified from a particular case.

Fifth Circuit

In re Complaint of Latimer, 955 F.2d 1036, 1037 (5th Cir. Jud. Council Jan. 13, 1992) (decided before 2008 Rules were enacted): The chief judge appointed a special committee to investigate a complaint alleging that the subject judge failed to recuse themself despite holding a disqualifying financial interest in the litigation. Dismissing the complaint and noting that the judicial misconduct complaint process is not a substitute for judicial process, the judicial council held that the chief judge should have dismissed the complaint as merits-related.

No. 07-05-351-0092 (5th Cir. C.J. Aug. 9, 2007) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge committed misconduct by failing to disqualify themself from presiding over complainant's lawsuit naming forty-one federal judges, including the subject judge and every active judge on the circuit, as defendants. The complainant had consented to have the subject judge preside but nonetheless moved for that judge's recusal, a motion that was denied because, even if the complainant had not consented to have the judge preside, the "Rule of Necessity" would have applied, allowing the judge to adjudicate a matter that could not be heard otherwise. The complaint was therefore dismissed as merits-related.

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 08-7-352-20 (7th Cir. C.J. May 22, 2008): The complaint alleged that the judge should have recused because they knew the lawyer for the adverse party, an Assistant United States Attorney who appeared regularly before all the judges of the district. The complainant did not allege that the lawyer was the judge's relative or that the dealings between the judge and the lawyer were other than strictly professional. Noting that the frequent appearance of certain lawyers is not a ground for disqualification, the chief judge dismissed the complaint as directly related to the merits of a procedural ruling.

Eighth Circuit

In re Complaint of John Doe, No. 08-10-90027 (8th Cir. C.J. Aug. 19, 2010): The complaint alleged that, before writing an opinion in complainant's case, a circuit judge should have recused himself *sua sponte* due to possible kinship with a state court judge who had ruled on complainant's state post-conviction appeal. The chief judge noted that the issue of recusal may not be re-litigated in the judicial complaint process and dismissed the complaint as merits-related.

In re Complaint of John Doe, No. 08-10-90024 (8th Cir. C.J. Aug. 19, 2010): The complainant alleged that a district judge should have ordered a magistrate judge's recusal. Citing Rule 3(h)(3)(A) (current Rule 4(b)(1)), the chief judge dismissed the complaint as merits-related.

Ninth Circuit

In re Complaint of Judicial Misconduct, Nos. 09-90254 (9th Cir. C.J. Oct. 12, 2010): The chief judge noted that a failure to recuse may constitute misconduct only if a judge deliberately fails to recuse for improper purposes. Because no improper purpose was alleged for the subject judge's failure to recuse, the complaint was dismissed as directly related to the merits of the judge's rulings pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 3(h)(3)(A) (current Rule 4(b)(1)).

In re Charge of Judicial Misconduct, No. 03-89114 (9th Cir. C.J. June 14, 2004) (decided before 2008 Rules were enacted): Citing Canon 3(C)(1)(e) of the Code of Conduct for U.S. Judges, which required a judge's disqualification from matters involving investigations or prosecutions that were pending during the judge's former tenure as a United States Attorney, the chief judge conducted a limited investigation of an allegation that the judge had improperly failed to recuse. In so doing, the chief judge determined that the complainant had not been investigated or prosecuted while the judge was a United States Attorney. The complaint about the subject judge's failure to recuse was thereupon dismissed as merits-related.

Tenth Circuit

In re Charge of Judicial Misconduct, No. 2003-10-372-32 (10th Cir. C.J. Sept. 10, 2003) (decided before 2008 Rules were enacted): A complaint alleged that the subject judge should have recused where their rulings allegedly affected their financial interests. The chief judge dismissed the complaint as merits-related, noting that recusal is a fact-specific judicial decision and is not necessarily required simply because a judge owns an interest in a company in the same business as the parties.

In re Charge of Judicial Misconduct, No. 2003-10-372-07 (10th Cir. C.J. Mar. 3, 2003); *In re Charge of Judicial Misconduct*, No. 2003-10-372-07 (10th Cir. Jud. Council May 28, 2003) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge committed misconduct by failing to recuse in two cases in which the judge's church was a

party. The chief judge dismissed the complaint as merits-related, indicating that a judge's decision not to recuse may not be challenged through a misconduct complaint The judicial council affirmed the dismissal, also declaring itself to be "satisfied that a party's interests, and counsel's responsibility to zealously represent his or her client, provide sufficient incentive for them to raise all legitimate grounds for recusal within the context of a particular case and to allow the issue of a judge's alleged bias or prejudice to be fully aired."

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, No. 06-04 (D.C. Cir. C.J. Mar. 9, 2006) (decided before 2008 Rules were enacted): The complainant alleged that the subject judges engaged in misconduct by failing to recuse themselves even though they were named as defendants in the underlying case. The chief judge noted that the appropriate way to address a conflict of interest is through a motion for recusal, which the complainant did not file, and that the complaint process is not a substitute for judicial processes. Because such a challenge to judicial qualification is not appropriate under 28 U.S.C. § 351, the allegation was dismissed.

Court of Federal Claims

In re Complaint of Judicial Misconduct, 2 Cl. Ct. 255, 256–57 (Cl. Ct. C.J. 1983) (decided before 2008 Rules were enacted): Relying on 28 U.S.C. § 352(b)(1)(A)(ii), the chief judge dismissed the complaint, describing it as a "transparent attempt" to relitigate issues resolved by the denial of complainants' motions for disqualification of the subject judge. The complaint related directly to the merits of the subject judge's decision and therefore could not form the basis of a judicial misconduct complaint.

ADDITIONAL RESOURCES

Legislative History

S. Rep. No. 96-362, at 6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4320: "Federal judges . . . should not be harassed in the legitimate exercise of their duty to interpret and apply the law."

S. Rep. No. 96-362, at 8 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4322: "It is important to point out what [the Judicial Conduct and Disability Act] does not mean; it is not designed to assist the disgruntled litigant who is unhappy with the result of a particular case."

S. Rep. No. 96-362, at 20 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4333: "[T]he decision-making functions of judges can only be reviewed through the traditional and conventional appellate process . . . [and] disciplinary measures [are not] to be taken against a judge because some might disagree with his decisions or judicial philosophy."

Related Case Law

Supreme Court

Liteky v. United States, 510 U.S. 540, 555 (1994): "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" under 28 U.S.C. § 144.

Related Statutes

28 U.S.C. § 144: "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding."

28 U.S.C. § 455: "Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. . . ."

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 2 at 146:

"A mere allegation that a judge should have recused is indeed merits-related; the proper recourse is for a party to file a motion to recuse. The very different allegation that the judge failed to recuse for illicit reasons—i.e., not that the judge erred in not recusing, but that the judge knew he should recuse but deliberately failed to do so for illicit purposes—is not merits-related. Such allegations are almost always dismissed for lack of factual substantiation."

See also Merits-Related—Existence of Appellate Remedy; Misconduct—Bias and Impartiality.

MERITS-RELATED—SUBSTANTIVE, PROCEDURAL, OR FACTUAL ERROR

Allegations that a judge committed a legal, procedural, or factual error are generally merits-related. Only in certain situations—involving, for example, a judge's willful and egregious failure to adhere to prevailing law—can such error constitute misconduct.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

28 U.S.C. § 352(b)(1)(A)(ii): A chief judge may dismiss a complaint that is "directly related to the merits of a decision or procedural ruling."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(b)(1): Misconduct does not include "an allegation that calls into question the correctness of a judge's ruling including a failure to recuse. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision."

Commentary to Rule 4(b)(1): "Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related — in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint — even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard."

"Conversely, an allegation that a judge conspired with a prosecutor to make a particular ruling is not merits-related, even though it "relates" to a ruling in a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and goes beyond a challenge to the correctness — "the merits" — of the ruling itself. An allegation that a judge ruled against the complainant because the complainant is a member of a particular racial or ethnic group, or because the judge dislikes the complainant personally, is also not merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or improper motive. Similarly, an allegation that a judge used an inappropriate term to refer to a class of people is not merits-related even if the judge used it on the bench or in an opinion; the correctness of the judge's rulings is not at stake. An allegation that a judge treated

litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner is also not merits-related."

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

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

Code of Conduct for United States Judges

Canon 3(A)(1): "A judge should be faithful to and maintain professional competence in the law, and should not be swayed by partisan interests, public clamor, or fear of criticism."

Orders

Judicial Conference

In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 562 (U.S. Jud. Conf. Jan. 14, 2008) (decided before 2008 Rules were enacted): "A cognizable misconduct complaint based on allegations of a judge not following prevailing law or the directions of a court of appeals in particular cases must identify clear and convincing evidence of willfulness, that is, clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law."

First Circuit

In re Complaint, No. 410 (1st Cir. Jud. Council Feb. 23, 2006) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge erred in failing to hold an evidentiary hearing when necessary. The judicial council affirmed dismissal of the allegation as merits-related. Any legal error, if it did occur, was grounds for appeal and not a judicial

misconduct complaint. Because the complaint arose from disagreement with the substance of judicial rulings, it was properly dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii).

In re Complaint, No. 452 (1st Cir. C.J. May 7, 2007) (decided before 2008 Rules were enacted): A complainant alleged "nothing more than erroneous factual and legal findings." Absent evidence of bias or improper motive, such claims are merits-related.

In re Complaint, No. 399 (1st Cir. C.J. Jan. 27, 2005) (decided before 2008 Rules were enacted): Complainant alleged that the subject judge made specified errors during litigation. Absent proof of bias, bad faith, or similar culpability, allegations of specific error are not cognizable in a misconduct proceeding. Because there was no such proof, the complaint was dismissed as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii).

In re Complaint, Nos. 375, 378 (1st Cir. C.J. Apr. 28, 2004) (decided before 2008 Rules were enacted): Allegations that a subject judge failed to address many of the substantive legal issues raised by the complainant and mischaracterized issues presented in the case were dismissed as merits-related. Absent evidence of bias or malice, disagreement with the substance of judicial rulings or with the reasoning underlying such rulings may provide a basis for an appeal but does not support a claim of judicial misconduct.

In re Complaint, No. 309 (1st Cir. C.J. Oct. 17, 2001) (decided before 2008 Rules were enacted): Complainant alleged that the subject judge erred in authorizing ex parte contact between defendant's private investigator and the plaintiff in order to prevent the plaintiff from misrepresenting his financial status under oath. Noting that a ruling might conceivably be so extraordinary a departure from the usual course of judicial proceedings that it might, in conjunction with other more direct evidence, be suggestive of judicial misconduct, the chief judge concluded that there was nothing remarkable about the court's decision to allow limited ex parte contact in this instance. While the court's decision may be the basis for an appeal, it was not conduct prejudicial to the effective and expeditious administration of the business of the courts.

Second Circuit

In re Charge of Judicial Misconduct, Nos. 02-10-90005 (2d Cir. C.J. Sept. 16, 2010): The complaint merely attacked the correctness of the subject judge's decision to issue an arrest warrant. A bare allegation that a judge "got it wrong" is not an allegation of judicial misconduct, but rather is an assertion of legal error, which is to be pursued through normal appellate procedures as allowed by law. Accordingly, the complaint was dismissed as "directly related to the merits of a decision or procedural ruling" pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rules 3(h)(3)(A) (current Rule 4(b)(1)) and 11 (c)(1)(8).

In re Charge of Judicial Misconduct, No. 02-10-90045, 02-10-90054, and 02-10-90079 (2d Cir. C.J. Sept. 16, 2010): A complaint attempted to re-litigate the correctness of the judges' various decisions, such as the denial of various motions for subpoenas or investigative funds or a new attorney, and were dismissed as "directly related to the merits of a decision or procedural ruling" under 28 U.S.C. § 352(b)(1)(A)(ii) and Rules 3 (h)(3)(A)

(current Rule 4(b)(1)) and 11 (c)(1)(B). Similarly, allegations that the judges failed to consider fully all arguments or deprived the complainant of due process also attacked the correctness of judicial decisions and were dismissed as purely merits-related. Allegations that both subject judges overlooked perjured testimony or failed to refer matters for prosecution or investigation were also dismissed as merits-related, because such decisions are quintessentially judicial actions not to be second-guessed in a judicial misconduct proceeding absent a supported allegation of improper motive or purpose.

In re Charge of Judicial Misconduct, No. 02-08-90135 (2d Cir. C.J. Apr. 29, 2009): The complaint alleged that the judge committed misconduct in construing the complainant's filing solely as an order to show cause for a temporary and preliminary injunction, ignoring the separate civil rights action filed, and that the judge was "factually wrong" in concluding that the defendants in his civil rights action were entitled to judicial immunity. Because the allegations merely attacked the correctness of the judge's various rulings and other official actions, they were dismissed as "directly related to the merits of a decision or procedural ruling" pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rules 3 (h)(3)(A) (current Rule 4(b)(1)) and 11(c)(1)(B).

Third Circuit

In re Complaint of Judicial Misconduct or Disability, Nos. 03-10-90003 and 03-10-90004 (3d Cir. C.J. Sept. 30, 2010): A pro se plaintiff disputed various decisions and rulings rendered by two judges in his civil proceedings before them, including a discovery order requiring production of a file, an order denying leave to amend the complaint, and a failure to recuse. The complainant also disputed certain specific facts found by the subject judges in written opinions. Because the claims were directly related to the merits of the subject judges' decisions, they were not cognizable in judicial misconduct proceedings and were dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 3(h)(3)(A) (current Rule 4(b)(1)).

In re Complaint of Judicial Misconduct or Disability, Nos. 03-08-90111 and 03-09-90040 (3d Cir. C.J. Aug. 4, 2009): Complainant alleged that the subject judge declared a default "moot" without regard to the applicable rules, "ignored the rules of court," and "refused to recuse in the face of a clear bias in this matter." Because complainant's only support for these allegations was disagreement with the judge's rulings, the chief judge dismissed the allegations as merits-related in accordance with Rule 3(h)(3)(A) (current Rule 4(b)(1)) and Rule 11(c)(1)(B).

In re Complaint of Judicial Misconduct or Disability, Nos. 03-08-90091 and 03-08-90092 (3d Cir. C.J. June 15, 2009): Complainant's allegations challenged decisions made in his civil actions, including the "fraudulent" dismissal of his civil suit and a refusal to appoint counsel. Because allegations calling into question the correctness of a judge's ruling, without more, are merits-related, the complainant's allegations were dismissed as squarely within the ambit of 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 3(h)(3)(A) (current Rule 4(b)(1)).

In re Complaint of Judicial Misconduct or Disability, No. 06-17 (3d Cir. C.J. May 31, 2006) (decided before 2008 Rules were enacted): Complainant challenged the correctness of the

subject judge's decisions, and alleged, based on those decisions, that the judge had failed to consider and review the case records, had acted as an advocate for the other side, had covered-up wrongdoing, and was biased. The chief judge noted that Congress had provided for dismissal of complaints related to the merits of a decision or procedural ruling out of concern that a misconduct complaint not be used to challenge judicial decisions. Because complainant's allegations were directly related to judicial decisions and procedural rulings, the complaint was dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii).

In re Complaint of Judicial Misconduct, No. 04-03 (3d Cir. C.J. Feb. 13, 2004) (decided before 2008 Rules were enacted): Allegations that the subject judge failed to articulate reasons for their decision and adopted a proposed opinion drafted by plaintiffs' counsel were dismissed as merits-related. The alleged errors were subject to normal judicial processes and did not indicate any clear dereliction of judicial duty.

Fourth Circuit

In the Matter of a Judicial Complaint, No. 06-9038 (4th Cir. C.J. Oct. 23, 2006) (decided before 2008 Rules were enacted): An allegation that the subject judge had falsified evidence by incorrectly citing the disposition of complainant's state criminal charges in rejecting complainant's double jeopardy claim was dismissed as merits-related pursuant to 28 U.S.C. § 372(c)(3)(A)(ii). The chief judge held that "[c]laims of legal or factual error in judicial opinions must be raised through appeal, rather than through a judicial complaint, and the judicial misconduct statute provides no additional authority for review of a decision after disposition of the appeal."

Fifth Circuit

Nos. 07-05-351-0055, 07-05-351-0056, 07-05-351-0057 (5th Cir. C.J. Mar. 1, 2007) (decided before 2008 Rules were enacted): Allegations that the subject judges erred in finding that complainant "produced no evidence that could undermine the poor performance evaluations that he received" and had not rebutted "the legitimate non-discriminatory reasons for termination" of his employment were dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(ii) as directly related to the merits of the judges' decisions.

No. 07-05-351-0037 (5th Cir. C.J. Mar. 1, 2007) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge unfairly dismissed complainant's petition for review, erroneously construed complainant's petition for rehearing en banc as a motion for reconsideration, and issued the mandate prematurely. Because the complaint related directly to the merits of the judge's decisions, it was dismissed pursuant to 28 U.S.C. § 372(c)(3)(A)(ii).

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 07-6-351-39 (6th Cir. C.J. Nov. 19, 2007) (decided before 2008 Rules were enacted): Allegations that the subject judge denied complainant's motion to amend too quickly, mischaracterized the allegations in

complainant's complaint, and misapplied the law in dismissing complainant's complaint were dismissed as merits-related pursuant to 28 U.S.C. § 372(c)(3)(A)(ii).

In re Complaint of Judicial Misconduct, No. 00-6-372-51 (6th Cir. C.J. Nov. 7, 2000) (decided before 2008 Rules were enacted): A complaint alleging that the subject judge failed to understand complainant's arguments in the case and must therefore be disabled by reason of a mental defect was dismissed as merits-related.

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-10-90066 (7th Cir. C.J. Oct. 14, 2010): The complaint alleged that the subject judge had engaged in misconduct by forwarding a "Notice of Interlocutory Appeal" to the court of appeals as if it were a notice of appeal and by intercepting and ruling on letters and motions that complainant had addressed to the district court's chief judge. Because the allegations addressed procedural steps in a suit, the chief judge dismissed the complaint as "directly related to the merits of a decision or procedural ruling" under 28 U.S.C. §352(b)(1)(A)(ii) and Rule 11(c)(1)(B).

In re Complaint Against a Judicial Officer, No. 07-10-90046 (7th Cir. C.J. Aug. 5, 2010): Complainant alleged that the subject judge believed the wrong witnesses, misunderstood the facts, failed to detect perjury and spoliation of evidence, failed to adequately prepare for trial, and made an incorrect decision. Complainant also contended that the subject judge should not have required submission of the dispute to an "early neutral evaluation," which complainant believed ran up his legal bill and deprived him of the wherewithal to appeal. Because all the contested judicial acts either resolved the trial on the merits or represented procedural steps on the road to decision, the complaint was dismissed as merits-related under 28 U.S.C. § 352(b)(1)(A)(ii).

Eighth Circuit

In re Complaint of John Doe, No. 08-08-90030 (8th Cir. C.J. Sept. 3, 2008): A complaint alleging substantive and procedural error in many of the subject judge's rulings—with specific allegations of failure to enforce various provisions of the Federal Rules of Civil Procedure, denial of a right to a jury trial, reliance on hearsay evidence, and wrongly declaring the complainant's evidence inadmissible—was dismissed as merits-related under 28 U.S.C. § 352(b)(1)(A)(ii).

Ninth Circuit

In re Charge of Judicial Misconduct, Nos. 09-90185 (9th Cir. C.J. Oct. 5, 2010): Allegations that the subject judge made various substantive and procedural errors when sentencing complainant to an above-Guidelines prison term were dismissed as directly related to the merits of the judge's rulings under 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 11(c)(1)(B).

Tenth Circuit

In re Charge of Judicial Misconduct, No. 10-10-90021 (10th Cir. C.J. July 26, 2010): Complainant took issue with the subject judge's ruling following an appellate remand in an underlying federal habeas case, contending that the subject judge abused their discretion. The allegation was dismissed under Rule 11(c)(1)(B) because it was "directly related to the merits of a decision or procedural ruling" and therefore not cognizable as judicial misconduct.

Eleventh Circuit

In re Complaint under the Judicial Conduct and Disability Act of 1980, No. 11-10-90018 (11th Cir. C.J. Apr. 30, 2010): Complainant alleged that the subject judge had failed to rule on various motions, failed to hold a hearing before dismissing a petition for habeas corpus, erroneously dismissed a motion as moot, failed to ensure the record was complete, and displayed leniency toward the respondent while denying petitioner an extension of time to reply to respondent's supplemental brief. After reviewing the record, the chief judge concluded that the allegations were merits-related and dismissed the complaint under 28 U.S.C. § 352(b)(l)(A)(ii).

ADDITIONAL RESOURCES

Legislative History

S. Rep. No. 96-362, at 6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4320: "Federal judges . . . should not be harassed in the legitimate exercise of their duty to interpret and apply the law."

S. Rep. No. 96-362, at 8 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4322: "It is important to point out what [the Judicial Conduct and Disability Act] does not mean; it is not designed to assist the disgruntled litigant who is unhappy with the result of a particular case."

S. Rep. No. 96-362, at 20 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4333: "[T]he decision-making functions of judges can only be reviewed through the traditional and conventional appellate process . . . [and] disciplinary measures [are not] to be taken against a judge because some might disagree with his decisions or judicial philosophy."

Related Case Law

Supreme Court

Liteky v. United States, 510 U.S. 540, 555 (1994): "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" under 28 U.S.C. § 144.

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 2 at 145:

"The core policy reflected here is that the complaint procedure cannot be a means for collateral attack on the substance of a judge's rulings. The interest protected is the independence of the judge in the course of deciding Article III cases and controversies. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related."

"This constitutes a broad reading of the phrase 'decision or procedural ruling.' It is not limited to rulings issued in deciding cases per se. Thus, a complaint challenging the correctness of a judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related—i.e., as challenging the substance of the judge's administrative determination to dismiss the complaint—even though it does not concern the judge's rulings in any case. A petition for review can be filed with the circuit council. Similarly, an allegation that a chief judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard."

Committee Standards for Assessing Compliance with the Act, Standard 2 at 145–46:

"Because of the special need to protect judges' independence in deciding what to say in an opinion or ruling, a somewhat different standard applies to determine the merits-relatedness of a nonfrivolous allegation that a judge's language in a ruling reflected an improper motive. If the judge's language was relevant to the case at hand, then the chief judge may presume the judge's choice of language was merits-related. Thus a chief judge may properly dismiss an allegation that a judge's language that is relevant to a ruling was inserted out of an illicit motive, absent evidence aside from the ruling itself to suggest improper motive. If, on the other hand, the challenged language does not seem relevant on its face, then the chief judge should ordinarily inquire of the judge complained against. If such an inquiry demonstrates that the challenged language was indeed relevant to the case at hand, then the chief judge may properly dismiss the allegation."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 1(b): "'Conduct prejudicial to the effective and expeditious administration of the business of the courts' . . . does not include making wrong decisions—even very wrong decisions—in cases. The law provides that a complaint may be dismissed if it is 'directly related to the merits of a decision or procedural ruling.'"

Commentary to Rule 1: "As at least some members of Congress anticipated, a great many of the complaints that have been filed under [the Judicial Conduct and Disability Act] have been filed by litigants disappointed in the outcomes of their cases. Some complaints allege nothing more than that the decision was in violation of established legal principles. Many of them allege that the judges are members of conspiracies to deprive the complainants of their rights, and offer the substance of the judicial decision as the only evidence of the conspiratorial

behavior. A great many of the complaints seek various forms of relief in the underlying litigation."

Rule 4(c)(2): "A complaint will be dismissed if the chief judge concludes . . . that the complaint is directly related to the merits of a decision or procedural ruling."

MERITS-RELATED—UNSUPPORTED ALLEGATIONS OF MISCONDUCT

A chief judge may dismiss as merits-related a judicial misconduct claim that asserts, without support, a non-merits-related basis for attacking the merits of a judge's ruling. (Unsupported complaints of judicial misconduct may also be subject to dismissal as frivolous, or as lacking sufficient evidence to raise an inference that misconduct occurred.)

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(b)(1)(a)(ii): A chief judge may dismiss a complaint that is "directly related to the merits of a decision or procedural ruling."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(b)(1): Misconduct does not include "an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision."

Commentary to Rule 4(b)(1): "Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related. The phrase "decision or procedural ruling" is not limited to rulings issued in deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a chief judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related — in other words, as challenging the substance of the judge's administrative determination to dismiss the complaint — even though it does not concern the judge's rulings in Article III litigation. Similarly, an allegation that a judge incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard."

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

Rule 11(c)(1)(B): A complaint must be dismissed in whole or in part to the extent that the chief judge concludes that the complaint "is directly related to the merits of a decision or procedural ruling."

Commentary to Rule11(c): "Subsection (c) describes the grounds on which a complaint may be dismissed. These are adapted from the Act, 28 U.S.C. § 352(b), and the Breyer Committee Report, 239 F.R.D. at 27 239–45."

Commentary to Rule11(c)(1)(B): "Subsection (c)(1)(B) permits dismissal of complaints related to the merits of a decision by a subject judge; this standard is also governed by Rule 3 and its accompanying Commentary."

Orders

First Circuit

In re Complaint, No. 01-09-90017 (1st Cir. C.J. Jan. 7, 2010); *In re Complaint*, No. 01-09-90017 (1st Cir. Jud. Council Sept. 14, 2010): The complaint alleged that the subject judge's bias against the complainants because of their prior misconduct complaint against the judge was reflected in orders lifting the automatic bankruptcy stay and dismissing the bankruptcy case. The chief judge's limited inquiry demonstrated that the prior misconduct complaint had been misfiled and the judge was unaware of it and that there was no information in the complaint or the reviewed record supporting the contention that the cited orders were improperly motivated. The judicial council therefore affirmed dismissal of the allegation as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 11(c)(1)(B).

Second Circuit

In re Charge of Judicial Misconduct, No. 01-8579 (2d Cir. C.J. Aug. 5, 2010): The complaint alleged that the subject judge's bias caused the judge to erroneously dismiss the complainant's case. The allegation challenging the correctness of the judge's initial decision to dismiss the case was dismissed as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 3(h)(3)(A). As no support—other than the allegedly erroneous decision itself—was offered to support the claim that the decision was improperly motivated by bias, the allegation was dismissed as "lacking sufficient evidence to raise an inference that misconduct has occurred" pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D)(i).

Third Circuit

In re Complaint of Judicial Misconduct or Disability, Nos. 03-10-90001 (3d Cir. C.J. Sept. 30, 2010): The subject judge transferred complainant's civil action to a different venue and closed the case. Complainant alleged that the subject judge had "shown a pattern of bias and carelessness," harboring a bias against disabled and pro se litigants and allowing the illegal sale of complainant's stock. Complainant did not elaborate upon these allegations. Because the allegations of misconduct were premised on disagreement with judge's decisions, they were dismissed as merits-related pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and Rules 3(h)(3)(A) and 11(c)(1)(B). To the extent that bias was alleged, those allegations were entirely lacking in evidentiary support and were therefore dismissed as frivolous and unsupported by any evidence that would raise an inference that misconduct occurred pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(C) and (D).

In re Complaint of Judicial Misconduct or Disability, Nos. 03-09-90012 and 03-09-90013 (3d Cir. C.J. Oct. 22, 2009): Complainant alleged that the subject judge demonstrated bias and favoritism by failing to require adherence to the Federal Rules of Civil Procedure, denying a jury trial, omitting facts from a decision, and failing to address a "motion of fraud and false official statements." The sole support for the allegations of bias, however, was disagreement with the subject judge's decisions. The chief judge concluded that complainant failed to raise an inference that misconduct had occurred under 28 U.S.C. § 352(b)(1)(A)(iii) and dismissed the allegations as merits-related under 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 3(h)(3)(A) (current Rule 4(b)(1)).

Fourth Circuit

In the Matter of a Judicial Complaint, Nos. 04-10-90099 (4th Cir. C.J. Oct. 13, 2010): Complainant alleged that the subject judge colluded with the U.S. Attorney but offered no factual support for the charge. Because the allegation was integrally related to the merits of the judge's rulings, the complaint was dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(ii).

In the Matter of a Judicial Complaint, Nos. 04-09-90045 and 04-09-90046 (4th Cir. C.J. Nov. 9, 2009): Complainant alleged that the subject judge deprived him of his right to self-representation based on his disability. The chief judge concluded that the allegation had both merits-related and conduct-related aspects. To the extent that the allegation challenged the judge's ruling on complainant's request to represent himself, it was merits-related and not cognizable as judicial misconduct. To the extent that the allegation charged discrimination based on disability, it was unsupported by the record. The complainant's allegation was dismissed under 28 U.S.C. § 352(b)(1)(A)(ii) as directly related to the merits of a judicial ruling, and under 28 U.S.C. § 352(b)(1)(A)(iii) as lacking in factual support.

Fifth Circuit

In the Matter of a Judicial Complaint, Nos. 05-10-90046 and 05-10-90047 (5th Cir. C.J. Jan. 29, 2010): Complainant asserted judicial bias as a basis for allegations of error in the dismissal of pleadings. The claims of error were dismissed under 28 U.S.C. § 352(b)(1)(A)(ii) as merits-related, and the claims of bias based only on adverse rulings were dismissed under 28 U.S.C. § 352(b)(1)(A)(iii) as conclusory assertions insufficient to support a finding of judicial misconduct.

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 01-6-372-85 (6th Cir. C.J. Jan. 27, 2002) (decided before 2008 Rules were enacted): A prisoner filed a complaint alleging that the subject judge imposed sanctions against him for seeking to obtain a trial transcript in his civil rights case. The order denying the prisoner's request had noted the prisoner's previous unsuccessful requests of this nature and the absence of any legal provision for installment payments for trial transcripts, and had prohibited the prisoner from making further filings in the case. Concluding that the allegations of bias were wholly without foundation and that the

complaint concerned the judge's rulings, the chief judge dismissed the complaint as merits-related.

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-7-352-36 (7th Cir. C.J. Sept. 21, 2007) (decided before 2008 Rules were enacted): A criminal defendant with a life interest in a charitable trust complained that the subject judge must have accepted a bribe or entered into a conspiracy to make decisions adverse to the beneficiary of a trust. The chief judge noted that although an allegation of bribery or conspiracy is covered by the Judicial Conduct and Disability Act, it must be supported by evidence other than an adverse decision, and that it is not enough to suggest that an honest judge would have decided the matter differently. The chief judge dismissed the complaint as directly related to the merits of the decision because "a judge's entry of a debatable decision does not support an inference of misconduct."

Eighth Circuit

In re Complaint of John Doe, No. 08-10-90026 (8th Cir. C.J. Aug. 19, 2010): A civil litigant alleged that the subject judge engaged in favoritism and erred in dismissing the case and failing to recuse himself. Citing 28 U.S.C. § 352(b)(1)(A)(ii) and Rule 11(c)(1)(B), the chief judge dismissed the complaint as directly related to the merits of a decision or procedural ruling. The chief judge noted that although allegations of judicial bias are not merits-related, Rule 3(h)(3)(A) requires that such allegations be dismissed as merits-related where, as here, their support consists only of adverse judicial rulings.

Ninth Circuit

In re Charge of Judicial Misconduct, Nos. 09-90248 and 10-90249 (9th Cir. C.J. Oct. 13, 2010): A pro se prisoner alleged that the subject judge had denied his requests to proceed in forma pauperis in retaliation for his actions in another case. Because adverse rulings alone do not constitute proof of bias and no other supporting evidence was presented, the charge was dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D).

Tenth Circuit

In re Charge of Judicial Misconduct, Nos. 10-09-90012 and 10-09-90017 (10th Cir. C.J. Aug. 3, 2010): Complainants took issue with the subject judge's rulings in the underlying case, alleging that the judge was biased and had conspired with opposing counsel. Other than the substance of the judge's rulings, only speculation about the judge's politics and personal connections was offered in support of the allegation. Acknowledging that claims of bias and conspiracy can state a valid claim for misconduct even when the alleged conspiracy relates to a judge's ruling, the chief judge concluded that the claims in this case failed because they were unsupported. Because there was insufficient evidence to raise an inference that misconduct had occurred, the allegations were dismissed pursuant to Rule 11(c)(1)(D).

Eleventh Circuit

In re Complaint under the Judicial Conduct and Disability Act of 1980, No. 11-10-90074 (11th Cir. C.J. Sept. 29, 2010): The complaint alleged that the subject judge had colluded with the government to prevent complainant from testifying, and that the subject judge had allowed perjured testimony. The chief judge noted that a decision as to whether a witness should testify is directly related to a judge's rulings and is therefore excluded from the definition of cognizable misconduct under Rule 3(h)(3)(A). Noting further that the complaint alleged no credible facts or evidence that would lead a reasonable person to conclude that the subject judge had allowed perjured testimony, the chief judge dismissed the complaint as merits-related or lacking sufficient evidence to raise an inference that misconduct has occurred pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii) and Rules 11(c)(1)(B) and (D).

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, No. 07-04 (D.C. Cir. C.J. Mar. 12, 2007) (decided before 2008 Rules were enacted): Complainant alleged that the subject judge had obstructed justice by altering complainant's pleadings, acting in concert with complainant's opponent, and erroneously dismissing complainant's case. The chief judge found that the complainant had offered only unsupported assertions and no specific evidence of wrongdoing. The chief judge therefore dismissed the complaint, pursuant to 28 U.S.C. § 352(b)(1)(A)(ii) and (iii), as merits-related and lacking sufficient evidence to raise an inference that misconduct occurred.

ADDITIONAL RESOURCES

Legislative History

S. Rep. No. 96-362, at 6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4320: "Federal judges . . . should not be harassed in the legitimate exercise of their duty to interpret and apply the law."

S. Rep. No. 96-362, at 8 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4322: "It is important to point out what [the Judicial Conduct and Disability Act] does not mean; it is not designed to assist the disgruntled litigant who is unhappy with the result of a particular case."

S. Rep. No. 96-362, at 20 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4333: "[T]he decision-making functions of judges can only be reviewed through the traditional and conventional appellate process . . . [and] disciplinary measures [are not] to be taken against a judge because some might disagree with his decisions or judicial philosophy."

Related Case Law

Supreme Court

Liteky v. United States, 510 U.S. 540, 555 (1994): "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion" under 28 U.S.C. § 144.

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 2 at 145–46:

"The core policy reflected here is that the complaint procedure cannot be a means for collateral attack on the substance of a judge's rulings. The interest protected is the independence of the judge in the course of deciding Article III cases and controversies. Any allegation that calls into question the correctness of an official action of a judge—without more—is merits-related."

"This [standard] constitutes a broad reading of the phrase 'decision or procedural ruling.' It is not limited to rulings issued in deciding cases per se. Thus, a complaint challenging the correctness of a judge's determination to dismiss a prior misconduct complaint would be properly dismissed as merits-related—i.e., as challenging the substance of the judge's administrative determination to dismiss the complaint—even though it does not concern the judge's rulings in any case. A petition for review can be filed with the circuit council. Similarly, an allegation that a chief judge had incorrectly declined to approve a Criminal Justice Act voucher is merits-related under this standard."

"Thus, an allegation—however unsupported—that a judge conspired with a prosecutor in order to reach a particular ruling is not merits-related, even though it 'relates' to a ruling in a colloquial sense. What that allegation attacks is the propriety of conspiring with the prosecutor. The allegation thus goes beyond a mere attack on the correctness ('the merits') of the ruling itself."

"Similarly, an allegation—however unsupported—that a judge ruled against the complainant because the complainant was Asian, or because the judge doesn't like the complainant personally, is not merits-related. What the allegation attacks is the propriety of arriving at rulings with an illicit or improper motive. The allegation thus goes beyond a mere attack on the correctness of the ruling itself."

"Most such complaints are more properly dismissed as frivolous—i.e., lacking in factual substantiation. If a judge did in fact conspire with a prosecutor, or rule on the basis of a party's ethnicity, that is fodder for the complaint process because it is not merits-related."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

> Rule 1(b): "'Conduct prejudicial to the effective and expeditious administration of the business of the courts' . . . does not include making wrong decisions—even very wrong decisions—in cases. The law provides that a complaint may be dismissed if it is 'directly related to the merits of a decision or procedural ruling.'"
>
> Commentary to Rule 1: "As at least some members of Congress anticipated, a great many of the complaints that have been filed under [the Judicial Conduct and Disability Act] have been filed by litigants disappointed in the outcomes of their cases. Some complaints allege nothing more than that the decision was in violation of established legal principles. Many of them allege that the judges are members of conspiracies to deprive the complainants of their rights, and offer the substance of the judicial decision as the only evidence of the conspiratorial behavior. A great many of the complaints seek various forms of relief in the underlying litigation."

See also Dismissal—Lacking any Factual Foundation.

APPOINTMENT OF SPECIAL COMMITTEE

If a circuit chief judge finds that a complaint can neither be dismissed nor concluded, he or she must appoint a special committee to investigate the complaint and to submit a report, with recommendations, to the circuit judicial council. The circuit chief judge must not dismiss the complaint if its allegations and the factual support it invokes are sufficient to raise an inference of misconduct or disability, or if there is a genuine issue of material fact concerning the existence of misconduct or a disability.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(a)(1): A chief circuit judge "shall not undertake to make findings of fact about any matter that is reasonably in dispute."

28 U.S.C. § 352(b)(1): Dismissal of a complaint is appropriate "when a limited inquiry . . . demonstrates that the allegations in the complaint lack any factual foundation or are conclusively refuted by objective evidence."

28 U.S.C. § 353: A circuit chief judge must appoint a special committee to "investigate the facts and allegations contained in the complaint," and "provide written notice [of that action] to the complainant and the judge whose conduct is the subject of the complaint," if he or she does not either dismiss the complaint or conclude proceedings on the complaint following an "expeditious" review of the complaint under 28 U.S.C. § 352. The special committee must consist of the chief judge "and equal numbers of circuit and district judges of the circuit."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 11(b): "In conducting [a limited] inquiry, the chief judge must not determine any reasonably disputed issue. Any such determination must be left to a special committee appointed under Rule 11(f) and to the judicial council that considers the committee's report."

Rule 11(f): "If some or all of the complaint is not dismissed or concluded, the chief judge must promptly appoint a special committee to investigate the complaint or any relevant portion of it and to make recommendations to the judicial council."

Commentary to Rule 11:
"[A] matter is not "reasonably" in dispute if a limited inquiry shows that the allegations do not constitute misconduct or disability, that they lack any reliable factual foundation, or that they are conclusively refuted by objective evidence."

"In conducting a limited inquiry under subsection (b), the chief judge must avoid determinations of reasonably disputed issues, including reasonably disputed issues as to whether the facts alleged constitute misconduct or disability, which are ordinarily left to the judicial council and its special committee. An allegation of fact is ordinarily not "refuted"

simply because the subject judge denies it. The limited inquiry must reveal something more in the way of refutation before it is appropriate to dismiss a complaint that is otherwise cognizable. If it is the complainant's word against the subject judge's— in other words, there is simply no other significant evidence of what happened or of the complainant's unreliability — then there must be a special-committee investigation. Such a credibility issue is a matter "reasonably in dispute" within the meaning of the Act."

"[I]f potential witnesses who are reasonably accessible have not been questioned, then the matter remains reasonably in dispute."

"The chief judge may not resolve a genuine issue concerning a material fact or the existence of misconduct or a disability when conducting a limited inquiry[.]"

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

Orders

Judicial Conference

In re Opinion of Judicial Conference Comm. To Review Circuit Council Conduct & Disability Orders, 449 F.3d 106, 115 (U.S. Jud. Conf. 2006) (Winter, J., dissenting) (decided before 2008 Rules were enacted): When issues are "reasonably in dispute," a chief judge must appoint a special committee. In this matter, the disputed issues included the subject judge's assertion that a bankruptcy reference was withdrawn and state court conviction was stayed because the judge considered the debtor's representation to the state court deficient, as well as the judge's argument that a meeting the judge held with a probationer was not an improper ex parte contact even though they discussed a separate legal action in the absence of the other parties to that action.

First Circuit

In re Complaint, No. 400 (1st Cir. Jud. Council July 7, 2005) (decided before 2008 Rules were enacted): Given the delay in filing the complaint, an investigation was not warranted. The chief judge had noted that "an inquiry . . . would require a very substantial search of record materials and quite possibly consulting with the judge complained of about events that occurred many years ago and as to which he may well have no recollection." *Id*. (1st Cir. C.J. Mar. 3, 2005).

Third Circuit

In re Complaint of Judicial Misconduct, Nos. 03-20-90043 and 03-20-90044 (3d Cir. Jud. Council July 27, 2021): A retired unit executive filed a complaint against two circuit judges alleging that they had abused their judicial authority and acted with racial animus when they interviewed employees and prepared a report about the complainant's leadership. After conducting a limited inquiry, during which he gave the subject judges an opportunity to supplement their previous responses to the complaint, the chief circuit judge determined that there were disputed issues of material fact and appointed a special committee to investigate. After conducting an investigation, the special committee found no evidence of racial bias and found that there was insufficient evidence in support of the allegations to warrant formal fact finding. The Judicial Council accepted the special committee's recommendations and dismissed the complaint because the facts on which it was based were not established, pursuant to 28 U.S.C. § 354(a)(1)(B) and Rule 20(b)(1)(A)(iii).

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 06-08-90031 (6th Cir. Jud. Council Apr. 8, 2011): A complaint alleged that the subject judge's membership in a country club that practiced invidious discrimination based on race and sex was misconduct. After conducting a limited inquiry, the chief circuit judge dismissed the complaint finding that there had not been a showing that the club engaged in invidious discrimination. The complainant filed a petition for review and the Judicial Council did not affirm the dismissal and a special committee was appointed to investigate. Following an investigation, a majority of the judicial council agreed that the complaint should be dismissed because the subject judge's membership in the club was not misconduct. *But see In re Complaint of Judicial Misconduct*, C.C.D. No. 11-01 (U.S. Jud. Conf. Dec. 1, 2011) (finding that the evidence showed that the club did engage in invidious discrimination and that subject judge's membership in the country club constituted misconduct and publicly reprimanding the judge).

ADDITIONAL RESOURCES

Breyer Committee Report

Recommendations Aimed Primarily at Enhancing Chief Judges' and Council Members' Ability to Apply the Act, Recommendation 3 at 115: "Chief judges and special committees have distinct roles. The chief judge's role is to determine whether there is any support—usually witnesses or information in the record—for the allegations in the complaint. A special committee's role is to explore fully the evidence that supports and that refutes the allegations, to resolve conflicts of evidence and credibility of witnesses, and to propose findings of fact and recommend conclusions to the judicial council."

Committee Standards for Assessing Compliance with the Act, Standard 5 at 148–49: "[A]n allegation is not "conclusively refuted by objective evidence" simply because the judge complained against denies it. The limited inquiry has to produce something more than that in the way of "refutation" before it will be appropriate to dismiss a complaint (that is not

inherently incredible) without a special committee investigation. If it is literally the complainant's word against the judge's—there is simply no other significant evidence—then there must be a special committee investigation. This is because who is telling the truth is a matter reasonably in dispute (even if the chief judge is morally certain that the judge complained against is no liar). A straight-up credibility determination, in the absence of other significant evidence, is ordinarily for the circuit council, not the chief judge."

Committee Standards for Assessing Compliance with the Act, Standard 9 at 151: "The chief judge should therefore keep in mind that the determination whether to identify a complaint is fundamentally different than the ultimate determination whether to appoint a special committee. The threshold is much lower. If an identified complaint is ultimately dismissed without appointment of a special committee, that does not mean that the complaint should not have been identified in the first place."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 4(e): "If the complaint is not dismissed or concluded, the chief judge will promptly appoint a special committee . . . to investigate the complaint and make recommendations to the judicial council."

See also Limited Inquiry; Dismissal—Complaint Lacking Sufficient Evidence to Infer Misconduct.

SUBPOENA POWER

A special committee, judicial council, and the JC&D Committee have full subpoena powers in conducting an investigation, as provided by 28 U.S.C. §§ 332(d) and 331, respectively.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. §331: "The Conference or the standing committee may hold hearings, take sworn testimony, issue subpoenas and subpoenas duces tecum, and make necessary and appropriate orders in the exercise of its authority. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the Supreme Court or by the clerk of any court of appeals, at the direction of the Chief Justice or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or any agency thereof."

28 U.S.C. §332(d)(1): "Each council is authorized to hold hearings, to take sworn testimony, and to issue subpoenas and subpoenas duces tecum. Subpoenas and subpoenas duces tecum shall be issued by the clerk of the court of appeals, at the direction of the chief judge of the circuit or his designee and under the seal of the court, and shall be served in the manner provided in rule 45(c) of the Federal Rules of Civil Procedure for subpoenas and subpoenas duces tecum issued on behalf of the United States or an officer or agency thereof."

28 U.S.C. §332(d)(2): "All judicial officers and employees of the circuit shall promptly carry into effect all orders of the judicial council. In the case of failure to comply with an order made under this subsection or a subpoena issued under chapter 16 of this title, a judicial council or a special committee appointed under section 353 of this title may institute a contempt proceeding in any district court in which the judicial officer or employee of the circuit who fails to comply with the order made under this subsection shall be ordered to show cause before the court why he or she should not be held in contempt of court."

28 U.S.C. § 356(a): "In conducting any investigation under this chapter, the judicial council, or a special committee appointed under section 353, shall have full subpoena powers as provided in section 332(d)."

28 U.S.C. § 356(b): "In conducting any investigation under this chapter, the Judicial Conference, or a standing committee appointed by the Chief Justice under section 331, shall have full subpoena powers as provided in that section."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 13(d): "The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena."

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

Commentary to Rule 14: "With respect to testimonial evidence, the subject judge should normally be called as a special-committee witness. Cases may arise in which the subject judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges."

Rule 15(c): "At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine special-committee witnesses, in person or by counsel."

Orders

Fifth Circuit

In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002, No. 05-14-90120 (5th Cir. Jud. Council Sept. 28, 2016): In an order concluding a complaint alleging sexual harassment based on intervening events due to the subject judge's retirement, a footnote explained that during the course of the special committee's investigation, the investigators exercised subpoena power provided by 28 U.S.C. § 356(a) while interviewing the thirty-one people with information potentially relevant to the investigation.

SPECIAL COMMITTEE INVESTIGATION

A special committee is authorized to conduct as extensive of an investigation as it considers necessary, using the methods it deems appropriate. While the JC&D Committee will conduct additional investigation only in extraordinary circumstances, it can remand a matter under its review to the judicial council for additional investigation.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 353(c): "Each committee appointed under subsection (a) shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit."

28 U.S.C. § 356(a): "In conducting any investigation under this chapter, the judicial council, or a special committee appointed under section 353, shall have full subpoena powers as provided in section 332(d)."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 13(a): "A special committee should determine the appropriate extent and methods of its investigation in light of the allegations in the complaint and the committee's preliminary inquiry. In investigating the alleged misconduct or disability, the special committee should take steps to determine the full scope of the potential misconduct or disability, including whether a pattern of misconduct or a broader disability exists. The investigation may include use of appropriate experts or other professionals. If, in the course of the investigation, the special committee has cause to believe that the subject judge may have engaged in misconduct or has a disability that is beyond the specific pending complaint, the committee must refer the new matter to the chief judge for a determination of whether action under Rule 5 or Rule 11 is necessary before the committee's investigation is expanded to include the new matter."

Rule 13(b): "If the special committee's investigation concerns conduct that may be a crime, the committee must consult with the appropriate prosecutorial authorities to the extent permitted by the Act to avoid compromising any criminal investigation. The special committee has final authority over the timing and extent of its investigation and the formulation of its recommendations."

Rule 13(c): "The special committee may arrange for staff assistance to conduct the investigation. It may use existing staff of the judiciary or may hire special staff through the Director of the Administrative Office of the United States Courts."

Rule 13(d): "The chief judge may delegate the authority to exercise the subpoena powers of the special committee. The judicial council or special committee may institute a contempt proceeding under 28 U.S.C. § 332(d) against anyone who fails to comply with a subpoena."

Commentary to Rule 13: "[T]he special committee has two roles that are separated in ordinary litigation. First, the special 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."

"Rule 13(a) includes a provision making clear that the special committee may choose to consult appropriate experts or other professionals if it determines that such a consultation is warranted. If, for example, the special committee has cause to believe that the subject judge may be unable to discharge all of the duties of office by reason of mental or physical disability, the committee could ask the subject judge to respond to inquiries and, if necessary, request the judge to undergo a medical or psychological examination. In advance of any such examination, the special committee may enter into an agreement with the subject judge as to the scope and use that may be made of the examination results. In addition, or in the alternative, the special committee may ask to review existing records, including medical records."

"The extent of the subject judge's cooperation in the investigation may be taken into account in the consideration of the underlying complaint. If, for example, the subject judge impedes reasonable efforts to confirm or disconfirm the presence of a disability, the special committee may still consider whether the conduct alleged in the complaint and confirmed in the investigation constitutes disability. The same would be true of a complaint alleging misconduct."

"The special committee may also consider whether such a judge might be in violation of his or her duty to cooperate in an investigation under these Rules, a duty rooted not only in the Act's definition of misconduct but also in the Code of Conduct for United States Judges, which emphasizes the need to maintain public confidence in the judiciary, *see* Canon 2(A) and Canon 1 cmt., and requires judges to "facilitate the performance of the administrative responsibilities of other judges and court personnel," Canon 3(B)(1). If the special committee finds a breach of the duty to cooperate and believes that the breach may amount to misconduct under Rule 4(a)(5), it should determine, under the final sentence of Rule 13(a), whether that possibility should be referred to the chief judge for consideration of action under Rule 5 or Rule 11. *See also* Commentary to Rule 4."

"Title 28 U.S.C. § 356(a) provides that a special committee will have full subpoena powers as provided in 28 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas will be issued on behalf of a judicial council by the circuit clerk "at the direction of the chief judge of the circuit or his designee." Rule 13(d) contemplates that, where the chief judge designates

someone else as presiding officer of the special committee, the presiding officer also be delegated the authority to direct the circuit clerk to issue subpoenas related to committee proceedings. That is not intended to imply, however, that the decision to use the subpoena power is exercisable by the presiding officer alone. *See* Rule 12(g)."

Rule 21(d): "Except in extraordinary circumstances, the Committee will not conduct an additional investigation. The Committee may return the matter to the judicial council with directions to undertake an additional investigation. If the Committee conducts an additional investigation, it will exercise the powers of the Judicial Conference under 28 U.S.C. § 331."

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. 17-01 (U.S. Jud. Conf. Aug. 14, 2017): Under the Act and the Rules, a special committee is authorized to conduct as extensive of an investigation as it considers necessary, including the methods and extent it deems to be necessary. Thus, a special committee has "broad flexibility and general authority to investigate the facts and allegations contained in the complaint." Order at 27–28. Where a special committee has a "reasonable basis" for concluding that a judge might be suffering from a disability that renders the judge unable to discharge the duties of office, both the judicial council and special committee have the authority to request that the judge undergo a mental health examination.

SPECIAL COMMITTEE INVESTIGATION—COMPLAINANT'S RIGHTS

If a special committee concludes that a complainant could offer substantial information, the complainant must be given an opportunity to appear at special committee proceedings. The complainant's rights during a special committee investigation are set forth in Rule 16.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 358(b)(3): A "complainant [must] be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 16(a): "The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant."

Rule 16(b): "If the complainant knows of relevant evidence not already before the special committee, the complainant may briefly explain in writing the basis of that knowledge and the nature of that evidence. If the special committee determines that the complainant has information not already known to the committee that would assist in the committee's investigation, a representative of the committee must interview the complainant."

Rule 16(c): "The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument."

Rule 16(d): "A complainant may submit written argument through counsel and, if permitted to offer oral argument, may do so through counsel."

Commentary to Rule 16: "In accordance with the view of the process as fundamentally administrative and inquisitorial, these Rules do not give the complainant the rights of a party to litigation and leave the complainant's role largely to the discretion of the special committee. However, Rule 16(b) gives the complainant the prerogative to make a brief written submission showing that he or she is aware of relevant evidence not already known to the special committee. (Such a submission may precede any written or oral argument the complainant provides under Rule 16(c), or it may accompany that argument.) If the special committee determines, independently or from the complainant's submission, that the complainant has information that would assist the committee in its investigation, the complainant must be interviewed by a representative of the committee. Such an interview may be in person or by telephone, and the representative of the special committee may be either a member or staff."

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

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

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. 18-02 (U.S. Jud. Conf. May 31, 2019): In a petition for review filed with the JC&D Committee, the complainant alleged, among other things, that she was denied the opportunity to be heard at a hearing on the merits, including the ability to present evidence and expert witnesses, present and cross examine witnesses, and respond to the results of the investigation. The JC&D Committee found that the complainant received all the process that she was due under the Act and the Rules and was given multiple opportunities to present evidence for the special committee to consider. Noting that misconduct proceedings are primarily inquisitorial rather than adversarial, the Rules do not require a special committee to hold a hearing and a complainant does not have "the rights of a party to litigation." Order at 6.

In re Complaint of Judicial Misconduct, C.C.D. 14-01 (U.S. Jud. Conf. Feb. 19, 2015): A complaint alleged that certain statements made by the subject judge at a lecture on the death penalty at a law school constituted misconduct. A special committee was appointed and following a thorough investigation that included an evidentiary hearing, the Judicial Council determined there was insufficient evidence in the record to support a finding of misconduct. In a petition for review with the JC&D Committee, complainants argued, among other things, that the special committee refused to allow complainants to testify at the special committee hearing. The JC&D Committee explained that the investigator interviewed the six individuals who had attended the lecture and who submitted affidavits in support of the complaint, as well as many others. As the special committee reviewed the report describing the interviews and held a hearing where it took sworn testimony from the subject judge and the author of the primary affidavit, there was no indication that the special committee or Judicial Council failed to seek any potentially material evidence or failed to exercise sound discretion in its investigation. Accordingly, the Committee found no error in the Judicial Council's dismissal of the complaint.

SPECIAL COMMITTEE INVESTIGATION—SUBJECT JUDGE'S RIGHTS

A judge who is the subject of proceedings under the Act has certain procedural rights, including the right to appear at special committee proceedings, to present evidence, to subpoena witnesses and documents, to cross-examine witnesses, and to present argument. A subject judge's rights during a special committee investigation are set forth in Rule 15.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 358(b)(2): A "judge whose conduct is the subject of a complaint under this chapter [must] be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 15(a)(1): "The subject judge must receive written notice of the appointment of a special committee under Rule 11(f); the expansion of the scope of an investigation under Rule 13(a); any hearing under Rule 14, including its purposes, the names of any witnesses the special committee intends to call, and the text of any statements that have been taken from those witnesses."

15(a)(2): "The subject judge may suggest additional witnesses to the special committee."

15(b): "The subject judge must be sent a copy of the special committee's report when it is filed with the judicial council."

15(c): "At any hearing held under Rule 14, the subject judge has the right to present evidence, to compel the attendance of witnesses, and to compel the production of documents. At the request of the subject judge, the chief judge or the judge's designee must direct the circuit clerk to issue a subpoena to a witness under 28 U.S.C. § 332(d)(1). The subject judge must be given the opportunity to cross-examine special-committee witnesses, in person or by counsel."

15(d): "The subject judge may submit written argument to the special committee and must be given a reasonable opportunity to present oral argument at an appropriate stage of the investigation."

15(e): "The subject judge has the right to attend any hearing held under Rule 14 and to receive copies of the transcript, of any documents introduced, and of any written arguments submitted by the complainant to the special committee."

15(f): “The subject judge may choose to be represented by counsel in the exercise of any right enumerated in this Rule. As provided in Rule 20(e), the United States may bear the costs of the representation.”

Commentary to Rule 15: “The Act does not require that the subject judge be permitted to attend all proceedings of the special committee. Accordingly, the Rules do not give a right to attend other proceedings — for example, meetings at which the special committee is engaged in investigative activity, such as interviewing persons to learn whether they ought to be called as witnesses or examining for relevance purposes documents delivered pursuant to a subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its recommendations.”

Rule 20(a): “Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The subject judge must also be given an opportunity to present argument, personally or through counsel, written or oral, as determined by the judicial council. The subject judge must not otherwise communicate with judicial-council members about the matter.”

Rule 20(e): “If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office use funds appropriated to the judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys’ fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b).”

SPECIAL COMMITTEE HEARING

A special committee may hold hearings to take testimony, receive evidence, and/or hear argument.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 353(c): "Each committee appointed under subsection (a) shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit. Such report shall present both the findings of the investigation and the committee's recommendations for necessary and appropriate action by the judicial council of the circuit."

28 U.S.C. § 358(b)(2): A "judge whose conduct is the subject of a complaint under this chapter [must] be afforded an opportunity to appear (in person or by counsel) at proceedings conducted by the investigating panel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing."

28 U.S.C. § 358(b)(3): A "complainant [must] be afforded an opportunity to appear at proceedings conducted by the investigating panel, if the panel concludes that the complainant could offer substantial information."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 14(a): "The special committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the special committee is investigating allegations against more than one judge, it may hold joint or separate hearings."

Rule 14(b): "Subject to Rule 15, the special committee must obtain material, nonredundant evidence in the form it considers appropriate. In the special committee's discretion, evidence may be obtained by committee members, staff, or both. Witnesses offering testimonial evidence may include the complainant and the subject judge."

Rule 14(c): "The subject judge has the right to counsel. The special committee has discretion to decide whether other witnesses may have counsel present when they testify."

Rule 14(d): "Witness fees must be paid as provided in 28 U.S.C. § 1821."

Rule 14(e): "All testimony taken at a hearing must be given under oath or affirmation."

Rule 14(f): "The Federal Rules of Evidence do not apply to special-committee hearings."
Rule 14(g): "A record and transcript must be made of all hearings."

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

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

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. 18-02 (U.S. Jud. Conf. May 31, 2019): In a petition for review filed with the JC&D Committee, the complainant alleged, among other things, that she was denied the opportunity to be heard at a hearing on the merits, including the ability to present evidence and expert witnesses, present and cross examine witnesses, and respond to the results of the investigation. The JC&D Committee found that the complainant received all the process that she was due under the Act and the Rules and was given multiple opportunities to present evidence for the special committee to consider. Noting that misconduct proceedings are primarily inquisitorial rather than adversarial, the Rules do not require a special committee to hold a hearing and a complainant does not have "the rights of a party to litigation." Order at 6.

In re Complaint of Judicial Misconduct, C.C.D. 14-01 (U.S. Jud. Conf. Feb. 19, 2015):
A complaint alleged that certain statements made by the subject judge at a lecture on the death penalty at a law school constituted misconduct. A special committee was appointed and following a thorough investigation that included an evidentiary hearing, the Judicial Council determined there was insufficient evidence in the record to support a finding of misconduct. In a petition for review with the JC&D Committee, complainants argued, among other things, that the special committee refused to allow complainants to testify at the special committee hearing. The JC&D Committee explained that the investigator interviewed the six individuals who had attended the lecture and who submitted affidavits in support of the complaint, as well as many others. As the special committee reviewed the report describing the interviews and held a hearing where it took sworn testimony from the subject judge and the author of

the primary affidavit, there was no indication that the special committee or Judicial Council failed to seek any potentially material evidence or failed to exercise sound discretion in its investigation. Accordingly, the Committee found no error in the Judicial Council's dismissal of the complaint.

CONCLUDING THE PROCEEDING—CORRECTIVE ACTION

The Act is generally forward-looking, and its remedial purposes may be served where a chief judge or a judicial council concludes a complaint by reason of the subject judge's voluntary and appropriate corrective action that acknowledges and remedies the problem that the complaint brought to light. To be "appropriate," such action should, to the extent possible, correct specific harms to an individual, and the subject judge should communicate it to that individual. Any corrective action should also be proportionate to the alleged misconduct and to sanctions a judicial council might impose after investigation. Corrective action may include—but need not be limited to—apologizing to the complainant or the affected individual, recusing from a case, pledging to refrain from specified conduct in the future, or ruling on a matter in which delay was alleged. In the context of corrective action, a subject judge's statement that merely recognizes a finding of misconduct does not suffice as an acknowledgment of misconduct. Corrective action generally may not include alteration of any rule that the judge has allegedly violated. Corrective action may be combined with other remedies, including admonishment.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(b)(2): A chief judge may "conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 11(d)(2): "The chief judge may conclude the complaint proceeding in whole or in part if . . . the chief judge determines that the subject judge has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint."

Commentary to Rule 11: Corrective action must be voluntary, taken by the subject judge, and proportionate to "any plausible allegations of misconduct in the complaint."

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

Rule 20(b)(1)(B): Upon considering the report of a special investigative committee, the circuit judicial council may, subject to Rule 20(a), "conclude the proceeding because

appropriate corrective action has been taken or intervening events have made the proceeding unnecessary."

Commentary to Rule 20: "[A]ction taken after a complaint is filed is "appropriate" when it acknowledges and remedies the problem raised by the complaint. Breyer Committee Report, 239 F.R.D. at 244. Because the Act deals with the conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of the complaint. Terminating a complaint based on corrective action is premised on the implicit understanding that voluntary self-correction or redress of misconduct or a disability may be preferable to sanctions. The chief judge may facilitate this process by giving the subject judge an objective view of the appearance of the judicial conduct in question and by suggesting appropriate corrective measures. Moreover, when corrective action is taken under Rule 5 satisfactory to the chief judge before a complaint is filed, that informal resolution will be sufficient to conclude a subsequent complaint based on identical conduct.

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

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

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

Orders

Judicial Conference

In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558 (2008): In returning a matter to a judicial council for reasons unrelated to the issue of corrective action, the Judicial Conduct and Disability Committee took note of a statement that had been offered as the subject judge's "acknowledgment" of misconduct. In the Committee's view, the statement, which the judicial council had cited as mitigating its sanctions against the judge, was "not a model of clarity" in that "it appear[ed] to acknowledge only that the special committee has found [the subject judge's] pattern and practice of not giving reasons to be misconduct." *Id.* at 560. The statement in question was as follows: "I realize that my failure in some cases to adequately state my reasons for my decisions when this is required by either prevailing law or direction from the Court of Appeals causes additional expense and delay to the litigants, and, therefore, is a pattern and practice that the Committee has determined is misconduct because it is prejudicial to the effective and expeditious administration of the business of the courts. I hereby commit to use my best efforts to adequately state reasons when required in the future." *Id.*

In re Opinion of Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders, 449 F.3d 106 (2006) (decided before 2008 Rules were enacted): Although the petition for review in this matter was denied by a Conference Committee majority without reference to any issue of corrective action, a dissent from the denial opined that a claim of "judicial action . . . taken as a result of an ex parte contact is not corrected by a promise to provide better explanations of such actions in the future." *Id.* at 115.

First Circuit

In re Complaint, No. 329 (1st Cir. C.J. Aug. 23, 2002) (decided before 2008 Rules were enacted): The subject judge's written acknowledgment of misconduct, which included an apology "to the judicial council and to my fellow judges in the First Circuit," was corrective action sufficient to conclude an identified complaint involving allegations that the judge had written to a judicial colleague to ask the colleague to be lenient in the sentencing of a former U.S. Attorney. *See also* Breyer Committee Report, No. C-15 at 92 (describing the disposition of this matter as "a model for the effective administration of the Act").

Second Circuit

In re Charge of Judicial Misconduct, No. 02-21-90017 (2d Cir. C.J. Jan. 10, 2022): A complaint alleged judicial misconduct in connection with a judge's ownership of a condominium and the judge's election as a board member of the condominium association, including using judicial letterhead to send a letter to the condominium's board members, lawyers, and general manager. The chief circuit judge dismissed this allegation based on corrective action because, in their response to the complaint, the judge acknowledged that using the letterhead for this purpose was improper and pledged not to do so in the future.

In re Charges of Judicial Misconduct, Nos. 02-16-90101; 02-16-90104 (2d Cir. C.J. May 22, 2017): A magistrate judge wrote a character reference letter for a defendant with whom the judge had worked at the U.S. Attorney's Office and whom the judge referred to as "my friend for nearly 40 years." The letter was not on official letterhead or signed with a judicial title but did mention that its author is on the bench. The complaint alleged that the judge violated Canon 2B by submitting an unsolicited character letter to the sentencing judge. After the complaint was filed, the subject judge wrote to the chief circuit judge and explained that they had inadvertently violated the Code, provided the reasons why they mistakenly believed their conduct was permissible, apologized to the complainant and the court, and promising to never engage in the conduct again. The chief circuit judge found that the reference letter violated Canon 2B, the subject judge had taken appropriate corrective action by "acknowledging the violation, apologizing for the violation, and pledging to refrain from similar conduct in the future." Order at 8. Accordingly, the complaint was concluded based on voluntary corrective action.

In re Charge of Judicial Misconduct, No. 02-14-90065 (2d Cir. C.J. Oct. 22, 2014):
A complainant alleged judicial misconduct in connection with a judge's denial of payment of a portion of complainant's deceased husband's CJA vouchers. After receiving the denial, complainant submitted her husband's contemporaneous billing records and the judge reconsidered their ruling and authorized full payment. The judge also wrote a letter to the complainant expressing their condolences and apologizing to the complainant. The chief circuit judge concluded the complaint, in part, based on corrective action due to the judge's apology letter. The allegations were also dismissed as being merits-related.

In re Charges of Judicial Misconduct, 465 F.3d 532, 02-05-8512 (2d Cir. Jud. Council 2006) (decided before 2008 Rules were enacted): After issuing an apparent threat of disbarment ("I'll have your law license") to an attorney with whom they had differed over the attorney's representation of a capital defendant, a judge offered the attorney an oral apology that, according to the circuit judicial council, was "appropriate corrective action if anything [the judge] had done could be said to warrant it." *Id.* at 547. While finding no misconduct in the matter, the council, adopting the report of its special investigative committee, observed that the apology—and the judge's admission, in their written response to the ensuing misconduct complaint, that their words had been "excessive"—showed the judge's "appropriate self-examination and an awareness of the possibility that [their] words could be misconstrued." *Id.*

In re Charges of Judicial Misconduct, 404 F.3d 688, 695, 02-04-8529 (2d Cir. Jud. Council 2005) (decided before 2008 Rules were enacted): A judge took corrective action by (1) recognizing that, in a speech they gave at a convention of the American Constitution Society, they had violated the Code of Conduct for United States Judges with their remarks advocating that the president of the United States not be reelected; (2) apologizing for the remarks in question; and (3) asserting that they had "every intention of seeing to it that such an episode [did] not happen again." The Act's purposes were served by the judge's apology to the chief judge, the chief judge's memorandum in reply, the public release of both items, and the judicial council's concurrence with the memorandum's admonition. In combination, "[t]hese actions constitute a sufficient sanction and appropriate corrective action." *Id.* at 696.

Third Circuit

In re Complaint of Judicial Misconduct, No. 04-26 (3d Cir. C.J. Dec. 29, 2009): Where a general partnership of whom the subject judge was a member accepted a $600,000 loan from a county official who, by virtue of her position, could come before the court, the arrangement was an "isolated transaction [that] would not lead to a 'substantial and widespread' lowering of confidence in the courts among reasonable people" and the subject judge took sufficient corrective action by repaying the loan, terminating the business relationship with the county official, and dissolving the partnership.

In re Complaint of Judicial Misconduct, No. 03-08-90050, 575 F.3d 279 (3d Cir. Jud. Council 2009): Where the subject judge possessed sexually explicit offensive material on their private computer and was careless in failing to safeguard it from electronic access by the general public, the judge took sufficient corrective action by (1) taking the web server offline so that their personal files could not be accessed by anyone, (2) initiating this disciplinary proceeding (by identifying a complaint against themself) and cooperating fully in the ensuing investigation, (3) explaining how and why their personal files were not protected from public view, (4) apologizing for the offensive and demeaning character of some of their personal files and promising to delete permanently the sexually explicit material, (5) acknowledging the embarrassment their conduct has caused the judiciary, (6) promising to install password protection to secure their personal files in the future, and (7) acknowledging that judges have an obligation to ensure that their private matters do not become grist for the public mill. Nevertheless, despite their corrective action, the judge was publicly admonished for conduct exhibiting, with respect to the offensive material, poor judgment that created a public controversy and that can reasonably be seen as having resulted in embarrassment to the institution of the federal judiciary. In combination, the judge's apology, acknowledgment of responsibility, and corrective action, along with their admonishment by the judicial council, remedied the problems raised by the complaint.

Fourth Circuit

In the Matter of a Judicial Complaint, No. 04-17-90033 (4th Cir. C.J. Aug. 7, 2017): A complaint alleged that a judge improperly interfered at trial and misstated the law at sentencing. The court of appeals, in considering an appeal in complainant's underlying criminal case, described the record as "replete with the district court's ill-advised comments and interference." The court of appeals ultimately upheld the conviction but remanded the case for resentencing and directed that a new judge be assigned. The chief circuit judge conducted a limited inquiry and discussed the allegations with the judge, who acknowledged the errors in detail, apologized, and committed to avoiding the errors in the future. In light of the judge's sincere apology and commitment to avoid such behavior in the future, the complaint was concluded based on corrective action.

In the Matter of a Judicial Complaint, No. 04-16-90088 (4th Cir. Jud. Council Apr. 24, 2018): A complaint alleged that a judge engaged in hostile, biased behavior outside by berating someone in the judge's neighborhood. A special committee was appointed to

investigate and found that others had complained about the judge's temperament. The judge acknowledged the harm caused by the behavior, apologized, and committed to avoiding such conduct in the future. However, because this was not the first time "that the judge's temperament has been questioned or that the judge has undertaken to revise [the judge's] conduct," the Judicial Council concluded that "[the judge's] corrective action on this occasion does not adequately assure the effective administration of justice." Accordingly, the judge was privately reprimanded.

Fifth Circuit

In re Complaint of Judicial Misconduct, No. 05-16-90116 (5th Cir. Jud. Council Nov. 18, 2019): A prospective juror filed a complaint alleging that a judge was verbally abusive to him in a telephone call. After the juror requested that he be excused from jury service, the judge called the complainant. A special committee was appointed to investigate the complaint. After an initial meeting, two judges from the special committee met with the subject judge in person to convey their concerns. The judge then acknowledged the issues raised by the complaint, apologized, and agreed to modify the behavior. Accordingly, the complaint was concluded based on corrective action.

In re Complaint of Judicial Misconduct, No. 05-18-90083 (5th Cir. Jud. Council Nov. 9, 2018): A complaint was identified and a special committee was appointed based on possible inappropriate behavior by a magistrate judge. The special committee found that the judge inappropriately pursued social relationships with an attorney appearing before them and a court employee. The subject judge acknowledged that the behavior was inappropriate, sent written apologies to the women in question, and averred that they would respect the women's confidentiality and not retaliate or disparage them personally or professionally. As a result, the Judicial Council concluded the proceedings based on appropriate corrective action.

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 06-16-90007 (6th Cir. C.J. Sept. 2, 2016): A complaint was concluded based on corrective action where a judge retracted a letter to the editor endorsing a political candidate. The subject judge admitted that the conduct violated Canons 2(B) and 5, acknowledged its wrongfulness, apologized, ensured that it wouldn't be repeated, and remedied the harm by issuing a retraction in the newspaper. As a result, the chief circuit judge concluded the proceedings based on corrective action.

In re Complaint of Judicial Misconduct, No. 07-6-351-01 (6th Cir. C.J. Jan. 10, 2007) (decided before 2008 Rules were enacted): After limited inquiry, an identified complaint alleging that the subject judge had made two political campaign contributions, unwittingly violating (former) Canon 7A(3) of the Codes of Conduct for United States Judges, was concluded for corrective action that consisted of a letter from the subject judge to the chief judge. In the letter, the subject judge described the circumstances underlying the inadvertent violation, acknowledged that a campaign contribution violated the Canon, and apologized for the action.

Seventh Circuit

In re Complaint Against a Judicial Officer, 07-15-90073 (7th. Cir. Jud. Council June 1, 2016): A complaint alleged that a judge's appointment to the Board of Trustees at a state university was misconduct. Following a special committee appointment, the complaint was concluded based on corrective action after the judge agreed to stop hearing cases brought by the State.

In re Complaint Against District Judge Billy Joe McDade, No. 07-09-90074 (7th Cir. C.J. July 2, 2009): A judge allowed video recording and live broadcasting (plus still photography) of a civil proceeding, violating a prohibition in Judicial Conference policy, a circuit judicial council resolution, and a district court local rule. This became the basis of a complaint identified by the circuit chief judge, to whom the subject judge then wrote a letter of apology in which they promised to comply with the prohibition going forward. With no litigant having complained or been harmed, the circuit chief judge found that the subject judge's apology and promise of future compliance was sufficient corrective action and noted that, under such circumstances, "'corrective action' can be 'effective' without any steps beyond the apology and commitment to follow the rules in the future." Citing "the public nature of the events" at issue—events that had been chronicled in a newspaper report—the circuit chief judge requested and received the subject judge's consent to public disclosure of this disposition. Copies of the circuit chief judge's order and memorandum and the subject judge's letter were posted on the court's web site, transmitted to the Judicial Conference under Rule 24(b), and sent to all judicial officers of the circuit and appropriate administrative staff.

In re Complaint Against a Judicial Officer, No. 07-09-90074 (7th Cir. C.J. July 2, 2009): The subject judge had presided at the trial in which complainant was convicted, but had recused as to any of complainant's post-conviction applications for relief. The judge nonetheless entered orders in two instances rejecting complainant's attempts to initiate, without appellate review, successive collateral attacks. The submissions in which complainant made those attempts had been erroneously routed to the subject judge, who mistakenly believed they could be acted on because the district court had no substantive decision to make. The orders in question were a harmless misstep that the subject judge sufficiently corrected by vacatur and by sending complainant a letter of explanation and apology.

In re Complaint Against a Judicial Officer, No. 07-7-352-17 (7th Cir. C.J. May 2, 2007) (decided before 2008 Rules were enacted): Where a subject judge's order had been meant as a valid restriction on future filings by the complainant but had unwittingly precluded any appeal, a complaint alleging that the judge had "conspired" with a clerk to block complainant's appeals was dismissed for corrective action taken after the subject judge, responding to the chief judge's inquiry about the complaint, adjusted the order so as to cure the defect. [*Editor's Note*: Where the basis for a complaint's disposition is corrective action, the Act and Rules characterize the complaint as "concluded" rather than "dismissed." *See* 28 U.S.C. § 352(b)(2); Rule 11(d), Rules for Judicial-Conduct and Judicial-Disability Proceedings.]

In re Complaint Against a Judicial Officer, No. 06-7-372-46 (7th Cir. C.J. Jan. 3, 2007) (decided before 2008 Rules were enacted): A subject judge against whom a complaint was identified alleging that the judicial title had been inappropriately used in a case in which, as a board member of a charitable organization, the judge was a party, took appropriate corrective action by reminding their counsel to (1) correct the pleadings on file; and (2) move for the judge's dismissal from the case, given that the judge had resigned from the organization.Also pivotal in this disposition was "counsel's written undertaking to act, coupled with acknowledgment that the fault lies with her" for having failed to heed her client's earlier request that she take these actions. The circuit council noted, however, "the judge's responsibility to achieve compliance" with the instructions to the judge's lawyer. And the council advised the subject judge that counsel should have been monitored more closely, and that the judge should "review pleadings before they are filed" and "act effectually" when the judge knows that the instructions to counsel are not being carried out.

In re Cudahy, 294 F.3d 947, 953–54 (7th Cir. C.J. 2002) (decided before 2008 Rules were enacted): A complaint alleging that a judge had leaked confidential information to the press about the empaneling of a grand jury in a criminal investigation of the president was concluded on the grounds that the subject judge's public apology constituted corrective action (and, in the alternative, that other events, such as the end of the president's term of office, had intervened). *But see* Breyer Committee Report, No. C-4 at 73–75 (concluding that the apology did not meet standards for corrective action because the "judge apologized for the disclosure but not the arguably more serious allegation that [they] tried to avoid acknowledging it"); Commentary to Rule 11, 2008 Rules ("As long as the subject of the complaint performs judicial duties, a complaint alleging judicial misconduct must be addressed").

Ninth Circuit

In re Charge of Judicial Misconduct, No. 07-89108 (9th Cir. C.J. June 9, 2008):
After being counseled by the circuit chief judge, a subject judge who had conducted a status conference without a court reporter (or other means of recording the proceedings), at which the judge was alleged to have addressed complainant in a "rude, hostile, and antagonistic manner," took sufficient corrective action by recognizing that better judgment could have been exercised in conducting the hearing, by undertaking to do so in the future, and by undertaking to conduct future hearings in similar circumstances only in the presence of a court reporter or using some other verbatim recording technique.

In re Complaint of Judicial Misconduct, 425 F.3d 1179, 1181–82 (9th Cir. Jud. Council 2005) (decided before 2008 Rules were enacted), *rev'd on other grounds*, *In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability*, 517 F.3d 558 (2008): Where a complaint alleged that the subject judge "acted inappropriately to benefit an attractive female" probationer by obtaining information from her in personal meetings with her, withdrawing a matter from a bankruptcy judge, and staying eviction proceedings against her, the judicial council concluded that the subject judge took adequate corrective action by (1) acknowledging that they could have prevented misunderstandings by

the parties if they had articulated reasons for their actions, and (2) declaring that a similar situation would not occur in the future. *But see* 517 F.3d 558. According to the council, "[a] finding of corrective action is not a cover up or a whitewash; it is a finding that adequate steps have been taken to assure that the conduct will not be repeated, whether or not the conduct crosses over the line from inappropriate conduct to misconduct." In dissent, one council member noted that the subject judge "fail[ed] to even acknowledge that [they] acted based on information [they] obtained from the party benefited by [their] orders, without disclosing this to the opposing parties or giving them an opportunity to correct any misstatements or exaggerations that may have been made to [them] in private. . . . Second, the judge withdrew the bankruptcy reference without any legal justification, for no reason other than to benefit the debtor by blocking her eviction. . . . Third, [they] acted without notice. . . . Fourth, the [subject] judge failed to heed the other explicit procedures applicable to the issuance of an injunction, such as the requirements of a bond and a clear statement of reasons, . . . all of which are designed to provide transparency for purposes of appellate review and otherwise protect the interests of the party against which an injunction is entered. . . . Fifth, the [subject] judge acted without even colorable legal authority. . . . Sixth, the [subject] judge has failed to acknowledge the serious harm [they] caused [a party] through [their] improvident actions." *Id*. at 1194–95.

In re Charge of Judicial Misconduct, No. 97-80629 (9th Cir. Jud. Council Aug. 7, 1998) (decided before 2008 Rules were enacted): The judicial council ordered a public reprimand of a judge who had publicly misrepresented that the judge was a sibling of an African American boy killed by a white youth in Alabama in 1963, although a dissent from that decision argued, in essence, that corrective action had occurred when the subject judge apologized to the family, who accepted the judge's apology and "believe[d] [the judge] [had] suffered enough."

In re Charge of Judicial Misconduct, No. 83-8037 (9th Cir. C.J. Mar. 5, 1986) (decided before 2008 Rules were enacted): Where a complaint alleged that a judge had "behaved intemperately" at a hearing, the subject judge took sufficient corrective action by (1) recognizing "the importance of the appearance as well as the substance of judicial temperament to the effective performance of the judicial function" and (2) promising to avoid potentially intemperate conduct in the future. (Other portions of this complex complaint were dismissed as non-actionable because they alleged non-bench conduct not prejudicial to the effective and expeditious administration of the business of the courts.) [*Editor's Note*: This opinion extensively discusses the legislative history and early implementation of the Act.]

Tenth Circuit

In re Charge of Judicial Misconduct, No. 10-09-90057 (10th Cir. C.J. Apr. 30, 2010): During a court hearing, the subject judge used the word "squaw" in reference to Native Americans that the judge had observed as a child. During another court hearing, the subject judge fell asleep. Responding to a complaint based on these two incidents, the subject judge acknowledged having come to understand that the word in question may be considered offensive, and pledged not to use it again. (The complainant did not allege that the judge's

use of the word was intentional or the result of ill motive, and there was no evidence of bias.) The subject judge also reported having adopted a severely limited caseload. As to both incidents, the subject judge's action was sufficiently corrective.

In re Charge of Judicial Misconduct, No. 10-08-90099 (10th Cir. C.J. Nov. 11, 2008): Subject judge who made campaign contributions, not realizing that this violated Canon 7 of the Code of Judicial Conduct, took appropriate voluntary corrective action that acknowledged and remedied the claim raised in an identified complaint about the contributions. The action consisted of the judge's reporting of the conduct to the circuit chief judge, acknowledgment of the violation of Canon 7, and public statement of apology, coupled with a letter to the campaign requesting return of the contributions (which were *de minimis*) and the campaign's reported intention to return them.

In re Charge of Judicial Misconduct, No. 10-08-90012, 10-08-90017 (10th Cir. C.J. Aug. 3, 2009): Where a subject judge had submitted financial disclosure forms on which one entry, carried forward from previous years, was obsolete, they took sufficient corrective action by acknowledging the error and correcting the reports on file at the Administrative Office of the U.S. Courts. (The chief circuit judge verified that the correction had been made.)

Eleventh Circuit

In the Matter of a Complaint, No. 11-17-90024 (11th Cir. C.J. Mar. 22, 2018): A complaint alleged, *inter alia*, that a judge made inappropriate comments in open court, including calling a debtor's father "a despicable human being" and telling an attorney "if you do this kind of stuff in practice, you're going to get a reputation as a real asshole." The judge expressed sincere remorse for the comments and acknowledged that they could be viewed as egregious and hostile. The judge wrote letters of apology to the people to whom the comments were directed and sent a letter to the chief circuit judge admitting the error and promising not to engage in similar conduct in the future. As a result, the chief circuit judge concluded that portion of the complaint based on voluntary corrective action.

In the Matter of a Complaint, No. 04-0046 (11th Cir. C.J. Sept. 21, 2005) (decided before 2008 Rules were enacted): The complaint was concluded because the subject judge had followed up on their improper failure to recuse by taking corrective action to minimize any prospect that they would rule on other cases in which they had served as United States Attorney. The failure to recuse had not, in any event, prejudiced complainant, and was attributable to an "oversight" rather than an improper motive.

Federal Circuit

In re Complaint of Judicial Misconduct, No. 27 (Fed. Cir. Jud. Council Feb. 16, 1989) (decided before 2008 Rules were enacted): Where the circuit chief judge confirmed the complainant's allegation that the subject judge was giving litigation strategy advice to counsel for the subject judge's fiancée, appropriate corrective action occurred where the chief judge advised the subject judge to discontinue this conduct, and the subject judge accepted that advice.

ADDITIONAL RESOURCES

Breyer Committee Report

Discussion of case No. C-15, 239 F.R.D. at 195: Where a complaint was identified based on a subject judge's action of writing to a sentencing judge to request leniency in the sentencing of a former U.S. Attorney, the circuit chief judge found corrective action by reason of the subject judge's public withdrawal of the letter, agreement that his conduct was unethical, sincere apology to the judicial council and to the other judges in his circuit, and release of relevant documents to the public. The Breyer Committee deemed this corrective action appropriate under its Standards for Assessing Compliance with the Act because the action "was . . . taken by the judge himself, was commensurate with the violation, was tailored to provide whatever benefit was possible to persons directly affected by the violation, and was swiftly made public."

Committee Standards for Assessing Compliance with the Act, Standard 7, 239 F.R.D. at 244–45: "Where a judge's conduct has resulted in identifiable, particularized harm to the complainant or another individual, appropriate corrective action should include steps taken by that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from a case, or a pledge to refrain from similar conduct in the future. While the Act is generally forward-looking, any corrective action should to the extent possible serve to correct a specific harm to an individual, if such a harm can reasonably be remedied. Ordinarily corrective action will not be 'appropriate' to justify conclusion of a complaint unless the complainant or other individual is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the judge complained against, or otherwise." *But see* Commentary to Rule 11, *supra* (adopting this portion of Standard 7 but with the last sentence modified to read as follows: "*In some cases, corrective action may not be* 'appropriate' to justify conclusion of a complaint unless the complainant or other individual harmed is meaningfully apprised of the nature of the corrective action in the chief judge's order, in a direct communication from the subject judge, or otherwise.") (emphasis added).

Scholarly Publications

Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 40–49 (1993): This article extensively discusses corrective action, whose salient features, according to the authors, can include its benefit to the complainant, remediation of the underlying wrong, tendency to enlighten the subject judge regarding proper conduct, and concern for making recurrences unlikely. The authors emphasize the importance of ensuring that the corrective action is documented and made known to outside observers. They show, through examples, that corrective action most often involves apologizing, receiving advice and pledging to follow it, changing administrative procedures, or arranging for some form of monitoring.

Arthur Hellman, *The Regulation of Judicial Ethics in the Federal System: A Peek Behind Closed Doors*. 69 U. Pitt L. Rev. 189, 218 (2007): "Disposition other than dismissal is rare. In about 1% of the cases, the chief judge concludes the proceeding on the ground that appropriate corrective action has been taken or that, because of intervening events, action is no longer necessary."

John P. Sahl, *Secret Discipline in the Federal Courts—Democratic Values and Judicial Integrity at Stake*, 70 Notre Dame L. Rev. 193, 237–38 (1994): This article contrasts "corrective action" with "intervening events": "While a finding . . . that 'appropriate corrective action has been taken' may vaguely suggest some official condemnation and action against a judge, the 'intervening events' language in that section suggests neither condemnation nor action. Instead, conclusion of a proceeding due to an intervening event suggests that the complaint is moot."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 4(d): "The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint or that action on the complaint is no longer necessary because of intervening events."

CONCLUDING THE PROCEEDING—INTERVENING EVENTS

A chief circuit judge or a judicial council can conclude a proceeding when intervening events, like the subject judge's retirement, resignation or death, render the complaint moot or make remedial action impossible as to the subject judge.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 352(b)(2): A chief judge may "conclude the proceeding if the chief judge finds that appropriate corrective action has been taken or that action on the complaint is no longer necessary because of intervening events."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 11(e): "The chief judge may conclude the complaint proceeding in whole or in part upon determining that intervening events render some or all of the allegations moot or make remedial action impossible as to the subject judge.

Commentary to Rule 11: "Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief judge to "conclude the proceeding," if "action on the complaint is no longer necessary because of intervening events," such as a resignation from judicial office. Ordinarily, stepping down from an administrative post such as chief judge, judicial-council member, or court-committee chair does not constitute an event rendering unnecessary any further action on a complaint alleging judicial misconduct. Breyer Committee Report, 239 F.R.D. at 245. As long as the subject of a complaint retains the judicial office and remains a covered judge as defined in Rule 1(b), a complaint must be addressed. *Id.*; 28 U.S.C. §§ 371(b); 372(a)."

"Concluding a complaint proceeding, by either the judicial council of the subject judge or the judicial council to which a complaint proceeding has been transferred, precludes remedial action under the Act and these Rules as to the subject judge. But the Judicial Conference and the judicial council of the subject judge have ample authority to assess potential institutional issues related to the complaint as part of their respective responsibilities to promote "the expeditious conduct of court business," 28 U.S.C. § 331, and to "make all necessary and appropriate orders for the effective administration of justice within [each] circuit." *Id.* at § 332(d)(1). Such an assessment might include an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence. The judicial council may request that the Committee on Judicial Conduct and Disability transmit its order to relevant Congressional entities."

Rule 20(b)(1)(B): Upon receiving a special committee's report, the judicial council may "conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary."

Commentary to Rule 20: "Rule 20(b)(1)(B) allows a judicial council to conclude a proceeding where appropriate corrective action has been taken or intervening events have made the proceeding unnecessary. This provision tracks Rules 11(d) and (e), which provide for similar action by the chief judge. As with Rule 11(d), appropriate corrective action must acknowledge and remedy the problem raised by the complaint. *See* Breyer Committee Report, 239 F.R.D. at 244. And similar to Rule 11(e), although "action on the complaint is no longer necessary because of intervening events," the Judicial Conference and the judicial council of the subject judge may nonetheless be able to take action on potential institutional issues related to the complaint (such as an analysis of what conditions may have enabled misconduct or prevented its discovery, and what precautionary or curative steps could be undertaken to prevent its recurrence). 28 U.S.C. § 352(b)(2)."

Orders

Judicial Conference

In re Complaints under the Judicial Conduct and Disability Act, C.C.D. No. 19-02 (U.S. Jud. Conf. Mar. 3, 2020): Where a subject judge resigned while the JC&D Committee was reviewing the Judicial Council's order publicly reprimanding them, the Committee was required to conclude the proceeding on the merits. Because the subject judge's retirement would not take effect until April 1, 2020, which extended the Committee's jurisdiction to that date, the Committee found it important to detail the procedural history and process that led to the subject judge's resignation, noting that the conduct was serious enough for the Committee to consider whether it should recommend a referral to Congress for consideration of impeachment. A subject judge's "departure from 'covered' judicial office" is the type of "intervening event" that warrants concluding the proceeding under the Act and Rules. Order at 10.

In re Complaints under the Judicial Conduct and Disability Act, C.C.D. No. 19-01 (U.S. Jud. Conf. Aug. 1, 2019): A subject judge's confirmation to the Supreme Court was an "intervening event" under 28 U.S.C. § 352(b)(2) and Rule 11(e) that required the Judicial Council to terminate the proceedings because a Supreme Court justice is not a covered judge under the Act. A chief judge, judicial council, the JC&D Committee and the Judicial Conference all lack statutory authority to review the merits of a complaint against an individual who is no longer a covered judge.

In re Complaint of Judicial Misconduct, C.C.D. No. 16-01 (U.S. Jud. Conf. Jan. 26, 2017): After a subject judge retired from office while a special committee proceeding was ongoing, the complainant filed a petition for review arguing that "nothing in the Rules prevents a judicial council from investigating, censuring and/or reprimanding a judge" following retirement. The Committee denied the petition for review and concluded that the proceeding was properly concluded based on intervening events due to the subject judge's retirement. The Committee explained that "Resignation from judicial office constitutes an intervening event rendering a conduct and disability proceeding unnecessary because the judicial officer ceases to exercise judicial functions." Order at 2. *See also In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial*

Improvements Act of 2002, 05-14-90120 (5th Cir. Jud. Council Sept. 28, 2016): (explaining that in light of the subject judge's retirement, the Judicial Council could not impose any sanction under the Act and concluding that that the conduct, though serious, did not warrant a recommendation for impeachment.)

In re Complaint of Judicial Misconduct, C.C.D. No. 13-01 (U.S. Jud. Conf. Jan. 17, 2014): A subject judge's retirement was not an intervening event that warranted the vacatur of the Judicial Council's earlier order finding that the subject judge had engaged in misconduct. While a judicial council may conclude a proceeding based on intervening events, this disposition is only available if a final decision has not been rendered on the merits. While the subject judge's retirement affected the proposed sanctions, the Judicial Council's factual findings and legal conclusions were not affected. The Committee explained that the Judicial Council could have issued a supplemental order alongside the original order declaring that the subject judge's retirement "divested the Council of its jurisdiction to enforce" the sanctions. Order at 11. Not terminating a complaint as moot in these circumstances was important in order to maintain public confidence in the judiciary's JC&D proceedings and transparency.

In re Complaint of Judicial Misconduct, C.C.D. No. 13-02 (U.S. Jud. Conf. Jan. 17, 2014): After a Judicial Council dismissed a complaint based on intervening events due to the subject judge's retirement, the subject judge filed a petition for review arguing that the order dismissing the complaint improperly disclosed the judge's name and referred the matter to the Department of Justice. The subject judge also argued that the complaint should have been concluded due to voluntary corrective action. While the subject judge had pledged to repay the questionable travel expenses that were the subject of the complaint, at the time of the JC&D Committee's consideration of the petition, only two of the three promised payments had been received. Finding no error in the Judicial Council's disposition, the JC&D Committee found that the disclosure of the subject judge's name was appropriate under the circumstances and consistent with the Rules. While a judicial council *may* conclude a proceeding based on corrective action, this is discretionary. Here, the Judicial Council did not find that corrective action had occurred, and the Committee concurred with this conclusion. Lastly, the referral to DOJ was not impermissible because "In the judgment of the Second Circuit Judicial Council, sound administration of the Act in this matter rested on public awareness that potentially actionable conduct may be at issue." *See also In re Charge of Judicial Misconduct*, 12-90069 (2d Cir. Jud. Council June 20, 2013).

Second Circuit

In re Charge of Judicial Misconduct, No. 02-17-90118 (2d Cir. Jud. Council Feb. 5, 2018): Because the subject judge had resigned from judicial office and could no longer perform any judicial duties, the judge did not fall within the scope of persons who can be investigated under the Act. Therefore, the Judicial Council was required to conclude the proceeding based on intervening events. Given the seriousness of the alleged misconduct, the Judicial Council requested that the JC&D Committee forward a copy of the Council's order to "any relevant Congressional committees for their information, and that the Secretary of the Judicial Council forward a copy of this order to all other judicial councils." *See also In re Complaint*

of Judicial Misconduct, C.C.D. No. 18-01 (U.S. Jud. Conf. Apr. 17, 2018) (Forwarding Judicial Council's order to the House of Representatives Judiciary Committee chairman and ranking minority member, with a copy to the Speaker of the House and minority leader, for their information).

Fifth Circuit

In re Complaint of Judicial Disability Regarding United States District Judge Patricia H. Minaldi, Under the Judicial Improvements Act of 2002, 05-16-90074 (5th Cir. Jud. Council Aug. 23, 2017): Where the subject judge retired for disability pursuant to 28 U.S.C. § 372(a) during a special committee investigation, the Judicial Council concluded the proceedings because intervening events had made the proceedings unnecessary.

Tenth Circuit

In re: Complaint Under the Judicial Conduct and Disability Act, No. 10-21-90022 (10th Cir. Jud. Council Sept. 14, 2022): Where the subject judge resigned during a special committee investigation, the Judicial Council concluded the proceeding due to intervening events. The Judicial Council's order cited to the Commentary to Rule 20 and identified institutional issues, including the conditions that may have enabled the misconduct or prevented its discovery and determining what steps could be taken to prevent its recurrence.

In re Edward W. Nottingham, Nos. 2007-10-372-36, 2007-10-372-45, 10-08-90089, 10-08-90090 (10th Cir. Jud. Council Oct. 30, 2008): Where a subject judge resigned after a special committee submitted its report to the Judicial Council but before a decision was reached on the merits, the Judicial Council concluded the complaints because intervening events made the proceedings unnecessary. The order dismissing the complaints named the subject judge, recounted the procedural history of the complaints, and described the serious allegations that the judge was facing.

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 4(d): "The complaint proceeding will be concluded if the chief judge determines that appropriate action has been taken to remedy the problem raised by the complaint or that action on the complaint is no longer necessary because of intervening events."

DISABILITY

A disability is a temporary or permanent condition—for example, severe cognitive impairment, substance abuse disorder, or an inability to stay awake on the bench—that renders the judge unable to discharge the duties of the office.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts . . . may file . . . a written complaint."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(c): "Disability is a temporary or permanent impairment, physical or mental, rendering a judge unable to discharge the duties of the particular judicial office. Examples of disability include substance abuse, the inability to stay awake during court proceedings, or impairment of cognitive abilities that renders the judge unable to function effectively."

Commentary to Rule 4: "Rule 4(c) relates to disability and provides only the most general definition, recognizing that a fact-specific approach is the only one available."

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. 17-02, at 5–7 (U.S. Jud. Conf. Nov. 30, 2017): A subject judge filed a petition for review arguing, *inter alia*, that it was unnecessary and unwarranted for the Judicial Council to include the judge's medical diagnosis in a public order rejecting allegations that the judge's assertion of disability was dishonest. The Committee recognized that "there may be instances where a judge's personal medical information should not be made public" but found that was not the case here. The Committee explained that the judge's medical diagnosis was directly at issue due to the timing of the judge's retirement and the filing of a misconduct complaint. Therefore, the basis for the judge's disability retirement was "a fact in controversy that required a determination as to its legitimacy under the circumstances. The specific nature of [the judge's] medical diagnosis is essential to a conclusion that [their] disability retirement was not a contrivance." Thus, the Committee found that its inclusion was warranted and necessary under the circumstances.

Second Circuit

In re Charge of Judicial Misconduct, No. 02-10-90036 (2d Cir. C.J. May 27, 2010): A complainant questioned a circuit judge's "fitness and . . . ability to meaningfully participate in matters considered and heard by the panel" because, during oral argument, the

judge "appeared to have difficulty hearing the arguments and, on occasion, appeared to doze off and had to be roused by the courtroom deputy" and "did not appear alert and did not appear to actively participate or to grasp the substance of the issues that were argued." After a limited inquiry, the circuit chief judge dismissed the complaint because "dozing off on occasion during appellate argument is not tantamount to 'inability to stay awake during court,'" a condition that Rule 4(c) cites as an example of "disability"; the judge's ability to hear is assured by a hearing aid the judge usually wears; a judge is under no obligation to participate actively in oral argument; and the assertion that the judge did not appear to grasp the issues was conclusory and was belied by the findings of the limited inquiry, which observed no impairment of the judge's cognitive abilities.

Third Circuit

In re Complaint of Judicial Misconduct, No. 03-29 (3d Cir. C.J. Oct. 29, 2003) (decided before 2008 Rules were enacted): An allegation that the subject judge made misstatements during a single oral argument was not probative of either disability or misconduct. "A significant and persistent pattern of misapprehending or incorrectly characterizing proceedings would need to be demonstrated to support a determination of disability or dereliction of duties."

In re Complaint of Judicial Misconduct, No. 02-32 (3d Cir. C.J. Dec. 20, 2002) (decided before 2008 Rules were enacted): A complaint questioning a judge's mental competence was dismissed as frivolous and lacking in factual support because it rested on an attorney's published derogatory remarks about the judge and on the procedural history of a particular criminal case.The complaint was dismissed as merits-related insofar as it claimed that "unless Respondent [judge] was mentally incompetent or biased, [the judge] could not have ruled" the way the judge did." The circuit chief judge noted, moreover, that "[a]fter a judge has been confirmed by the Senate a distinction must be made between a judge's native mental abilities and legal skill, which may be challenged only during the confirmation process, and a subsequently occurring mental disability."

In re Complaint of Judicial Misconduct, Nos. 01-14, 01-20 (3d Cir. C.J. June 1, 2001) (decided before 2008 Rules were enacted): A complaint alleging that the subject judge "simply does not have the intelligence or mental competence" to "effectively" perform judicial duties, and that the cases on which the judge had been reversed "illustrate a pattern of incompetence," must be dismissed as merits-related. The circuit chief judge also found the complaint frivolous "[t]o the extent that complainants allege bias, mental disability, et alia," because "the allegations are highly conclusory, contain no suggestion of corroboration in the record, and do not appear to have any basis in fact."

Fourth Circuit

In the Matter of a Judicial Complaint, No. 06-9044 (4th Cir. Jud. Council Nov. 27, 2006) (decided before 2008 Rules were enacted): Faced with a claim that the subject judge fell asleep on a single occasion during one trial, the circuit chief judge failed to find that the described incident "rise[s] to the level of either misconduct or disability." The circuit chief

judge based this assessment on "the judge's obvious command of the facts of complainant's case and the fact that counsel did not consider the situation to be one requiring action to be taken," as well as the "isolated, unintentional nature of the alleged conduct." The circuit chief judge reasoned that "[a]lthough it is unfortunate for a judge to fall asleep during a trial or other proceeding, review of the record here does not suggest that the judge's inattention to the proceeding was so prolonged as to interfere with the effective functioning of the courts."

In the Matter of a Judicial Complaint, No. 06-9034 (4th Cir. Jud. Council Sept. 11, 2006) (decided before 2008 Rules were enacted): Although the subject judge was alleged to have fallen asleep during a nonjury criminal trial, thereby rendering the judge "unable to remember testimony and argument well enough to render a fair judgment," the judge's later misstatement of one witness's name and another witness's occupation did not suffice as factual support for a claim that the judge was mentally disabled, because the judge's twenty-three pages of findings and conclusions in the matter "were otherwise clear and cohesive."

In the Matter of a Judicial Complaint, No. 05-9027 (4th Cir. C.J. Sept. 2, 2005) (decided before 2008 Rules were enacted): Claims that a subject judge was disabled by virtue of being "no longer able to comprehend the nature of proceedings . . . , understand the principles of law involved, or remember sufficiently well to render fair judgments," and that "undisclosed third parties" are drafting the judge's orders, could not be factually sustained where their basis as alleged was that the judge dismissed a prisoner civil rights case with language reserved for dismissals of habeas corpus petitions, signed a document one day later than it was dated, and signed another document without writing the signature date in the appropriate blank. (The claim about third-party drafting was unsupported by specific evidence or facts and was therefore frivolous.)

In the Matter of a Judicial Complaint, No. 01-9045 (4th Cir. C.J. Oct. 16, 2001) (decided before 2008 Rules were enacted): A claim that the subject judge had fallen asleep periodically during presentation of testimony in two days of trial was an "allegation of isolated, unintentional conduct on the part of the judge" that did not "rise to the level of either misconduct or disability." "While not to be approved," the circuit chief judge noted, "a judge's falling asleep during the presentation of some of the testimony before a jury in one case does not warrant or require corrective action for misconduct or disability."

In the Matter of a Judicial Complaint, No. 00-9051 (4th Cir. C.J. Dec. 20, 2000) (decided before 2008 Rules were enacted): Certain allegations in a complaint of judicial disability lacked factual support in that they were belied by the record: "complainant's line-by-line parsing of the district judge's orders discloses neither bizarre misstatements nor other ramblings suggestive of an impaired mental state." And the complaint was too vague to state a claim of disability or misconduct inasmuch as it alleged that the judge had engaged in bobbing, weaving, seemingly nodding off, and gesturing; had demonstrated a discriminatory and oppressive manner toward other litigants; and had declared an intention to give "one million years of jail time" before retiring.

In the Matter of a Judicial Complaint, No. 00-9041 (4th Cir. C.J. Oct. 19, 2000) (decided before 2008 Rules were enacted): Where a complainant alleged that the circuit judges who

decided his appeal "were mentally disabled in that they did not understand the principles of law involved," the circuit chief judge dismissed the complaint as merits-related, noting that "[c]omplainant's disagreement with a decision is not evidence of mental disability or criminal conduct on the part of the judges who decided the case."

Fifth Circuit

In re Complaint of Judicial Disability, No. 05-16-90074 (5th Cir. Jud. Council Aug. 23, 2017): After a complaint alleging disability was filed, a special committee was appointed to investigate. The special committee retained medical experts to evaluate the judge. While the proceeding was ongoing, the judge retired under 28 U.S.C. § 372(a). Therefore, the Judicial Council concluded the proceeding because intervening events—the judge's retirement—made the proceeding unnecessary.

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 06-22-90026 (6th Cir. C.J. Nov. 3, 2022): A complaint alleged that the subject judge's vision impairment prevents the judge from being able to comprehend lengthy briefs. The chief circuit judge dismissed the allegations as lacking sufficient evidence to raise an inference that a disability exists. Rule 4(c) defines disability as an impairment that renders the judge "unable to discharge the duties of the particular judicial office." Although the subject judge has a vision impairment, the subject judge uses assistive technology to accommodate the impairment. The chief circuit judge found no evidence supporting the claim that the vision impairment affects the subject judge's ability to understand filings or discharge the duties of office. Accordingly, the complaint was dismissed pursuant to 28 U.S.C. § 352(b)(1)(B) and Rule 11(c)(1)(D).

In re Complaint of Judicial Misconduct, No. 00-6-372-51 (6th Cir. C.J. Nov. 7, 2000) (decided before 2008 Rules were enacted): Where a complainant argued that the subject judge was disabled by reason of a mental defect for failing to understand complainant's arguments in a civil case, the complaint was dismissed as merits-related.

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-09-90060 (7th Cir. C.J. May 8, 2009): A judge's competence was not implicated by a judicial decision adverse to the complainant or by the absence or unfavorability of ratings of the judge on "The Robing Room" website.

In re Complaint Against a Judicial Officer, No. 07-08-90100 (7th Cir. C.J. Oct. 31, 2008): Where a district judge was claimed to be mentally incompetent because several of the judge's decisions had been reversed on appeal (and was claimed to be biased because some of those decisions had been adverse to African American litigants), the fact of the reversals was "wholly inadequate" as supporting evidence.

In re Complaint Against a Judicial Officer, No. 07-7-352-10 (7th Cir. C.J. Mar. 9, 2007) (decided before 2008 Rules were enacted): Where a complainant offered no evidence of a

judge's "mental defect and pure corruption" other than a series of adverse decisions by the judge, the complaint was dismissed as merits-related. Citing *Liteky v. United States*, 510 U.S. 540 (1994), the circuit chief judge noted that "[e]ven a long string of adverse decisions does not begin to establish bias, mental disability, or corruption." "Usually," he added, "multiple adverse decisions establish only that multiple non-meritorious positions have been advanced."

Eighth Circuit

In re Complaint of John Doe, No. 04-028 (8th Cir. C.J. July 7, 2004) (decided before 2008 Rules were enacted): No cognizable claim of judicial disability was stated by a complaint alleging that the subject judge frequently stopped speaking mid-sentence and was unable to understand "fairly straightforward" objections at trial.

Ninth Circuit

In re Complaint of Judicial Misconduct, No. 09-90255 (9th Cir. C.J. Aug. 26, 2010): Where a complainant suggested that a judge must be mentally disabled by reason of a ruling adverse to the complainant, the complaint was dismissed because adverse rulings alone are not proof of a disability, *see In re Complaint of Judicial Misconduct*, 583 F.3d 598 (9th Cir. 2009).

In re Complaint of Judicial Misconduct, No. 09-90201 (9th Cir. C.J. July 14, 2010): Where transcripts in which a judge seemingly contradicted themself supplied the basis of a claim that the judge was mentally incompetent, the complaint was dismissed as unfounded because "the transcripts show only that the judge may have misspoken or not spoken clearly on one occasion," the judge clarified their remark when asked, and "the transcripts show that the judge is in full control of [their] sanity—and [their] courtroom."

In re Charge of Judicial Misconduct, No. 05-89004 (9th Cir. C.J. Apr. 14, 2005) (decided before 2008 Rules were enacted): An argument that the subject judge should be found to have had a disability because the judge's eyes were closed during portions of testimony (allegedly drawing a "pernicious grin" from the prosecuting attorney) was without factual support because "[a]ssuming arguendo that the [judge's eyes were closed] at times, the transcript demonstrates that [the judge] was active throughout the proceeding—ruling on objections, asking or answering questions, and giving instructions."

In re Charge of Judicial Misconduct, No. 04-89070 (9th Cir. C.J. Sept. 20, 2004) (decided before 2008 Rules were enacted): Where a district judge adopted a magistrate judge's findings and recommendations that erroneously referred to a third amended complaint rather than a fourth amended complaint, "the [district] judge's oversight in failing to correct [this] typographical error . . . [did] not constitute credible evidence indicating a mental or physical disability resulting in inability to discharge the duties of office."

Tenth Circuit

In re Complaint Under the Judicial Conduct and Disability Act, No. 10-20-90049 (10th Cir. Jud. Council June 18, 2021): A complainant who had observed a judge during court proceedings filed a complaint alleging that a judge suffered from a disability. A special committee was appointed to investigate. The special committee interviewed the judge's colleagues and staff, reviewed the judge's medical records, and consulted with the circuit's Certified Medical Professional. The judge agreed to undergo "several clinical examinations." Based on the medical expert's report and its investigation, the special committee concluded that the judge could not "maintain the full workload of an active judge," that the judge's medical condition "justified [the judge's] retirement into senior status" under 28 U.S.C. § 354(a)(2)(B)(ii), and recommended that the Judicial Council waive the years of service requirement under § 371. The Judicial Council accepted the special committee's findings and recommendations. The judge was permitted to perform "judicial duties only 'when designated' by the chief circuit judge," and the chief circuit judge "will designate the judicial duties he believes [the judge] is able to perform based on further evaluation."

In re Complaint Under the Judicial Conduct and Disability Act, Nos. 10-16-90009; 10-16-90017 (10th Cir. Jud. Council July 28, 2017): A complaint alleged that, *inter alia*, a judge dishonestly retired on disability a few days after a complaint was filed "to avoid the consequences of the allegations against [the judge]." A special committee was appointed to investigate whether the timing of the disability retirement was "coincidental and legitimate or otherwise," as well as other allegations raised in the complaint. The special committee reviewed medical records from all of the judge's doctors, interviewed two physicians with knowledge of the judge's condition, and interviewed court staff and others identified by the judge as having knowledge of the judge's condition. The special committee also used a medical expert to consult with and to review the medical evidence. Both of the judge's physicians opined that the judge was disabled, and the special committee found them to be credible. Of note, a specialist had been treating the judge for nearly two years at the time he opined to the acting chief circuit judge that the judge was disabled, and had diagnosed the judge with a rare condition that caused memory loss, disorientation, seizures, and changes in personality. The Judicial Council agreed with the special committee and concluded that the judge "has a serious condition that significantly impacts [their] ability to perform as a trial judge" and that the evidence did not support a conclusion that the judge "dishonestly took a disability retirement." *See also In re Complaint of Judicial Misconduct*, C.C.D. 17-02, at 5–7 (U.S. Jud. Conf. Nov. 30, 2017).

In re Complaint Under the Judicial Conduct and Disability Act, No. 10-10-90056 (10th Cir. Jud. Council Jan. 15, 2014): A former law clerk filed a complaint alleging, *inter alia*, that a judge suffered from a disability. After initially dismissing the complaint and denying the petition for review, the JC&D Committee suggested that the Judicial Council reopen the proceedings to investigate whether the judge was suffering from a disability. The proceedings were reopened and a special committee was appointed to investigate. The special committee interviewed numerous witnesses and the judge agreed to be evaluated by a psychiatrist and neuropsychologist. The medical experts concluded that the judge did not have a mental disability "that would prevent [the judge] from performing the duties of

[judicial] office." Based on the experts' opinions, the special committee concluded that the judge was not disabled and recommended that the complaint be dismissed. The Judicial Council agreed with the special committee, found that the judge was not disabled, and dismissed the complaint.

In re Charge of Judicial Misconduct, No. 10-09-90057 (10th Cir. C.J. Apr. 30, 2010): Where a judicial disability complaint was based on an allegation that a subject judge had fallen asleep during a proceeding, the judge took sufficient corrective action by adopting a severely limited caseload—in particular, by taking a lesser draw of criminal cases, declining all trials and lengthy hearings, and cutting working hours.

Eleventh Circuit

In re Complaint under the Judicial Conduct and Disability Act of 1980, No. 07-0025 (11th Cir. Jud. Council July 20, 2007) (decided before 2008 Rules were enacted): Allegations that a subject judge suffered from dementia or engaged in misconduct were frivolous and merits-related where they were based only on the judge's dismissal of complainant's habeas corpus petition and on what the complainant described as the judge's failure to recognize the state court's faulty determination that complainant's claims were not raised on direct appeal.

In re Complaint under the Judicial Conduct and Disability Act of 1980, No. 07-0026 (11th Cir. Jud. Council May 10, 2007) (decided before 2008 Rules were enacted): Complaint was merits-related and frivolous in alleging that a subject judge showed bias or mental infirmity in their failure to develop a required rule mandating circuit judge rotation among panels.

ADDITIONAL RESOURCES

Breyer Committee Report

Findings, Ch. 2, No. 3, 239 F.R.D. at 132: "Almost all complaints allege misconduct rather than disability."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 1(b): "'Mental or physical disability' may include temporary conditions as well as permanent disability."

See also Disability—Medical Examination.

DISABILITY—MEDICAL EXAMINATION

A special committee that has reason to believe that a judge may be suffering from a disability may ask the subject judge to undergo a medical or psychological examination. If a judge impedes reasonable efforts to assess the presence of a disability, a special committee should then consider whether the judge is in violation of the duty to cooperate with an investigation. If the special committee finds that the duty to cooperate has been breached, it should determine whether such breach should be referred to the chief circuit judge for consideration under Rule 5 or 11.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 353(c): A special committee "shall conduct an investigation as extensive as it considers necessary."

28 U.S.C. § 354(a)(1)(A): A judicial council 'may conduct any additional investigation which it considers to be necessary."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(5): "Cognizable misconduct includes refusing, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules."

Commentary to Rule 4: "Rule 4(a)(5) provides that a judge's refusal, without good cause shown, to cooperate in the investigation of a complaint or enforcement of a decision rendered under these Rules constitutes cognizable misconduct. While the exercise of rights under the Fifth Amendment to the Constitution would constitute good cause under Rule 4(a)(5), given the fact-specific nature of the inquiry, it is not possible to otherwise anticipate all circumstances that might also constitute good cause."

Commentary to Rule 13: "Rule 13(a) includes a provision making clear that the special committee may choose to consult appropriate experts or other professionals if it determines that such a consultation is warranted. If, for example, the special committee has cause to believe that the subject judge may be unable to discharge all of the duties of office by reason of mental or physical disability, the committee could ask the subject judge to respond to inquiries and, if necessary, request the judge to undergo a medical or psychological examination. In advance of any such examination, the special committee may enter into an agreement with the subject judge as to the scope and use that may be made of the examination results. In addition or in the alternative, the special committee may ask to review existing records, including medical records."

"The extent of the subject judge's cooperation in the investigation may be taken into account in the consideration of the underlying complaint. If, for example, the subject judge impedes reasonable efforts to confirm or disconfirm the presence of a disability, the special committee

may still consider whether the conduct alleged in the complaint and confirmed in the investigation constitutes disability. The same would be true of a complaint alleging misconduct."

The special committee may also consider whether such a judge might be in violation of his or her duty to cooperate in an investigation under these Rules, a duty rooted not only in the Act's definition of misconduct but also in the Code of Conduct for United States Judges, which emphasizes the need to maintain public confidence in the judiciary, *see* Canon 2(A) and Canon 1 cmt., and requires judges to "facilitate the performance of the administrative responsibilities of other judges and court personnel," Canon 3(B)(1). If the special committee finds a breach of the duty to cooperate and believes that the breach may amount to misconduct under Rule 4(a)(5), it should determine, under the final sentence of Rule 13(a), whether that possibility should be referred to the chief judge for consideration of action under Rule 5 or Rule 11. *See also* Commentary to Rule 4.

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. 17-01, at 23–34 (U.S. Jud. Conf. Aug. 14, 2017): A judge's failure to cooperate with a special committee's request to undergo a mental health examination constituted misconduct. At the time of the special committee's request, the 2015 updates to the Rules, which expressly authorize a special committee to request that a judge undergo an examination, were not yet in effect. The Committee found that even before the Rules were amended, the authority to request that a subject judge undergo a mental health examination clearly exists, as a judicial council has statutory authority to conduct any additional investigation it considers necessary and a special committee is statutorily authorized to conduct as extensive an investigation as it considers necessary. The Committee explained that the judiciary "has long been vested with the power to self-regulate the conduct and behavior of its judges to ensure "the effective and expeditious administration of the business of the courts." (citing 28 U.S.C. § 351(a)). The Committee found that the judiciary's "broad investigative powers in conduct and disability proceedings are necessary to uphold the integrity of the judicial process." Thus, "[i]f a judicial council or its special committee has a reasonable basis for concluding that a judicial colleague might suffer from a disability rendering him or her unable to perform the duties and responsibilities of the judicial office, the judicial council and its special committee necessarily possess the authority to request the subject judge undergo a mental health examination." This authority "stems from the Judiciary's inherent authority to regulate its affairs, 28 U.S.C. § 332(d)(1), including the conduct and fitness for duty of federal judges, and from its broad investigatory powers and decisional discretion under the Act and the Rules." Therefore, the judge's failure to cooperate impeded the judicial council's ability to conduct a thorough investigation and was conduct prejudicial to the effective and expeditious administration of the business of the courts.

Additionally, the Committee found that the judge did not have a good faith basis to object to the examination on the ground that it violated the judge's right to privacy. Because the

judicial council's order was reasonable based on the facts of the case, ordering the judge to undergo the exam did not violate the judge's privacy interest. In reaching this conclusion, the Committee explained that although the judge has an "indisputable privacy interest relating to [the judge's] mental health," that interest must be evaluated in light of the responsibilities as a judge. The Committee further explained that "a federal judge's sound mental health is essential to his or her fulfillment of all judicial duties. Judges must fairly, justly, and expeditiously resolve the cases before them. Litigants depend on individual judges . . . to protect their interests. Public confidence in the Judiciary turns in major ways on the judges' ability to address and vindicate the parties' rights with fairness, efficiency, and sound decisionmaking." Here, the exam was "for the limited purpose of determining whether [the judge] suffers from a disability that renders [the judge] unable to discharge the duties of [the] judicial office. . . . The examination and its results would be confidential in accordance with the applicable provisions of the Act and Rules, *see* 28 U.S.C. § 360(a); R. 23(a), which prohibit disclosure of information related to judicial conduct and disability proceedings." The Committee concluded that the judge's concerning behavior was "sufficient to justify the reasonable requirement that [the judge] undergo a mental health examination."

See also Disability.

MISCONDUCT—ABUSIVE CONDUCT OR HOSTILE WORK ENVIRONMENT

A judge should be patient, dignified, respectful, and courteous to those with whom the judge deals in an official capacity, including judicial employees. The judiciary is committed to maintaining a work environment where employees are treated with dignity, fairness and respect. Although a judge's expression of impatience, dissatisfaction, or annoyance is not, without more, evidence of misconduct under the Act, such behavior at a higher level of intensity—amounting to a "demonstrably egregious and hostile," treatment of judicial employees or others, or creating a hostile work environment for employees—would be cognizable as misconduct.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(2): "Cognizable misconduct includes . . . treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or creating a hostile work environment for judicial employees."

Commentary to Rule 4: "The phrase 'prejudicial to the effective and expeditious administration of the business of the courts' is not subject to precise definition, and subsection (a) provides some specific examples."

"Rules 4(a)(2), (3), and (4) reflect the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect, and are free from harassment, discrimination, and retaliation. *See* Code of Conduct for United States Judges, Canon 3A(3) cmt. ("The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.")."

"An allegation that a judge treated litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner is also not merits-related."

Code of Conduct for United States Judges

Canon 3(A)(3): "A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity."

Orders

Fourth Circuit

In the Matter of a Judicial Complaint, No. 04-19-90143 (4th Cir. C.J. Aug. 12, 2019): A former law clerk alleged that she was harassed and subjected to a hostile working environment. She said that the judge put her on a perform improvement plan, repeatedly scolded her, and threatened her position by telling her the chief judge "had a target on her because she was female and a Democrat." The complainant was in a serious car accident and suffered damage to her heart, which required surgery and further medical treatment. She was ultimately terminated by the subject judge. The chief circuit judge requested that the subject judge respond to the complaint. The subject judge denied the complaint's allegations and stated that the complainant's termination was due to untimeliness in submitting work. As to the allegations about the subject judge's tone, the chief circuit judge explained that if the judge felt under pressure, then "a certain amount of frustration and even incivility are normal and common human reactions to that kind of stimulus, however regrettable." The order further noted that "a certain amount of disagreement and tension between some people is common and perhaps inevitable, and does not rise to the level of judicial misconduct. A judge is entitled to manage [the judge's] chambers and . . . employees in the manner the judge thinks best, within reasonable limits," and the chief circuit judge found nothing in the complaint that suggested those limits were exceeded. The order further explained that a judge's personnel decision cannot be the basis for misconduct absent "wrongful conduct independent of whether the judge's decision was correct."

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 06-19-90045 (6th. Cir. C.J. Apr. 12, 2021): A former judicial employee alleged that, on one or two separate occasions, the subject judge was extremely rude and cursed and yelled at him. Assuming the allegations were true, the chief circuit judge found that:

> "[T]he nature of these isolated incidents would not rise to the level of cognizable misconduct under Rule 4(a)(2) concerning abusive or harassing behavior. . . . Here, there is no evidence that the subject judge treated complainant in a demonstrably egregious and hostile manner, or that the limited isolated incidents of alleged bullying behavior created a hostile work environment. While such alleged behavior might be a violation of the rules, it does not indicate a threat to the safety or security of any person, is not serious or egregious such that it threatens the integrity and proper functioning of the judiciary, and does not rise to the level of misconduct under the Act."

Tenth Circuit

In re Complaint Under the Judicial Conduct and Disability Act, No. 10-21-90022 (10th Cir. Sept. 14, 2022): Two former law clerks and two anonymous former employees filed a complaint alleging that a magistrate judge engaged in abusive conduct and created a hostile

work environment. A special committee was appointed to investigate and interview all of the judge's former employees and four of the judge's judicial colleagues. After the special committee was scheduled to interview the subject judge, the judge informed the Special Committee that the interview would not be proceed with and that the request to be reappointed as a magistrate judge would be withdrawn. The subject judge was not reappointed and the judge's term expired before the special committee could submit its report and recommendations to the Judicial Council. Therefore, the Judicial Council was unable to reach the merits of the complaint and concluded the matter due to intervening events pursuant to Rule 20(b)(1)(B). The Judicial Council then conducted an institutional review and found that the apparent misconduct was able to continue due to both lack of awareness about what constitutes abusive conduct and/or a hostile work environment, and widespread fear of retaliation deterred reporting. As part of its institutional review, the Judicial Council recited standards from Title VII to help define abusive conduct and hostile work environment.

MISCONDUCT—BIAS AND IMPARTIALITY

Cognizable misconduct includes discrimination based on race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(3): "Cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability."

Commentary to Rule 4: "Rules 4(a)(2), (3), and (4) reflect the judiciary's commitment to maintaining a work environment in which all judicial employees are treated with dignity, fairness, and respect, and are free from harassment, discrimination, and retaliation. *See* Code of Conduct for United States Judges, Canon 3A(3) cmt. ("The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.")."

Rule 4(b)(1): "Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision."

Code of Conduct for United States Judges

Canon 3: "The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased."

Commentary to Canon 3A(3): "The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias."

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. No. 18-02 (U.S. Jud. Conf. May 31, 2019): A complaint alleged that the subject judges engaged in judicial misconduct by selecting magistrate judges based on favoritism and discriminated against the complainant as an African American female magistrate judge applicant. A special committee was appointed to investigate the allegations and found that the subject judges complied with the law governing magistrate judge selection and did not find evidence of discrimination. The Judicial Council agreed with the special committee's findings and dismissed the complaint for failing to establish facts upon which the claims of misconduct were based. The JC&D Committee considered complainant's argument that she was denied due process because she was not given a meaningful opportunity to be heard on the merits, to present credible evidence, cross examine witnesses or respond to the results of the investigation. The JC&D Committee found that the complainant was given all the process that she was due under the Rules and the Act, noting that special committee proceedings are primarily inquisitorial rather than adversarial and that a complainant does not have the rights of a party to litigation. The JC&D Committee found no error of law or abuse of discretion and affirmed the judicial council's dismissal of the complaint. *See also In the Matter of Judicial Complaints under 28 U.S.C. § 351*, Nos. 04-15-90186 et al. (4th Cir. Jud. Council Dec. 18, 2017).

In re Complaint of Judicial Misconduct, C.C.D. No. 11-01 (U.S. Jud. Conf. Dec. 1, 2011): A complaint alleged that the subject judge's membership in a country club that practiced invidious discrimination based on race and sex was misconduct. Following a special committee investigation, a divided Judicial Council did not find misconduct, citing to the subject judge's attempt to change the organization's practices. The JC&D Committee disagreed and found that the judge's membership constituted misconduct. Canon 2C prohibits membership in an organization that practices invidious discrimination. Whether an organization practices such discrimination is a fact-specific inquiry. The Committee concluded that the country club discriminated against women and African Americans. Although the subject judge's attempt to change the club's policy was laudable, the Code provides that if attempts to get the organization to stop discriminating are not successful within two years, the judge must resign membership. Here, the judge had been a member for twenty years, well outside of the two-year safe harbor. The Committee publicly reprimanded the subject judge.

Third Circuit

In re Complaint of Judicial Misconduct, Nos. 03-20-90043 and 03-20-90044 (3d Cir. Jud. Council July 27, 2021): A retired unit executive filed a complaint against two circuit judges alleging that they had abused their judicial authority and acted with racial animus when they interviewed employees and prepared a report about the complainant's leadership. A special committee was appointed to investigate and found no evidence of racial bias. The special committee further found that there was insufficient evidence in support of the allegations to warrant formal fact finding. The Judicial Council accepted the special committee's

recommendations and dismissed the complaint because the facts on which it was based were not established, pursuant to 28 U.S.C. § 354(a)(1)(B) and Rule 20(b)(1)(A)(iii).

Fourth Circuit

In the Matter of a Judicial Complaint, No. 04-16-90088 (4th Cir. Jud. Council Apr. 24, 2018): A complaint alleged that a magistrate judge harassed a driver based on racial stereotyping and told the driver that, as a federal judge, the "Feds" could be summoned with the push of a button. A special committee was appointed to investigate and did not find sufficient evidence that the conduct was motivated by racial bias or abuse of office, but did find that the judge's actions in accosting the driver created an appearance of impropriety and eroded public confidence in the judiciary. The judge sincerely apologized and took corrective action. After receiving the special committee's report, the Judicial Council undertook additional investigation and asked other judges in the district if the subject judge has engaged in conduct that raised a question about the judge's temperament or bias. The district judges noted that in the public comments on biennial magistrate judge surveys, a number of responses described the judge as rude and disrespectful. At the time, the judges had counseled the magistrate judge to take sensitivity training, which the judge completed and which resulted in an improvement. The Judicial Council ultimately found that the judge's conduct constituted judicial misconduct and that the appropriate sanction was a private reprimand. Although the judge took voluntary corrective action, the Judicial Council found that this was not the first time that the judge's temperament had been questioned. Therefore, to preserve public confidence in the judiciary, the Judicial Council issued a private reprimand to the judge.

Fifth Circuit

In re Complaint of Judicial Misconduct, 05-13-90046 (5th Cir. Jud. Council Nov. 22, 2019): An attorney filed a complaint alleging that the subject judge had engaged in a "racially motivated, hateful, personal vendetta" against him, as evidenced by the judge's remarks in hearings held in two lawsuits where the attorney was counsel of record. A special committee was appointed and while the special committee did not find evidence of racial bias, it was concerned by the judge's harshness and tone, and that the subject judge's initial response to the complaint demonstrated insensitivity to the seriousness of the complaint. After meeting with the special committee, the subject judge submitted a sincere supplemental written response acknowledging that the tone used by the judge was "unnecessary and heavy-handed" and pledging to avoid similar conduct in the future. Based on the judge's commitment to avoid similar conduct in the future, the Judicial Council concluded the complaint based on appropriate corrective action under Rule 20(b)(1)(B).

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-16-90021 (7th Cir. Jud. Council Nov. 10, 2016): A complaint alleged that the subject judge made an antisemitic comment during a recess at a trial. A special committee was appointed to investigate. Based on the special committee's report, the Judicial Council found that the subject judge made the statement in

question, that the judge knew that the complainant and her husband, who were litigants before the judge, were Jewish, and that the comment was likely made in the context of evidence about ownership. However, the Judicial Council found no evidence of actual bias by the subject judge, as no witnesses, attorneys, or staff had ever seen any other evidence of antisemitic bias. The Judicial Council explained that "[s]tatements by a judge or by court staff that seem to stereotype people based on religion, race, sex, national origin, or other characteristics can undermine the appearance of fairness even where there is no actual bias or animus." Order at 3. The Council found that the statement was inappropriate, even though there was no evidence of actual bias. The Council noted that the comment was not made before the jury, was off the record, and without hostile intent. The Judicial Council ultimately found that the statement was misconduct and issued a private reprimand.

Eleventh Circuit

In re Judicial Complaint, Nos. 11-21-90075 & 11-21-90076 (11th Cir. Sept. 20, 2022):
A former law clerk filed a misconduct complaint alleging that the subject judge "demoted, terminated, and retaliated" against her on the basis of pregnancy. The complainant also pursued her claims through the court's EDR process, where the presiding judicial officer dismissed the claims. The presiding judicial officer's dismissal was affirmed by the Judicial Council, finding that the complainant's poor performance, not her pregnancy, was the reason for the adverse employment actions and that many of her claims were time-barred. In dismissing the complaint, the chief circuit judge explained that the Judicial Council's order in the EDR proceeding determined that the complainant had failed to prove that she was fired based on pregnancy rather than performance. Accordingly, the complaint was dismissed on the basis that the allegations lack sufficient evidence to raise an inference that misconduct occurred pursuant to Rule 11(c)(1)(D).

MISCONDUCT—BREACH OF COURT RULE

A judge's breach of a court rule—or of a Judicial Conference policy or Judicial Council resolution—is not misconduct under the Judicial Conduct and Disability Act unless it is prejudicial to the effective and expeditious administration of the business of the courts. The question whether such a breach was deliberate could be relevant to whether the breach would be misconduct under this standard.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(1): "Cognizable misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts."

Commentary to Rule 4: "The phrase 'prejudicial to the effective and expeditious administration of the business of the courts' is not subject to precise definition."

Orders

Third Circuit

In re Complaint of Judicial Misconduct or Disability, Nos. 03-08-90111 and 03-09-90040 (3d Cir. C.J. Aug. 4, 2009): A complaint alleging that the subject judge ignored the rules of court was dismissed as merits-related in accordance with 28 U.S.C. § 352(b)(1)(A)(iii) and Rules 3(h)(3)(A) and 11(c)(1)(B).

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-09-90083 (7th Cir. C.J. Sept. 28, 2009): The chief judge identified a complaint against a district judge who had allowed video recording and live broadcasting of a civil proceeding in violation of a district court rule, a resolution of the circuit judicial council, and Judicial Conference policy. According to the chief judge, "[a] judge who contravenes policies adopted by the Judicial Conference and the Judicial Council has 'engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts.'" The chief judge also noted that "[w]hether or not a single district judge is permitted to grant exceptions to a given local rule, no judge may disregard the Judicial Council's resolution." The chief judge concluded that the subject judge took appropriate corrective action by admitting their violation of the rule and the resolution, expressing regret, and agreeing to comply in the future with the rule, resolution and policy. In

an order citing 28 U.S.C. § 352(b)(2), the chief judge dismissed the complaint by reason of this corrective action. [*Editor's Note:* Where corrective action has been taken, 28 U.S.C. § 352(b)(2) calls for concluding the complaint proceeding rather than dismissing the complaint.]

Eighth Circuit

In re Complaint of John Doe, No. 10-90001 (8th Cir. C.J. Mar. 8, 2010): The complainant alleged that a judge had violated Rule 11(c)(1) of the Federal Rules of Criminal Procedure, which bars judges from participating in plea agreement discussions. The judge had refused to accept a plea unless the parties agreed to waive the right to appeal the sentence to which both had unconditionally agreed. Finding no misconduct, the chief judge dismissed the complaint.

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, Nos. 99-11, 00-01 (D.C. Cir. Jud. Council Feb. 26, 2001) (decided before 2008 Rules were enacted): Complainants alleged that the subject judge had engaged in prejudicial conduct by circumventing the court's random assignment procedure so that judges appointed by the president would be assigned criminal cases involving individuals with close ties to the White House. Complainants also alleged that certain cases were inappropriately assigned as related cases. The court's rule at the time authorized the special assignment of a case if the chief judge determined that the case would be protracted and that expeditious and efficient disposition required non-random assignment. A Special Committee was appointed, and although its investigation revealed that the subject judge may have exceeded relevant authority in assigning cases as related, it found no evidence that the subject judge's purpose had been improper or politically motivated. Based on its review of the Special Committee's report, the judicial council dismissed the complaint, concluding that the evidence did not warrant a finding of misconduct. It noted, however, that a purposeful or clear breach of a rule could be "prejudicial to the effective and expeditious administration of the business of the courts" and might support an inference of political motivation, and that, in a close case, even a breach that is neither clear nor deliberate might suffice to tip the scale toward a finding of misconduct.

See also Merits-Related—Substantive, Procedural, or Factual Error.

MISCONDUCT—BRIBES, GIFTS, AND PERSONAL FAVORS

Cognizable misconduct includes accepting bribes, gifts or personal favors related to the judicial office, or using the judicial office to obtain special treatment for friends and relatives.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(1): "Cognizable misconduct includes . . . using the judge's office to obtain special treatment for friends or relatives" and "accepting bribes, gifts, or other personal favors related to the judicial office."

Orders

Fifth Circuit

In re Complaint of Judicial Misconduct, No. 07-05-351-0085 (5th Cir. Jud. Council Dec. 20, 2007): The Judicial Council found that the subject judge engaged in misconduct by, among other things, receiving gifts and things of value from attorneys with cases pending before the judge. The Judicial Council determined that the subject judge engaged in conduct that might constitute grounds for impeachment and certified its determination to the Judicial Conference. The subject judge was later impeached by the House of Representatives and convicted by the Senate.

Tenth Circuit

In re Complaint Under the Judicial Conduct and Disability Act, No. 10-10-90022 (10th Cir. Mar. 22, 2011): Following a special committee investigation, the Judicial Council found that the subject judge committed misconduct by using the judicial office to appoint friends to serve as adjunct settlement judges, even though they weren't qualified, and by ordering counsel and parties to pay them fees for their service in breach of a local court rule. The Judicial Council further found that the subject judge committed misconduct by making inappropriate oral and written comments during court proceedings. The subject judge apologized and assured the Judicial Council that they would not engage in inappropriate conduct in the future. The Judicial Council publicly reprimanded the judge.

MISCONDUCT—CLERICAL ERRORS

Clerical or administrative errors do not constitute judicial misconduct.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

28 U.S.C. § 351(d)(1): "[T]he term 'judge' means a circuit judge, district judge, bankruptcy judge, or magistrate judge."

28 U.S.C. § 352(b)(1)(A)(i): "A chief judge may dismiss a complaint that is not in conformity with the statute."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(1): "Cognizable misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts."

Commentary to Rule 4: "The phrase 'prejudicial to the effective and expeditious administration of the business of the courts' is not subject to precise definition."

Orders

First Circuit

In re Complaint, No. 01-09-90004 (1st Cir. Jud. Council Jan. 25, 2010): The judicial council affirmed dismissal of allegations of clerical error, noting that the chief judge had correctly explained that clerical errors, including those involving both docketing and distribution of court orders, are not attributable to the presiding judge.

In re Complaint, No. 406 (1st Cir. Jud. Council Dec. 22, 2005) (decided before 2008 Rules were enacted): The judicial council affirmed the chief judge's dismissal of allegations that a court improperly failed to list all parties in the caption of the case, wrongfully included an unintended party in the caption, and neglected to serve all the parties to the case. The allegations were, at most, clerical errors that did not constitute judicial misconduct within the meaning of the statute.

Second Circuit

In re Charge of Judicial Misconduct, Nos. 07-9081, 07-9082 (2d Cir. C.J. Jan. 25, 2008) (decided before 2008 Rules were enacted): An allegation that one of complainant's cases was

erased from the court's electronic data filing system was dismissed because it was a charge against non-judicial officers and therefore did not allege judicial misconduct, and because it was factually disproven.

In re Charge of Judicial Misconduct, No. 07-9061 (2d Cir. C.J. Jan. 16, 2008) (decided before 2008 Rules were enacted): Complainant's claims that certain documents were missing from the record and that sentencing transcripts were withheld were dismissed as not alleging judicial misconduct. Citing 28 U.S.C. § 351(a) and (d)(1), the chief judge explained that the Act only applies to the conduct of judges, and that the claims in question are, fundamentally, complaints about the operations of the clerk's office.

Fourth Circuit

In the Matter of a Judicial Complaint, No. 05-9028 (4th Cir. C.J. Oct. 3, 2005) (decided before 2008 Rules were enacted): Allegations concerning the absence of a docket entry for complainant's pleading and the lack of authenticity of a file stamp affixed to his motion pertained to the responsibilities of the clerk's office and were not the proper subject of a judicial misconduct complaint. The allegations were therefore dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i) for failure to state a claim of judicial misconduct.

In the Matter of a Judicial Complaint, No. 03-9026 (4th Cir. C.J. July 2, 2003) (decided before 2008 Rules were enacted): Allegations of error or delay in docket entries made by the clerk's office were dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). The allegations involved the conduct of deputy clerks and therefore fell outside the scope of the judicial complaint statute.

Fifth Circuit

Nos. 05-10-90133 through 05-10-90136 (5th Cir. C.J. Aug. 26, 2010): Complainant asserted that the clerk's office erroneously determined that his motion was untimely and should be returned pursuant to the court's general order. The complaint was dismissed under 28 U.S.C. § 352(b)(1)(A)(i) because a complaint about clerk's office personnel is not cognizable as judicial misconduct.

Nos. 07-05-351-0112, 07-05-351-0113 (5th Cir. C.J. Aug. 9, 2007) (decided before 2008 Rules were enacted): The complainant alleged that three motions were not promptly docketed by the clerk's office. The complaint was dismissed because administrative error, if any, by the clerk's office is insufficient to raise an inference of judicial misconduct.

No. 07-05-351-0096 (5th Cir. July 25, 2007) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge concealed and falsified the defendant's original return of service as demonstrated by a significant lapse of time between the date of the certified mail receipt and the date of the corresponding entry on the docket. The allegation was dismissed as frivolous under 28 U.S.C. § 352(b)(1)(A)(iii) because the maintenance of the case record and docket sheet are the responsibility of the clerk's office, not the judge.

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 07-6-351-33 (6th Cir. C.J. Oct. 2, 2007) (decided before 2008 Rules were enacted): A complaint alleging undue delay was dismissed pursuant to 28 U.S.C. § 352(b)(1)(A)(i). After a limited inquiry, the chief judge determined that to the extent an eighteen-day delay between issuance of an order and a party's receipt of a paper copy could ever be deemed unreasonable or part of a persistent pattern, such a delay would be the result of a ministerial matter within the responsibility of the clerk's office and not the proper subject of a complaint against a judge.

In re Complaint of Judicial Misconduct, No. 05-6-351-65 (6th Cir. C.J. Apr. 24, 2006) (decided before 2008 Rules were enacted): Complainant alleged that the clerk improperly rejected his pleading. Because complainant did not allege that the subject judges were involved with the clerk's rejection of his pleading, the allegation was dismissed as outside the scope of the judicial complaint procedure.

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 04-7-372-36 (7th Cir. C.J. July 28, 2004) (decided before 2008 Rules were enacted): An allegation of negligence by the trial and appellate court clerks' offices was dismissed because it was not the proper subject of a judicial misconduct complaint.

Ninth Circuit

In re Charge of Judicial Misconduct, No. 07-89100 (9th Cir. C.J. Apr. 25, 2008) (decided before 2008 Rules were enacted): Complainant took issue with a transfer order issued in his case and filed a complaint against the magistrate judge and district judge handling the matter. The complaint alleged in part that the subject district judge had intercepted a letter to the Standing Committee on Discipline (of attorneys) because it contained allegations about an attorney-defendant in the case and about the subject judges. In fact, the district judge had rejected the letter in light of a local rule prohibiting parties from writing letters to the judge to whom their case is assigned. Then, having determined that the letter had been misdirected to the judge, the clerk of court forwarded complainant's letter to the Standing Committee. Complainant presented no credible evidence that the district judge was in any way involved in an interception. And, because the judicial complaint procedure applies only to federal judges, the chief judge dismissed the complaint to the extent that it concerned an error by clerk's office staff.

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, No. DC-10-90092 (D.C. Cir. C.J. Oct. 21, 2010): The complaint alleged that the complainant's case was never assigned to a judge as required by local rule and that the clerk of court never served the complaint and summons. Because the complainant failed to allege any wrongdoing by the subject judge, the

complaint was dismissed under 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D) as lacking any evidence to raise an inference that misconduct has occurred.

In the Matter of a Charge of Judicial Misconduct or Disability, No. DC-10-90071 through DC-10-90083 (D.C. Cir. C.J. Oct. 1, 2010): The complainant asserted that the subject judges violated his due process rights by sending official court correspondence to the prison warden instead of directly to him. The complainant failed to provide any evidence of wrongdoing by the judges, however, because the responsibility of transmitting correspondence rests with the clerk's office. The allegation was therefore dismissed under 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(D) as lacking any evidence to raise an inference that misconduct has occurred.

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 1(c): "The complaint procedure applies to judges of the United States courts of appeals, judges of the United States district courts, judges of the United States bankruptcy courts, and United States magistrate judges."

"Complaints about other officials of federal courts should be made to their supervisors in the various courts. If such a complaint cannot be satisfactorily resolved, at lower levels, it may be referred to the chief judge of the court in which the official is employed. The circuit executive . . . is sometimes able to provide assistance in resolving such complaints."

Commentary to Rule 1(c): "The second paragraph of rule 1(c) reflects a concern that the public be given some guidance about how to pursue grievances about court officials other than judges. A circuit council may wish to modify this paragraph to make it conform with the circuit's own internal procedures, but there should be some guidance about where such a complaint may be taken."

"The invitation in the last sentence of the paragraph to seek assistance from the circuit executive is, of course, related to the circuit executive's special relationship with the circuit council, which under 28 U.S.C. § 332(d)(1) would have authority to act on evidence of improper behavior by a court employee. We note in this connection that some complaints have been filed under section 372(c) in which a chief judge is complained against for failing to take action to correct deficiencies of subordinate personnel. Assuming that they cannot get satisfaction in the court in which someone is employed, it seems preferable that people take complaints about nonjudicial personnel directly to the circuit executive."

MISCONDUCT—CONDUCT OCCURRING OUTSIDE OFFICIAL DUTIES

Conduct occurring outside the performance of official duties can constitute misconduct under the Act if the conduct "is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people."

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(7): "Cognizable misconduct includes conduct occurring outside the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people."

Commentary to Rule 4: "Rule 4(a)(7) reflects that an allegation can meet the statutory standard for misconduct even though the judge's alleged conduct did not occur in the course of the performance of official duties. Furthermore, some conduct specified in Rule 4(a)(1) through 4(a)(6), or not specified within these Rules, might constitute misconduct occurring outside the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct under the Act and these Rules. For example, allegations that a judge solicited funds for a charity or other organization or participated in a partisan political event are cognizable under the Act even though they did not occur in the course of the performance of the judge's official duties."

Orders

Second Circuit

In re Charge of Judicial Misconduct, 02-21-90017 (2d Cir. C.J. Jan. 10, 2022): A complaint alleged misconduct in connection with a judge's ownership of a condominium and the judge's election as a board member of the condominium association. The complaint also alleged that the judge violated the confidentiality of misconduct proceedings by contacting someone the complainant had identified as a potential witness and disclosing the existence of the complaint. The order notes that the conduct at issue is extra-official in nature and cites to the standard in Rule 4(a)(7) that describes when extrajudicial conduct rises to the level of misconduct. The order explains that Canon 2(B) of the Code of Conduct (a judge should not "lend the prestige of the judicial office to advance the private interests of others") was at

issue, including whether the judge's conduct violated Canon(b) and rose to the level of misconduct under the Act. The chief circuit judge concluded that, based on the record, no reasonable person could view the subject judge's conduct as rising to that standard. As to the alleged breach of confidentiality, the chief circuit judge explained that even if the judge technically violated Rule 23, the violation did not "rise to the level of misconduct under the Act," and cited to the Commentary to Rule 4.

In re Charge of Judicial Misconduct, No. 06-9056 (2d Cir. C.J. Dec. 14, 2007) (decided before 2008 Rules were enacted): A complaint alleged that the subject judge engaged in misconduct by: (1) hitting the complainant and being criminally charged as a result; (2) committing perjury in connection with the investigation; and (3) possibly instructing the judge's nephew to feign ignorance to obstruct the investigation of an alleged assault on complainant's daughter. The chief circuit judge dismissed the first two allegations because, even if true, they did not constitute "conduct prejudicial to the effective and expeditious administration of the business of the courts," and the third allegation was dismissed as lacking sufficient evidence to infer that misconduct occurred. The underlying altercation took place on a beach and the chief circuit judge therefore considered whether a personal altercation on a beach can constitute misconduct under the Act. The chief circuit judge explained that the Second Circuit has treated certain out-of-court, extra-judicial conduct, like publicly expressing partisan political views, as sanctionable and that the Breyer Committee concluded that extra-judicial conduct could be covered by the Act. The order found that extra-judicial conduct complained of would be cognizable only to the extent that it lowers public confidence in the courts among reasonable people, brings the judicial office into disrepute, or causes stigma, disrepute or loss of public esteem and confidence in the courts. In finding that the alleged assault did not rise to the level of misconduct, the order explained that: 1) it occurred out of court, did not relate to a particular case, and did not involve the judge's official duties; 2) the complaint described a highly charged confrontation where the complainant accused the judge of lying and using obscene language in the presence of children; and 3) there is not evidence that the judge has engaged in questionable conduct at any other time.

Third Circuit

In re Complaint of Judicial Misconduct, No. 04-26 (3d Cir. C.J. Dec. 29, 2009): A complaint alleged that a judge committed misconduct through financial dealings and a conversation about the propriety of a transaction with an elected county official. The chief circuit judge conducted a limited inquiry into the allegations and found that the subject judge was a close family friend of the county executive and had received a $600,000 loan from the county executive to a general partnership that the judge had been a member of prior to their appointment to the bench. The loan was repaid in full after one year, with the appropriate interest, and the partnership has since been dissolved. The subject judge had not engaged in any business dealings with the county official. The order explained that misconduct included extrajudicial conduct where the conduct might have a "prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people." Rule 4(a)(7). The order notes the guidance in Canons 2, 2A, and 5, highlighting Canon 5(C)(1)'s guidance that a judge

should refrain from business and financial dealings with persons likely to come before the court. Ultimately, the chief circuit judge found that the single, isolated transaction would not lead to a "substantial and widespread" lowering of confidence in the courts among reasonable people and was therefore subject to dismissal under Rule 11(c)(1)(A) and 28 U.S.C. § 352(b)(1)(A)(i). The order also notes that the subject judge's corrective action—by repaying the loan, terminating the business relationship, and dissolving the partnership—was sufficient to conclude the complaint about the business loan based on voluntary corrective action under 28 U.S.C. § 352(b)(2). As to the conversation between the subject judge and the official, the order explained that a judge can "have friends and participate in society even if this means that he or she may have a relationship with attorneys or official who might come before the judge." The order further notes that the conversation was not a formal legal consultation and there was no evidence of an attorney-client relationship. Accordingly, that allegation was dismissed as frivolous and lacking sufficient evidence to raise an inference that misconduct has occurred under 28 U.S.C. § 352(b)(1)(A)(iii).

In re Complaint of Judicial Misconduct, No. 03-08-90050 (3d Cir. Jud. Council June 5, 2009): A complaint was identified based on reporting that a chief circuit judge maintained a publicly accessible website featuring sexually explicit photos and videos. After the complaint was transferred, a special committee was appointed to investigate. The order notes that the allegations involved conduct occurring outside the performance of official duties, which can constitute misconduct where it has a "prejudicial effect of the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people." Rule 4(a)(7). The Judicial Council ultimately concluded that the subject judge's possession of sexually explicit material combined with the failure to safeguard the judge's "sphere of privacy was judiciary imprudent." The Judicial Council admonished the subject judge that the conduct and poor judgment created a public controversy that could reasonably be seen as an embarrassment to the judiciary. Based on the subject judge's acknowledgment of responsibility, apology, other corrective action, and the public admonishment, the proceeding was concluded under Rule 20(b)(1)(B).

Fourth Circuit

In the Matter of a Judicial Complaint, No. 04-16-90088 (4th Cir. Jud. Council Apr. 24, 2018): A complaint alleged that a magistrate judge harassed a driver in the judge's neighborhood based on racial stereotyping and told the driver that, as a federal judge, the "Feds" could be summoned with the push of a button. The order noted that conduct occurring outside the performance of official duties can be misconduct where the conduct might have a prejudicial effect on the administration of the business of the courts, including a widespread lowering of public confidence in the courts among reasonable people. A special committee was appointed to investigate and did not find sufficient evidence that the conduct was motivated by racial bias or abuse of the office, but did find that the judge's actions in accosting the driver created an appearance of impropriety and eroded public confidence in the judiciary. The judge sincerely apologized and took corrective action. After receiving the special committee's report, the Judicial Council undertook additional investigation and asked other judges in the district if the subject judge has engaged in conduct that raised a question about the judge's temperament or bias. The district judges noted that in the public comments

on biennial magistrate judge surveys, a number of responses described the judge as rude and disrespectful. At the time, the judges had counseled the magistrate judge to take sensitivity training, which the judge completed and which resulted in an improvement. The Judicial Council ultimately found that the judge's conduct constituted judicial misconduct and that the appropriate sanction was a private reprimand. Although the judge took voluntary corrective action, the Judicial Council found that this was not the first time that the judge's temperament had been questioned. Therefore, to preserve public confidence in the judiciary, the Judicial Council issued a private reprimand to the judge.

ADDITIONAL RESOURCES

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 3 at 147: "[T]he fact that a judge's alleged conduct occurred off the bench and had nothing to do with the performance of official duties, absolutely does not mean that the allegation cannot meet the statutory standard. The Code of Conduct for U.S. Judges expressly covers a wide range of extra-official activities. Allegations that a judge personally participated in fundraising for a charity or attended a partisan political event—conduct having nothing to do with official duties—are certainly cognizable.

"Nevertheless, many might argue that judges are entitled to some zone of privacy in extra-official activities into which their colleagues ought not venture. Perhaps the statutory standard of misconduct could be construed in an appropriate case to have such a concept implicitly built-in. Thus, for example, a chief judge might decline to investigate an allegation that a judge habitually was nasty to her husband, yelling and making a scene in public (as long as there was no allegation of criminal conduct such as physical abuse), even though this might embarrass the judiciary, on the ground that such matters do not constitute misconduct. Complaints raising such issues are so rare as to obviate the need for ground rules for them in advance."

MISCONDUCT—EGREGIOUS OR HOSTILE TREATMENT OF ATTORNEYS AND LITIGANTS

A judge should be patient, dignified, respectful, and courteous to those with whom the judge deals in an official capacity. Although a judge's expression of impatience, dissatisfaction, or annoyance is not, without more, evidence of misconduct under the Act, such behavior at a higher level of intensity—amounting to unnecessarily hostile, or "demonstrably egregious and hostile," treatment of litigants or attorneys—would be cognizable as misconduct.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(2): "Cognizable misconduct includes . . . treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner."

Commentary to Rule 4: "The phrase 'prejudicial to the effective and expeditious administration of the business of the courts' is not subject to precise definition, and subsection (a) provides some specific examples."

"An allegation that a judge treated litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner is also not merits-related."

Code of Conduct for United States Judges

Canon 3(A)(3): "A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity."

Orders

First Circuit

In re Complaint, No. 01-09-90024 (1st Cir. Jud. Council Oct. 19, 2010): The complaint alleged that the subject judge intimidated complainant into forgoing reasonable legal claims. After a careful review of the record, the chief judge determined that the subject judge was not threatening, impatient, or otherwise inappropriate in articulating the judge's opinions on complainant's likelihood of success and on the ethical obligation concomitant to continued pursuit of the action. On petition for review, the complainant asserted that the judge's tone, which could not be appreciated from the written record, evidenced bias. Noting that a judge's tone cannot be the basis for a finding of misconduct absent extraordinary circumstances, the judicial council found no misconduct because the transcript of the lengthy hearing suggested

no impropriety and the judge issued an extensive ruling based exclusively on the record. The chief judge's dismissal of the complaint was therefore affirmed.

In re Complaint, No. 01-09-90019 (1st Cir. Jud. Council Sept. 14, 2010); *In re Complaint*, No. 01-09-90017 (1st Cir. C.J. Aug. 23, 2010): Complainants alleged that the subject judge's rude language and harsh tone reflected bias, but the audio recordings of the hearings conclusively refuted the allegations by demonstrating that the judge was professional, patient, calm, and polite at all times. Because there was no inappropriate language or any other indication of bias, the chief judge dismissed the allegation. On petition for review, the judicial council affirmed the complaint's dismissal and the chief judge's reasoning.

In re Complaint, No. 01-09-90019 (1st Cir. C.J. Sept. 9, 2010); *In re Complaint*, No. 01-09-90019 (1st Cir. C.J. Feb. 2, 2010): Complainant, in his capacity as an attorney and party in bankruptcy, charged the subject judge with improper bias as evidenced by the judge's demeanor in a number of hearings. After a careful review and analysis of the record, the chief judge determined that there was no misconduct, and that the subject judge's conduct was a temperate expression of frustration based on the judge's perception that the complainant continually pursued meritless claims and failed to meet the standards of competence and professionalism expected by the court. The complainant filed a second complaint against the judge, again alleging bias as evidenced by improper tone of voice. The audio recording of the hearing, however, demonstrated that the subject judge's tone was calm and quiet without any indication of animosity or bias in consideration of the issue before the judge. Noting that the judge's tone alone would not be grounds to find misconduct, the chief judge dismissed the allegation as unsupported.

In re Complaint, No. 431 (1st Cir. Jud. Council Oct. 17, 2006); *In re Complaint*, No. 431 (1st Cir. C.J. June 26, 2006) (decided before 2008 Rules were enacted): Complainant alleged that the subject judge had exhibited bias in a hearing by assisting his opponent, while treating complainant with disrespect. But a review of both the transcript and the audio tape of the hearing demonstrated that the judge's questions were posed to clarify factual information needed to a render a decision, not to assist a litigant, and that the judge's conduct and comments were well within the limits of ordinary practice even though those comments included firm directions and a colloquial expression. The judicial council affirmed the chief judge's dismissal of the allegations, noting that a judge's use of a directive manner—deciding who may speak and when they may do so—is typical in a courtroom setting, where a busy judge must try to understand relevant facts.

In re Complaint, No. 416 (1st Cir. C.J. Dec. 7, 2005) (decided before 2008 Rules were enacted): The subject judge was alleged to have used a harsh and threatening tone when explaining that counsel should not expect reimbursement for the evidentiary hearing sought if it proved to be a waste of judicial resources. Acknowledging that it was impossible to verify the precise tone of the proceedings, the chief judge held that where style or tone is at issue, it would take a continuing pattern of seriously abusive behavior to raise any question under the misconduct statute. The chief judge concluded that the allegation would not constitute misconduct under the Act even assuming that the judge had spoken in a harsh or exasperated manner as alleged.

In re Complaint, No. 320 (1st Cir. C.J. Jan. 14, 2002) (decided before 2008 Rules were enacted): The complaint alleged the judge had engaged in a pattern of disdainful and humiliating speech toward the complainant in open court over a period of months. Noting that a certain amount of animated dialogue is to be expected in the courtroom environment, the chief judge acknowledged that verbal attacks by a judge in open court may constitute judicial misconduct. After reviewing the transcript of a hearing that involved the only specific example of verbal impropriety, the chief judge determined that the judge had remained fair and respectful and that the judge's insistence on the submission of honest pleadings in no way constituted misconduct. The allegation of a pattern of verbal abuse was therefore dismissed as lacking sufficient factual foundation to warrant further investigation.

Second Circuit

In re Charge of Judicial Misconduct, No. 02-14-90061 (2d Cir. C.J. Aug. 13, 2015): A court observer filed a complaint alleging that a district judge spoke to her in a "reprimanding and belittling tone" and asked her to leave the courtroom. The chief circuit judge explained that although the judge may have committed an error in excluding the observer, it did not rise to the level of misconduct absent "clear and convincing evidence of willfulness" and the complainant did not provide any evidence of willfulness. As to the judge's tone, even if it was loud or abrasive, this alone would "not rise to the level of cognizable misconduct" under the Act.

In re Charge of Judicial Misconduct, No. 02-10-90025 (2d Cir. C.J. June 29, 2010): The complaint objected to the judge's courtroom manner that allegedly demonstrated favoritism and bias. While treating litigants or attorneys in a demonstrably egregious and hostile manner can constitute misconduct, such behavior must "transcend the expected rough-and-tumble of litigation" in order to "move into the sphere of cognizable misconduct" under the Act. The allegation was dismissed because a review of the transcript of the conference at issue did not evidence hostility, favoritism, or demeaning conduct.

In re Charges of Judicial Misconduct, 465 F.3d 532, 546 (2d Cir. Jud. Council 2006) (decided before 2008 Rules were enacted): An attorney alleged that the subject judge had threatened to have the attorney disbarred if he would not pursue the issue of his client's competence to undergo the death penalty. While threatening to use judicial influence to cause the revocation of a lawyer's license would be improper, a judge's threat to refer a matter to disciplinary authorities would be appropriate in some circumstances. After review of the special committee's report, the council determined that the judge's intent was the latter. The judge's conduct did not constitute misconduct because it was a judge's response to a perceived "breakdown in the adversarial process" and was reasonable.

Third Circuit

In re Complaint of Judicial Misconduct or Disability, No. 03-10-90017 (3d Cir. C.J. Nov. 4, 2010): Complainant alleged that the subject judge's demeanor reflected bias, hostility, anger, frustration, and arrogance, and that it therefore undermined public confidence in the integrity

and impartiality of the court. Based on a review of the record as a whole, the chief judge found no evidence that the subject judge had acted in a hostile, inappropriate, or biased manner, or had engaged in any form of judicial misconduct. Accordingly, the chief judge dismissed the allegations as frivolous and unsupported by any evidence that would raise an inference that misconduct had occurred, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii) and Rule 11(c)(1)(C) and (D).

Fourth Circuit

In the Matter of a Judicial Complaint, No. 04-10-90087 (4th Cir. C.J. Aug. 10, 2010): An allegation that the subject judge treated complainant in a demonstrably egregious and hostile manner was dismissed because the complainant presented no evidence to support it, and the docket likewise revealed no such evidence.

In the Matter of a Judicial Complaint, No. 04-10-90049 (4th Cir. C.J. May 6, 2010): Complainant, a lawyer seeking to practice *pro hac vice* before the court, alleged that a judge had engaged in misconduct by unnecessarily embarrassing him. The judge had asked whether admission was for the current detention hearing only or the entire case, and when complainant answered, the judge told complainant in an allegedly rude and insolent tone that co-counsel was being addressed at this point. The chief judge determined that while the judge's conduct may arguably fall below the standard for judicial demeanor announced in the Code of Conduct, it did not rise to the level of demonstrably egregious and hostile treatment required for a finding of misconduct under the Act.

In the Matter of a Judicial Complaint, No. 04-10-90038 (4th Cir. C.J. April 5, 2010): The complainant, a lawyer, alleged that the subject judge had used language unbecoming to a federal judge by suggesting during a telephonic discovery hearing that counsel were acting like children. Complainant also took issue with the judge's recommendation to the district court. In that recommendation, the judge indicated that, based on the judge's experience, it was clear that complainant was playing games (which the judge determined by reviewing complainant's website). The chief judge found that while the judge did not treat the complainant in a dignified or courteous fashion, arguably falling below the standards of the Code of Conduct, the judge's conduct did not treat complainant in the demonstrably egregious and hostile manner required for misconduct under the Act.

In the Matter of a Judicial Complaint, No. 05-9046 (4th Cir. C.J. Jan. 24, 2006) (decided before 2008 Rules were enacted): An attorney alleged that the subject judge had repeatedly admonished him for improper conduct and for threatening the subject judge, when the attorney was doing nothing wrong. The exchanges identified as improper were instances where the judge had ruled that the attorney could not continue certain lines of questioning and had told the attorney that he must comply with the rulings or his permission to appear would be revoked. Noting that a judge is entitled to have their rulings obeyed and to take appropriate measures to ensure compliance, the chief judge dismissed the complaint for failing to state a claim of misconduct.

Fifth Circuit

In re Complaint of Judicial Misconduct, No. 05-16-90116 (5th Cir. Jud. Council Nov. 18, 2019): A prospective juror filed a complaint alleging that a judge was verbally abusive to him in telephone call. After the juror requested that he be excused from jury service, the judge called the complainant. A special committee was appointed to investigate the complaint. The special committee found reason for concern over the statements that the judge allegedly made, as well as the judge's tone and demeanor. After an initial meeting, two judges from the special committee met with the subject judge in person to convey their concerns. The judge then acknowledged that the judge should not have spoken harshly to the complainant, apologized, and agreed to modify the behavior. The complaint was concluded based on corrective action.

No. 06-05-351-0043 (5th Cir. C.J. July 10, 2006) (decided before 2008 Rules were enacted): A lawyer alleged that the subject judge insulted his client by incorrectly referring to the man by his wife's last name, by admonishing him for rolling his eyes, and by warning him that he would be escorted from the courtroom by the U.S. Marshal if such behavior continued. The lawyer charged that the judge also made mean-spirited comments during a hearing. Noting that the two sets of comments appeared to be attempts to control courtroom conduct, the chief judge dismissed the allegations because such comments, even if construed as expressions of impatience, dissatisfaction, annoyance or anger, are not evidence of misconduct.

No. 05-05-372-0022 (5th Cir. C.J. Dec. 30, 2004) (decided before 2008 Rules were enacted): Complainant alleged that the subject judge made inappropriately derogatory remarks. The allegation was dismissed because the remarks apparently manifested the judge's exasperation at the slow progress of the case and the judge's perceptions, developed in the course of the proceedings and supported by transcripts, that the debtor was less than respectful of the court's authority and not credible. Noting that it is always better for a judge to remain temperate under such circumstances, the chief judge determined the remarks at issue did not support a claim of bias or misconduct.

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-10-90060 (7th Cir. C.J. Oct. 1, 2010): The complaint alleged that the subject judge had committed misconduct by "treating litigants in a demonstrably egregious and hostile manner." Complainant offered no proof of the judge's conduct, however, and the transcript of the proceeding in question demonstrated that the judge had been civil, had permitted complainant to speak at length, and had provided complainant with helpful (and legally correct) advice. Because nothing remotely "hostile" or "egregious" had occurred at the hearing, the charge was dismissed as conclusively refuted by objective evidence.

In re Complaint Against a Judicial Officer, No. 07-10-90041 (7th Cir. C.J. June 22, 2010): Complainant, the plaintiff in a civil suit, contended that the subject judge had defamed him by labeling him as "frivolous" and "moot." Noting that complainant had misunderstood the

legal significance of the words and that the judge did not say that *complainant* was frivolous or moot but rather that particular motions were, the chief judge concluded that a layperson should not feel insulted when a judge determines that a legal filing is frivolous (meaning obviously wrong) or moot (meaning it no longer requires decision).

Eighth Circuit

In re Complaint of John Doe, No. 08-19-90024 (8th Cir. C.J. June 19, 2019): A non-litigant submitted a complaint alleging that a judge made "derogatory" and "partisan-charged" remarks against two other circuit judges and a district judge in a dissenting opinion. After reviewing the statements, the chief circuit judge concluded that they were "relevant to the case at hand" and were therefore presumptively merits-related and subject to dismissal.

In re Complaint of John Doe, No. 08-10-90004 (8th Cir. C.J. Mar. 31, 2010): The complaint alleged the subject judge was rude and intimidating during a telephonic scheduling conference and did not allow meaningful participation. The record, however, demonstrated that the objection complainant wished to make was not relevant. The chief judge therefore determined that it was not misconduct for the subject judge to manage the conference by prohibiting irrelevant arguments. Because complainant failed to cite any specific improper statements by the judge, there was no basis to conclude that the judge had engaged in rude and intimidating behavior. The allegations were dismissed as lacking sufficient evidence to raise an inference that misconduct has occurred.

In re Complaint of John Doe, No. 05-011 (8th Cir. C.J. May 31, 2005) (decided before 2008 Rules were enacted): The subject judge lost his temper as a result of his perception that a criminal defendant had engaged in repeated, unreasonable, dilatory tactics. A review of the docket revealed a manipulative defendant and a highly patient court. The hearing at issue was the fourth time the defendant had appeared before the judge for a scheduled change of plea without being prepared to plead. While recognizing that the subject judge's statement that the defendant should be "strung up" was inappropriate, the chief judge concluded that a single loss of temper during court proceedings did not interfere with the effective and expeditious administration of the business of the courts.

In re Complaint of John Doe, No. 04-031 (8th Cir. C.J. Aug. 6, 2004) (decided before 2008 Rules were enacted): The complainant took issue with the subject judge's deportment during oral argument. The chief judge concluded that exhibiting impatience with counsel who were less than responsive to questions during oral argument did not constitute actionable misconduct.

Ninth Circuit

In re Charge of Judicial Misconduct, Nos. 10-90025 and 10-90073 (9th Cir. C.J. Oct. 18, 2010): Complainant alleged that the judge showed contempt for him and slandered him by finding his case to be "frivolous." A review of the judge's dismissal order, however, demonstrated that it was neither slanderous nor contemptuous. Because complainant failed to

provide any objectively verifiable proof in support of his allegations, the complaint was dismissed for insufficient evidence that misconduct occurred.

In re Charge of Judicial Misconduct, No. 07-89108 (9th Cir. C.J. June 9, 2008) (decided before 2008 Rules were enacted): Complainants alleged that the judge's behavior at a status conference and the judge's unfavorable rulings exhibited bias and prejudice against them due to their pro se or socioeconomic status, although complainants failed to include any objectively verifiable proof (for example, names of witnesses or recorded documents) supporting the allegations. Because there was insufficient evidence to raise an inference that misconduct had occurred, the charges were dismissed.

In re Charge of Judicial Misconduct, No. 06-89047 (9th Cir. C.J. Dec. 1, 2006) (decided before 2008 Rules were enacted): An attorney complained about the subject judge's improper demeanor during trial and about a separate comment the judge made concerning the attorney's father. A review of the trial transcripts demonstrated that the judge's statement regarding an attorney's cell phone being set to vibrate was not obviously improper innuendo and that an off-hand comment about the need to settle certain issues did not rise to the level of misconduct. With regard to the comment about the attorney's father, the subject judge acknowledged that the comment was inappropriate, apologized, and promised to keep the attorney's perception of the judge's rudeness in mind. The portion of the complaint that addressed the comment about the attorney's father was concluded for corrective action.

In re Charge of Judicial Misconduct, No. 83-8037 (9th Cir. C.J. 1986) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge had behaved intemperately at a hearing on a motion to disqualify. Recognizing the importance of the appearance as well as the substance of judicial temperament to the effective performance of the judicial function, the subject judge promised to avoid such intemperate conduct in the future. The allegation was therefore concluded on the basis that corrective action had been taken.

Tenth Circuit

In re Charge of Judicial Misconduct, No. 10-10-90003 (10th Cir. C.J. Nov. 8, 2010): The complaint alleged that the subject judge, in a hearing on complainant's motion for new counsel, had (1) yelled at or intimidated complainant and counsel; (2) told complainant to plead guilty; and (3) threatened complainant with a life sentence unless complainant would plead guilty. A review of the relevant transcripts, however, demonstrated no support for these allegations. While the judge criticized complainant's counsel for not being prepared at a later sentencing hearing, the transcript of that hearing did not support claims of intimidation or threats by the judge. The chief judge therefore concluded that complainant's claims of mistreatment by the judge were unsupported, and that they failed to give rise to an inference that misconduct may have occurred.

In re Charge of Judicial Misconduct, No. 10-10-90042 (10th Cir. C.J. Oct. 20, 2010): Complainant contended that the subject judge's order directing complainant to cease filing pleadings, motions, or other papers in a long-closed case constituted misconduct because it was "demonstrably egregious and hostile" treatment of a litigant. The complaint was

dismissed because the judge's mere entry of an order precluding complainant from filing further documents in a closed case does not constitute misconduct.

In re Charge of Judicial Misconduct, No. 10-10-90016 (10th Cir. C.J. July 26, 2010): Complainant contended that the language of the subject judge's rulings reflected bias and hostile treatment. A review of the court's rulings in the underlying case, however, revealed no language factually supporting complainant's allegations. Noting that allegations of bias and hostile treatment can state valid claims for misconduct even when related to a judge's ruling, the chief judge concluded that the completely unsupported claims failed for lack of sufficient evidence to raise an inference that misconduct had occurred.

Eleventh Circuit

In re Matter of a Complaint, No. 04-0014 (11th Cir. Jud. Council July 19, 2004) (decided before 2008 Rules were enacted): After investigation, the special committee recommended dismissal of a complaint alleging that the subject judge had used hostile language in cautioning counsel about possible negative legal consequences of the client's actions. The special committee found that the language at issue was not impious, ribald, or biased and was not outside the acceptable range given the circumstances and context.

Federal Circuit

In re Complaint of Judicial Misconduct, No. 37 (Ct. Fed. Cl. C.J. Jan. 7, 2002) (decided before 2008 Rules were enacted): Complainant charged that the subject judge had displayed inappropriate "rank incivility" by rejecting a medical opinion as not making sense neurologically and as lacking logic and reputable medical support. Noting that the language used in assessing and rejecting the expert testimony was not extreme and was within the realm of judicial discretion, the chief judge dismissed the complaint as not in conformity with the Act.

ADDITIONAL RESOURCES

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 2 at 146: "An allegation that a judge was rude to counsel or others while on the bench is not merits-related."

Committee Standards for Assessing Compliance with the Act, Standard 3 at 147: "It cannot always be clear what degree of alleged discourtesy transcends the expected rough-and-tumble of litigation and moves into the sphere of cognizable misconduct. These appraisals have an 'I know it when I see it' quality. Again, when in doubt—when a reasonable observer would think it possible (not 50+%, but 20%) that the alleged discourtesy was serious enough—the researchers should treat the allegation as cognizable."

Related Case Law

Supreme Court

Liteky v. United States, 510 U.S. 540, 555–56 (1994): Considering whether judicial rulings and statements that allegedly displayed impatience, disregard, and animosity might require recusal, the Supreme Court determined that judicial rulings alone almost never constitute a valid basis for a finding of bias. Turning to an examination of judicial remarks as possible evidence of bias, the Court asserted:

> "[O]pinions formed by a judge based on facts introduced or events occurring during proceedings do not constitute a valid basis for a finding of bias unless they reveal a high degree of favoritism or antagonism that would make fair judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible."
>
> "*Not* establishing bias or partiality, however, are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women, even after having been confirmed as federal judges, sometimes display. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune."

See also Misconduct—Abusive Conduct or Hostile Work Environment; Bias and Impartiality.

MISCONDUCT—EX PARTE COMMUNICATIONS

Improper ex parte contact with parties or counsel for one side in a case can constitute cognizable misconduct.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(1)(C): "Cognizable misconduct includes . . . engaging in improper ex parte communications with parties or counsel for one side in a case."

Rule 4(b)(1): "Cognizable misconduct does not include an allegation that calls into question the correctness of a judge's ruling, including a failure to recuse. If the decision or ruling is alleged to be the result of an improper motive, e.g., a bribe, ex parte contact, racial or ethnic bias, or improper conduct in rendering a decision or ruling, such as personally derogatory remarks irrelevant to the issues, the complaint is not cognizable to the extent that it calls into question the merits of the decision."

Code of Conduct for United States Judges

Canon 3(A)(4): "Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

Orders

Judicial Conference

Memorandum of Decision, No. 08-02 (U.S. Jud. Conf. Jan. 14, 2008): A judicial council publicly reprimanded a judge, *inter alia*, finding that the judge had committed misconduct by withdrawing the reference of a bankruptcy matter from bankruptcy court and ordering a stay of judgment based on improper ex parte contact. The JC&D Committee found that the issuing of a public reprimand was within the Judicial Council's discretion, especially where the subject judge has persistently denied any impropriety.

Fourth Circuit

DECIDED UNDER PREVIOUS RULES

In the Matter of a Judicial Complaint, No. 05-9047 (4th Cir. Jud. Council June 7, 2007) (decided before 2008 Rules were enacted): A special committee was appointed to investigate misconduct charges against a trial judge who had the courtroom deputy question a jury, an exchange that was not shared with counsel, creating confusion over whether a verdict had been returned. The judge then had ex parte contact with the prosecution after declaring a mistrial. After distinguishing legal error from judicial misconduct, the judicial council determined that while aspects of the trial may have been erroneously handled, the evidence failed to establish that any judicial misconduct occurred. A dissent was issued on the basis that the ex parte contact constituted misconduct and warranted a private reprimand.

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 06-22-90026 (6th Cir. C.J. Nov. 3, 2022):
A complaint alleged, among other things, that the subject judge engaged in improper ex parte communications in a civil matter that may have given opposing counsel an advantage in the case. The subject judge's judicial assistant directed the complainant and opposing counsel "to file short, concise, and double-spaced ex parte statements via cm/ecf detailing discovery issue[s]" before a status conference. The parties filed the statements and the judge presided over the status conference. While no one complained about this at the conference, the docket shows that at least one party's substantive statement was filed ex parte. The subject judge took voluntary corrective action that acknowledged and remedied the problems raised by the complaint. Accordingly, that claim was dismissed based on voluntary corrective action under 28 U.S.C. § 352(b).

Seventh Circuit

In re Complaint Against a Judge, No. 07-22-90030 (7th Cir. C.J. June 28, 2022):
A complaint alleged that a judge was a close friend of a defendant in a case before the judge

and that the judge had engaged in ex parte communications with the defendant during the case. The chief judge conducted a limited inquiry and invited the judge to respond to the allegations. The judge explained that there was a friendship with the defendant in the mid-1990s but that the two had not been close since. The judge acknowledged two email exchanges that did not bear on the case, although the judge acknowledged that sending the email during a pending case may have been an error in judgment. Based on the limited inquiry, the chief circuit judge dismissed that complaint on the basis that the allegations were conclusively refuted by the evidence, pursuant to 28 U.S.C. § 352(b)(1)(B). In dismissing the complaint, the chief judge explained that all but one of the communications happened before the case was filed and that the single communication while the case was ongoing was "unrelated to the case or any issues presented in the case," even if the communication "may have been better left unwritten but alone does not amount to judicial misconduct."

In re Complaints Against District Judge Colin S. Bruce, Nos. 07-18-90053, 07-18-90067 (7th Cir. Jud. Council May 14, 2019): A special committee was appointed to investigate a complaint identified by the chief circuit judge and a subsequent complaint filed by the federal public defender in the subject judge's district. The complaints concerned allegations that the subject judge engaged in improper communications with the U.S. Attorney's Office, where he had worked before becoming a judge. The improper ex parte communications were publicized by the *Illinois Times* and alleged that the subject judge had exchanged emails about a criminal trial before the judge with a prosecutor in the U.S. Attorney's Office while the trial was ongoing. The special committee found that the subject judge had frequent ex parte contacts with the U.S. Attorney's Office after taking the bench in 2013 and that these communications sometimes pertained to criminal matters before him. The special committee found no evidence that the communications impacted any of the subject judge's rulings or advantaged any party. The subject judge adopted new measures to limit ex parte communications. The special committee found that the majority of the ex parte communications did not require the exclusion of defense counsel—they were a matter of convenience or habit. Accordingly, the communications violated Canon 3 and negatively impacted the appearance of propriety and fairness. Based on the special committee's findings and recommendations, the Judicial Council: 1) publicly reprimanded the subject judge, 2) kept him removed from cases involving the U.S. Attorney's Office for a year, and 3) required him to watch certain ethics training provided by the Federal Judicial Center (FJC).

Eighth Circuit

In re Complaint of John Doe, 08-20-90054 (8th Cir. C.J. July 19, 2022): A complaint alleged that the subject judge was biased in favor of the judge's former client and former law partner, who was serving as defense counsel in a case before the subject judge, and may have had ex parte communications with defense counsel. In response to the complaint, the subject judge explained that although the judge worked with defense counsel, they did not socialize together and the judge did not consider him a close personal friend, and that the judge had not had any type of ex parte communications with the defense counsel or his staff. Accordingly, the complaint was dismissed as lacking sufficient evidence to raise an inference that misconduct had occurred, pursuant to 28 U.S.C. § 352(b)(1)(A)(iii).

Tenth Circuit

In re Charge of Judicial Misconduct, Nos. 10-10-90035 through 10-10-90037 (10th Cir. C.J. Nov. 10, 2010): A complaint alleged, among other things, that a subject judge engaged in improper ex parte communications with opposing counsel, based on the judge's statement that it had "come to the Court's attention" that the complainant had acted belligerently towards court staff and made inaccurate statements to defense counsel about the status of proceedings. The chief circuit judge found that the subject judge's statement did not give rise to a "reasonable inference that the judge had improper communications with opposing counsel." Accordingly, the claim was dismissed pursuant to Rule 11(c)(1)(D).

MISCONDUCT—PARTISAN POLITICAL ACTIVITY

A judge should not participate in partisan political activity, which includes endorsing political candidates, fundraising or contributing to political campaigns or organizations, and making partisan political statements.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(1)(D): "Cognizable misconduct includes . . . engaging in partisan political activity or making inappropriately partisan statements."

Commentary to Rule 4: "The phrase 'prejudicial to the effective and expeditious administration of the business of the courts' is not subject to precise definition, and subsection (a) provides some specific examples."

Code of Conduct for United States Judges

Canon 5(A): "A judge should not… make speeches for a political organization or candidate, or publicly endorse or oppose a candidate for public office; or solicit funds for, pay an assessment to, or make a contribution to a political organization or candidate, or attend or purchase a ticket for a dinner or other event sponsored by a political organization or candidate."

Orders

Second Circuit

In re Charges of Judicial Misconduct, 404 F.3d 688, 695 (2d Cir. Jud. Council 2005) (decided before 2008 Rules were enacted): A special committee investigated complaints that a judge committed misconduct by making partisan political remarks at an American Constitution Society event when they compared the president to Hitler and Mussolini and advocated that he not be reelected. The Judicial Council found that the subject judge had engaged in misconduct and concluded the proceedings based on the subject judge's apology and the public dissemination of an admonishment from the chief circuit judge. The judge took corrective action by (1) recognizing that, in a speech they gave at a convention of the American Constitution Society, they had violated the Code of Conduct for United States Judges with their remarks advocating that the president of the United States not be reelected; (2) apologizing for the remarks in question; and (3) asserting that they had "every intention

of seeing to it that such an episode [did] not happen again." The Act's remedial purposes were served by the judge's apology to the chief judge, the chief judge's memorandum in reply, the public release of both items, and the judicial council's concurrence with the memorandum's admonition. In combination, "[t]hese actions constitute a sufficient sanction and appropriate corrective action." *Id.* at 696.

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 06-16-90007 (6th Cir. C.J. Sept. 2, 2016):
A complaint was filed after the subject judge wrote a letter to the editor of a local newspaper endorsing a candidate for county prosecutor. As part of a limited inquiry, the chief circuit judge asked the subject judge to respond to the complaint. The subject judge admitted that they had unintentionally violated the Code by writing the letter. As the letter to the editor could only be interpreted as an endorsement of a political candidate in contravention of Canon 5(C), the chief circuit judge found that the subject judge had engaged in misconduct by engaging in partisan political activity. The chief circuit judge ultimately concluded the complaint based on voluntary corrective action, due to the subject judge's submission of a letter of retraction to the newspaper, apology, and assurance that the conduct would not happen again.

Seventh Circuit

In re Complaint of Judicial Misconduct, Nos. 07-20-90044 through 07-20-90046 (7th Cir. Jud. Council June 22, 2020): Three complaints were filed after the subject judge published a law review article that contained portions that could be understood as an attack on the integrity of the chief justice. A special committee was appointed to investigate. The Judicial Council explained that while judges are permitted, and even encouraged, to write and speak on legal topics, these activities should not detract from the dignity of office. Judges should "write and speak in ways that will not interfere with their work as judges" and "should not interfere with public perceptions that the judges will approach the cases before them fairly and impartially." Order at 7. The Judicial Council found that the "vast majority" of the subject judge's article pertained to substantive criticism of Supreme Court decisions, which are within the boundaries of appropriate discourse. However, there were a few sentences that could be understood as an attack on the integrity of the chief justice and on Republican party positions that could call into question the subject judge's impartiality on matters with partisan or ideological concerns. The Judicial Council found that those portions of the article "do not promote public confidence in the integrity and impartiality of the judiciary" even if not addressed by specific rules of judicial conduct. Order at 9. The Judicial Council found that the problematic portions of the article amounted to misconduct, publicly reprimanded the subject judge, and directed the subject judge to publicly acknowledge that parts of the article went too far and to disavow any intention to malign the justices of the Supreme Court.

Ninth Circuit

In re Complaint of Judicial Misconduct, No. 10-90016 (9th Cir. C.J. Feb. 2, 2011):
A complaint alleged that the subject judge committed misconduct by giving a speech after

9/11 where the judge described having "a sickening feeling in [the judge's] stomach about what might happen to race relations and religious tolerance" and that the "[c]riminalization of immigration laws" constituted "[i]nstitutionalized racism." The complaint also alleged that, in another speech, the judge "criticized [a senator's] work in trying to investigate campaign finance controversies." In dismissing the complaint, the chief circuit judge noted that a "judge does not check his First Amendment rights at the courthouse door." Order at 1. Noting that the Code encourages judges to engage in law-related activities, including speeches on current events, the chief circuit judge found that the remarks fell within the type of speech protected by the Code. As to the comments about the senator, the chief circuit judge reasoned that a joke about someone running for office is not necessarily endorsement of or opposition to the candidate. The order noted that the joke was not "racist, sexist, or otherwise invidious" nor was it reported in the press or the subject of "significant public comment." Order at 2–3. Without more, the chief circuit judge found that the complaint must be dismissed because there was no evidence of misconduct.

D.C. Circuit

In the Matter of a Charge of Judicial Misconduct or Disability, No. DC-21-90051 (D.C. Cir. C.J. Nov. 16, 2021); *In the Matter of a Charge of Judicial Misconduct or Disability*, No. DC-21-90051 (D.C. Cir. Jud. Council Feb. 14, 2022): A complaint alleged that the subject judge's service as a member of the D.C. Judicial Nomination Commission ("Commission") was misconduct because, *inter alia*, it was improper political activity and caused the subject judge to have improper influence over the lawyers appearing before the judge. The statute creating the Commission requires an active or retired judge from the D.C. district court to serve on the Commission. After the complaint was filed, the subject judge sought an advisory opinion from the Codes Committee. A majority of the Codes Committee concluded that the judge's service was permissible and did not constitute impermissible political activity. In light of the Codes Committee's opinion, the chief circuit judge dismissed the complaint on the ground that the conduct complained of did not constitute misconduct. The complainant filed a petition for review. A majority of the Judicial Council affirmed the chief judge's dismissal of the complaint, while two council members dissented and one member concurred in the denial of the petition and joined part of the dissent. The dissent would have found that, notwithstanding the Codes Committee's opinion, the subject judge's service on the Commission constitutes impermissible political activity, would not impose a sanction on the subject judge, and would only conclude the proceeding if the judge would take corrective action by resigning from the Commission or ceasing to hear cases while serving on it.

MISCONDUCT—PRE-APPOINTMENT CONDUCT

The conduct of a person before he or she is appointed to a federal judgeship is generally not "prejudicial to the effective and expeditious administration of the business of the courts" and therefore would not be cognizable under the Judicial Conduct and Disability Act. While the principle that pre-appointment behavior can never be actionable as judicial misconduct has determined the outcome of some complaints, there is a contrary view: the Breyer Committee, positing that the statutory standard does not preclude allegations concerning such conduct, observed that the question whether pre-appointment conduct can be cognizable under the Act has not been conclusively resolved within the judiciary. To illustrate that such conduct may be prejudicial to the current administration of court business, the Breyer Committee cited an "extreme case" involving a well-publicized allegation (with some factual support) that a judge had committed a felony while in private practice.

AUTHORITIES

Judicial Conduct and Disability Act

> 28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

> Rule 4(a)): "Cognizable misconduct is conduct prejudicial to the effective and expeditious administration of the business of the courts."
>
> Commentary to Rule 4: "The phrase 'prejudicial to the effective and expeditious administration of the business of the courts' is not subject to precise definition."
>
> Rule 4(a)(7): "Cognizable misconduct includes conduct occurring outside the performance of official duties if the conduct is reasonably likely to have a prejudicial effect on the administration of the business of the courts, including a substantial and widespread lowering of public confidence in the courts among reasonable people."
>
> Commentary to Rule 4(a)(7): "[A]n allegation can meet the statutory standard for misconduct even though the judge's alleged conduct did not occur in the course of the performance of official duties. Furthermore, some conduct specified in Rule 4(a)(1) through 4(a)(6), or not specified within these Rules, might constitute misconduct occurring outside the performance of official duties. The Code of Conduct for United States Judges expressly covers a wide range of extra-official activities, and some of these activities may constitute misconduct under the Act and these Rules. For example, allegations that a judge solicited funds for a charity or other organization or participated in a partisan political event are cognizable under the Act even though they did not occur in the course of the performance of the judge's official duties."

Orders

Second Circuit

In re Charge of Judicial Misconduct, Nos. 10-90014 and 10-90015 (2d Cir. C.J. Nov. 29, 2010): The complaint alleged that the subject judge deliberately suppressed evidence in the judge's former capacity as a federal prosecutor. The chief judge described the allegations as entirely speculative and unsupported, and also determined that any actions by the judge in their former capacity as a federal prosecutor would not constitute judicial misconduct under the Act. The complaint was therefore dismissed, pursuant to 28 U.S.C. § 352(b)(1)(A)(i) and Rule 11(c)(1)(A), as alleging conduct that, even if it occurred, was not prejudicial to the effective and expeditious administration of the business of the courts. [*Editor's Note:* The Breyer Committee Report acknowledges a "contrary view" that "pre-judicial conduct can be prejudicial to the current administration of the business of the courts . . . so the statutory standard does not preclude allegations concerning pre-judicial conduct." Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116, 241 (Jud. Conduct & Disability Act Study Comm. 2006).]

Third Circuit

In re Complaint of Judicial Misconduct or Disability, Nos. 04-35, 05-16 (3d Cir. C.J. Aug. 2, 2005) (decided before 2008 Rules were enacted): Allegations that the subject judge knowingly and willingly made false statements during their Senate confirmation hearings were dismissed because the conduct occurred before the subject judge became a member of the federal judiciary and therefore was not cognizable under the Act, and because the complainant presented no evidence to support the allegations. [*Editor's Note:* The Breyer Committee Report acknowledges a "contrary view" that "pre-judicial conduct can be prejudicial to the current administration of the business of the courts . . . so the statutory standard does not preclude allegations concerning pre-judicial conduct." Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116, 241 (Jud. Conduct & Disability Act Study Comm. 2006).]

Sixth Circuit

In re Complaint of Judicial Misconduct, No. 06-15-90029 (6th C.J. June 29, 2015): Allegations concerning a subject judge's behavior as a state court judge were not cognizable because misconduct proceedings under the Act only cover actions or conduct as a federal judge. [*Editor's Note:* The Breyer Committee Report acknowledges a "contrary view" that "pre-judicial conduct can be prejudicial to the current administration of the business of the courts . . . so the statutory standard does not preclude allegations concerning pre-judicial conduct." Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116, 241 (Jud. Conduct & Disability Act Study Comm. 2006).]

In re Complaint of Judicial Misconduct, No. 06-6-351-02 (6th Cir. Jud. Council May 1, 2006) (decided before 2008 Rules were enacted): The complaint alleged that the subject judge may have secured their nomination to the federal bench by making campaign

contributions to the judge's two home-state Senators. Citing a lack of authority that would give the judicial council jurisdiction over the conduct of an individual prior to that person's appointment to the federal bench, the chief judge dismissed the complaint for lack of jurisdiction. [*Editor's Note:* The Breyer Committee Report acknowledges a "contrary view" that "pre-judicial conduct can be prejudicial to the current administration of the business of the courts . . . so the statutory standard does not preclude allegations concerning pre-judicial conduct." Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116, 241 (Jud. Conduct & Disability Act Study Comm. 2006).]

Seventh Circuit

In re Complaint Against a Judicial Officer, No. 07-11-90031 (7th Cir. C.J. June 6, 2011): A complaint alleged that twenty years previously, the subject judge, as a state judge, had improperly limited the receipt of evidence that would have shown wrongdoing by public officials. The chief circuit judge dismissed the complaint as directly related to the merits of a decision or procedural ruling, and explained that the merits bar "applies to judicial decisions taken before appointment to the federal judiciary as well as to actions taken afterward."

In re Complaint Against a Judicial Officer, No. 07-7-352-47 (7th Cir. C.J. Nov. 13, 2007) (decided before 2008 Rules were enacted): A complaint alleging that forty years prior, when complainant was a child, the subject judge approached complainant without the permission of complainant's parents was dismissed as unrelated to the business of the federal courts.

Ninth Circuit

In re Charge of Judicial Misconduct, Nos. 09-90269 and 10-90043 (9th Cir. C.J. Oct. 21, 2010): Citing 28 U.S.C. § 351(a) and (d)(1), as well as Rules 4 and 11(c)(1)(G) of the 2008 Rules, the chief judge dismissed allegations that the subject judge committed misconduct before joining the federal bench as not cognizable under the judicial misconduct procedures. [*Editor's Note:* The Breyer Committee Report acknowledges a "contrary view" that "pre-judicial conduct can be prejudicial to the current administration of the business of the courts . . . so the statutory standard does not preclude allegations concerning pre-judicial conduct." Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116, 241 (Jud. Conduct & Disability Act Study Comm. 2006).]

In re Charge of Judicial Misconduct, No. 89-80031 (9th Cir. C.J. Oct. 5, 1989) (decided before 2008 Rules were enacted): The complaint alleged the subject judge improperly took possession of a trial exhibit while a state judge. Noting that judicial misconduct procedures focus on correction of conditions that interfere with the administration of justice in federal courts, the chief judge concluded that the judge's preappointment conduct had no bearing on the effective and efficient administration of the federal courts and was therefore "beyond the administrative jurisdiction of the chief judge and the circuit judicial council." [*Editor's Note:* The Breyer Committee Report acknowledges a "contrary view" that "pre-judicial conduct can be prejudicial to the current administration of the business of the courts . . . so the statutory standard does not preclude allegations concerning pre-judicial conduct."

Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116, 241 (Jud. Conduct & Disability Act Study Comm. 2006).]

In re Charge of Judicial Misconduct, No. 83-8037 (9th Cir. C.J. Mar. 5, 1986) (decided before 2008 Rules were enacted): After analyzing the legislative history of the Judicial Conduct and Disability Act of 1980, the chief judge concluded that the House intended the legislation to address only such conduct of judicial officers as relates to the "effective functioning of the judge's court." The chief judge determined that preappointment conduct is unrelated to the judge's judicial role and therefore does not come within the scope of the statute, and that complaints based on such conduct should be dismissed as not in conformity with the Judicial Conduct and Disability Act. The chief judge also reasoned that allowing the judiciary to decide on the fitness of a judge based on his or her preappointment conduct would violate the separation of powers by encroaching upon the role of the president, with the advice and consent of the Senate, to nominate federal judges. [*Editor's Note:* The Breyer Committee Report acknowledges a "contrary view" that "pre-judicial conduct can be prejudicial to the current administration of the business of the courts . . . so the statutory standard does not preclude allegations concerning pre-judicial conduct." Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice, 239 F.R.D. 116, 241 (Jud. Conduct & Disability Act Study Comm. 2006).]

Tenth Circuit

In re Complaint under the Judicial Conduct and Disability Act, Nos. 10-16-90009 & 10-16-90017 (10th Cir. Jud. Council July 28, 2017), *aff'd* C.C.D. No. 17-02 (U.S. Jud. Conf. Nov. 30, 2017): Complaints alleged that the subject judge had an improper sexual relationship with a young female witness during a trial when the judge was a federal prosecutor seventeen years earlier. A special committee was appointed to investigate. The Judicial Council concluded that the pre-appointment conduct does not fall within the scope of the Act and that the judge had no continuing duty to disclose the conduct after becoming a judge. The Judicial Council reasoned that 28 U.S.C. § 351(a) excludes "any complaint aimed at a judge's conduct before he or she became a federal judicial office." Although the Breyer Committee's Report expressed a contrary view, the Judicial Council found that "both the accumulation of circuit precedents and the Code of Conduct support the conclusion that pre-appointment conduct falls outside the scope of the Act." The Judicial Council noted the importance of ensuring that governing bodies with "clear jurisdiction" are aware of the complaint, and requested that the JC&D Committee forward a copy of the Judicial Council's order to the House Judiciary Committee, the House Oversight Committee, the Senate Judiciary Committee, and the Senate Finance Committee.

Federal Circuit

In re Complaint of Judicial Misconduct, No. 34 (Fed. Cir. C.J. May 4, 1990) (decided before 2008 Rules were enacted): Complainant alleged that the subject judge facilitated and attended a meeting in connection with a custody suit before taking the bench, and further alleged, relying on a conjectural interpretation of this conduct, that the judge later perjured themself. Noting that the Act is only concerned with the conduct of judges, the chief judge

dismissed the allegations of facilitating and attending the meeting because that conduct occurred before the subject judge became a judge and was not improper in and of itself. The charge of perjury was dismissed as frivolous because it was conjectural and without support of any kind.

ADDITIONAL RESOURCES

Breyer Committee Report

Committee Standards for Assessing Compliance with the Act, Standard 3 at 147: "More common are complaints alleging conduct that occurred before the judge went on the federal bench. Whether such an allegation can constitute misconduct under the statutory standard is a question the judiciary does not appear to have resolved conclusively. It would seem that at least some chief judges believe that the Act simply does not extend to pre-judicial conduct. A contrary view is that pre-judicial conduct can be prejudicial to the current administration of the business of the courts (e.g., the extreme case of a well-publicized allegation with some factual support that a judge had committed a felony while in private practice), so the statutory standard does not preclude allegations concerning pre-judicial conduct."

Impeachment of G. Thomas Porteous, Jr.

Although not a proceeding under the Judicial Conduct and Disability Act, the Senate's conviction and removal from office on December 8, 2010, of then-judge G. Thomas Porteous, Jr., was on four Articles of Impeachment, at http://www.gpo.gov/fdsys/pkg/BILLS-111hres1031rds/pdf/BILLS-111hres1031rds.pdf, that had been predicated in part on the judge's pre-appointment conduct. (Impeachment prosecutors had argued that if the relevant pre-bench conduct had been disclosed, Porteous could not have been confirmed as a judge.)

Law Review Articles

Richard L. Marcus, *Who Should Discipline Federal Judges, And How?*, 149 F.R.D. 375, 402, 406–07 (1993): Examines the standard, "conduct prejudicial to the effective and expeditious administration of the business of the courts," and notes the distinction between actions as a judge and actions as a private citizen. The article cites occasions where judicial misconduct procedures have addressed pre-appointment conduct of subject judges.

Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. Pa. L. Rev. 25, 73–75 (1993): Discusses two instances of a subject judge's alleged preappointment perjury and two other instances of conduct that occurred before a subject judge's appointment to the federal bench.

See also Misconduct—Conduct Occurring Outside Official Duties.

MISCONDUCT—SEXUAL HARASSMENT

Judicial misconduct includes engaging in unwanted, offensive or abusive sexual conduct, including sexual harassment or assault.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(a): "Any person alleging that a judge has engaged in conduct prejudicial to the effective and expeditious administration of the business of the courts" may file a written complaint.

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 4(a)(2)(A): "Cognizable misconduct includes . . . engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault."

Commentary to Rule 4: "[U]nwanted, offensive, or abusive sexual conduct by a judge, including sexual harassment or assault, constitutes cognizable misconduct. . . . [A]nyone can be a victim of unwanted, offensive, or abusive sexual conduct, regardless of their sex and of the sex of the judge engaging in the misconduct."

Code of Conduct for United States Judges

Canon 3: "The duties of judicial office take precedence over all other activities. The judge should perform those duties with respect for others, and should not engage in behavior that is harassing, abusive, prejudiced, or biased."

Canon 3(B)(4): "A judge should practice civility, by being patient, dignified, respectful, and courteous, in dealings with court personnel, including chambers staff. A judge should not engage in any form of harassment of court personnel. A judge should not retaliate against those who report misconduct. A judge should hold court personnel under the judge's direction to similar standards."

Commentary to Canon 3(B)(4): "Under this Canon, harassment encompasses a range of conduct having no legitimate role in the workplace, including harassment that constitutes discrimination on impermissible grounds and other abusive, oppressive, or inappropriate conduct directed at judicial employees or others. *See* Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 4(a)(2) (providing that "cognizable misconduct includes: (A) engaging in unwanted, offensive, or abusive sexual conduct, including sexual harassment or assault; (B) treating litigants, attorneys, judicial employees, or others in a demonstrably egregious and hostile manner; or (C) creating a hostile work environment for judicial employees") and Rule 4(a)(3) (providing that "cognizable misconduct includes intentional discrimination on the basis of race, color, sex, gender, gender identity, pregnancy, sexual orientation, religion, national origin, age, or disability")."

Orders

Judicial Conference

In re Complaints Under the Judicial Conduct and Disability Act, No. 19-02, at 9 (U.S. Jud. Conf. Mar. 3, 2020): While the Committee was reviewing a Judicial Council's order publicly reprimanding the subject judge for sexually harassing judiciary employees, the subject judge resigned from office. Based on the judge's resignation, the Committee was required to conclude the proceedings. Because the Committee's jurisdiction extended to April 1, the day the resignation would become effective, the Committee thoroughly detailed the history of the complaint and noted that the conduct was serious enough to warrant review by the Committee to determine whether the judge should be referred to Congress for impeachment. Although a judicial council must certify a matter to the Judicial Conference when it determines that a judge "may have engaged in conduct which might constitute one or more grounds for impeachment," 28 U.S.C. § 354(b)(2)(A), the judicial council is not required to reach a definitive conclusion about whether the conduct meets the standard for impeachment, as that determination is left to Congress.

In re Complaint of Judicial Misconduct, No. 16-01 (U.S. Jud. Conf. July 8, 2016): A complainant filed a petition for review arguing that a Judicial Council's sanction of the subject judge was too lenient. The JC&D Committee found that because the complainant's petition for review included the names of individuals who allegedly witnessed other instances of the subject judge's harassment of women in the courthouse, it raised the question of whether there was a pattern and practice of behavior. Accordingly, pursuant to Rule 21(d), the Committee sent the matter back to the Judicial Council with directions to undertake additional investigation and "to make additional findings where appropriate and reconsider the appropriate sanction if there are additional findings." *See also In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002*, No. 05-14-90120 (5th Cir. Jud. Council Dec. 3. 2015); *In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002*, No. 05-14-90120 (5th Cir. Jud. Council Sept. 28, 2016).

Fourth Circuit

In the Matter of Judicial Complaints, Nos. 04-18-90137; 04-18-90152 (4th Cir. Jud. Council Oct. 31, 2019): A judicial assistant for a district judge alleged that the judge sexually harassed her by engaging in unwanted physical contact; subjecting her to a hostile work environment; and retaliating against her when she rejected the judge's advances and vetoing a buyout that would have resolved her claims. A special committee was appointed to investigate. The subject judge stated that the relationship had been consensual, denied harassing the complainant, but acknowledged exercising poor judgment in exploring a romantic relationship with the complainant. The special committee found that there were two to three physical encounters between the subject judge and the complainant that were consensual, and that the complainant initiated the physical contact and stopped it from progressing each time. The special committee found that the complainant intentionally led

the subject judge on because the judge was nicer to her when the judge thought they might have a sexual relationship and because she was afraid she would be fired based on problems with her performance. After the complainant unequivocally told the subject judge that the judge's conduct made her uncomfortable, the subject judge stopped trying to pursue a relationship with her. The Judicial Council found that the subject judge had engaged in serious misconduct and that it was somewhat mitigated by: the complainant's conduct, the fact that there was no pattern of improper activity, and that the judge had acknowledged the actions were inappropriate. The judicial council issued a private reprimand to the subject judge.

Fifth Circuit

In re Complaint of Judicial Misconduct Under the Judicial Improvements Act of 2002, Nos. 05-18-90049 through 05-18-90051 (5th Cir. Jud. Council Nov. 15, 2018): A former employee filed a complaint against three bankruptcy judges alleging that they covered up the sexual misconduct of a former court supervisor and two supervisory subordinates; authorized the complainant's firing under a false pretense when the real reason was retaliatory; and violated the complainant's rights in processing his EDR claim. A special committee was appointed and interviewed sixteen witnesses, including the complainant and the subject judges. The special committee found no evidence to support the allegations and the Judicial Council dismissed the complaint pursuant to 28 U.S.C. § 354(a)(1)(B). *See also In re Complaints Under the Judicial Conduct and Disability Act*, No. 19-03 (U.S. Jud. Conf. Mar. 31, 2020) (affirming Judicial Council's dismissal).

In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002, No. 05-14-90120 (5th Cir. Jud. Council Dec. 3. 2015): A complaint alleged that the subject judge committed misconduct by making inappropriate, unwanted physical and non-physical sexual advances to a court employee in 1998. The special committee found that the subject judge made inappropriate and unwanted sexual advances towards the court employee and failed to understand the gravity of his inappropriate behavior and the effect it had on court operations. The special committee also found that the subject judge allowed false factual assertions to be made in response to the complaint which contributed to the length and cost of the investigation. Based on the special committee's findings, the Judicial Council publicly ed the subject judge, suspended his case assignments for one year, and required him to take sensitivity training at his own expense. The Judicial Council concluded that the subject judge's actions did not warrant a recommendation for impeachment. *See also In re Complaint of Judicial Misconduct*, No. 16-01 (U.S. Jud. Conf. July 8, 2016); *In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002*, No. 05-14-90120 (5th Cir. Jud. Council Sept. 28, 2016).

In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002, No. 05-14-90120 (5th Cir. Jud. Council Sept. 28, 2016): On remand from the JC&D Committee, the special committee re-engaged its prior investigators to investigate: (1) whether there was a pattern and practice of sexual harassment of court employees and (2) whether the subject judge's conduct in allowing false

factual assertions to be made "adversely impacted or interfered with the inquiry, if at all." After the special committee completed its subsequent investigation but before any hearings were held, the subject judge retired from office. The Judicial Council found that due to the subject judge's retirement from office, the Judicial Council could not impose any sanction under the Act. The Judicial Council concluded that the subject judge's actions did not warrant a recommendation for impeachment. Following the additional investigation on remand, the investigators found no evidence that any additional instances of sexual harassment had occurred in many years and that any misrepresentations by the subject judge extended the proceeding but did not affect its outcome. *See also In re Complaint of Judicial Misconduct*, No. 16-01 (U.S. Jud. Conf. July 8, 2016); *In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002*, No. 05-14-90120 (5th Cir. Jud. Council Dec. 3. 2015).

Tenth Circuit

In re Complaint Under the Judicial Conduct and Disability Act, No. 10-18-90022 (10th Cir. Sept. 30, 2019): The chief circuit judge identified a complaint against the subject judge and appointed a special committee to investigate. Based on the special committee's report, the Judicial Council found that the subject judge sexually harassed judiciary employees, engaged in an extramarital affair with a felon, and was habitually tardy for court proceedings. As to the sexual harassment of court employees, the Judicial Council found that the behavior violated Canons 3B(4) and 3A(3), as well as Rules 4(a)(2) and 4(a)(2)(A). As to the affair with the convicted felon, the Judicial Council explained that although an affair might not always constitute misconduct, the subject judge made themself susceptible to extortion due to the affair. While the subject judge admitted to the misconduct found by the Judicial Council, apologized, and offered to take corrective action, the Judicial Council noted that the subject judge was not always candid with the special committee. Based on the severity of the conduct, the Judicial Council publicly reprimanded the subject judge. *But see In re Complaints Under the Judicial Conduct and Disability Act*, No. 19-02, at 9 (U.S. Jud. Conf. Mar. 3, 2020) (noting that the conduct at issue was serious enough to warrant consideration of a referral for impeachment).

REMEDIES—ASSIGNMENT OF CASES

A circuit judicial council may order that no new cases be assigned to a subject judge on a temporary basis and for a time certain, with the aim of promoting the "effective and expeditious administration of the business of the courts," provided that the suspension is not the practical equivalent of removing the judge from the bench. But a council should not order, as a sanction, any reassignment of cases pending before a subject judge.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 354(2)(A)(i): A judicial council may order that, "on a temporary basis for a time certain, no further cases be assigned to the judge whose conduct is the subject of a complaint."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 20(b)(1)(D)(ii): A judicial council may "take remedial action to ensure the effective and expeditious administration of the business of the courts, including . . . ordering that no new cases be assigned to the subject judge for a limited, fixed period."

Orders

Supreme Court

DECIDED BEFORE ENACTMENT OF THE JUDICIAL CONDUCT AND DISABILITY ACT:

Chandler v. Judicial Council, 398 U.S. 74, 84–85, 136–37 (1970): A circuit judicial council issued an order suspending new case assignments to a backlogged district judge. For reasons unrelated to the order's merits, the Court upheld the denial of the district judge's mandamus petition attacking the order, thereby leaving the order intact. The Court remarked, however, that 28 U.S.C. § 332, which requires a council to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit," confers "some management power"; that courts' internal rules suspending new case assignments to backlogged judges are "reasonable, proper, and necessary," with a "need for enforcement [that] cannot reasonably be doubted"; and that, when such rules are violated, "the extraordinary machinery" of impeachment "can hardly be . . . the only recourse." Dissenting, Justices Black and Douglas argued that the suspension order unconstitutionally impeded judicial independence by barring the judge from "doing [their] work" and by branding the judge "unfit to sit in oncoming cases," sanctions available only to Congress through impeachment.

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. No. 17-01 (U.S. Jud. Conf. Aug. 14, 2017): A subject judge sought review of a Judicial Council's order finding that the judge committed misconduct and challenging the sanctions imposed. Among other sanctions, the Judicial Council suspended new case assignments and reassigned the judge's current cases. The Committee noted that the record was devoid of evidence that the subject judge was unable to perform the adjudicative duties of the office and declined to affirm the sanctions. The Committee explained that the Judicial Council's findings were limited to the subject judge's conduct "in the context of the court's internal administrative responsibilities" and that curtailing the judge's docket was not supported by the evidence as it relates to the judge's ability to "discharge [the judge's] adjudicative duties." Order at 37. The Committee further stated that it could not "rule out the appropriateness of such a sanction should sufficient evidence establish [the subject judge's] incapacity, but we cannot base a sanction on the assumption [the subject judge's] behavior in connection with court administrative matters would likewise adversely affect [the judge's] adjudicative responsibilities." *Id*.

In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 558, 562 (U.S. Jud. Conf. 2008): After considering a special committee's report on a complaint alleging that a district judge had failed to give reasons for some of the judge's decisions, the judicial council confirmed the failure, found that it constituted misconduct, and privately reprimanded the judge. On petition for review, the Judicial Conduct and Disability Committee reversed this result and remanded the matter to the judicial council for reconsideration, instructing the council that a misconduct finding would require "clear and convincing evidence of a judge's arbitrary and intentional departure from prevailing law based on his or her disagreement with, or willful indifference to, that law." This standard, the Committee explained, would require that an omission of reasons be "virtually habitual" in order to sustain any misconduct finding whose basis is "a large number of cases in which reasons were not given when seemingly required by prevailing law." If, however, the judge had failed to give reasons in particular cases "after an appellate remand directing that such reasons be given," then "a substantial number of such cases may well be sufficient to support . . . a [misconduct] finding." Acknowledging other recent misconduct by the subject judge, including actions that earned the judge a public reprimand even as the judge continued to deny impropriety, the Committee instructed the judicial council that the judge should receive more than a private reprimand if the judge committed the "very serious" misconduct of willfully and unlawfully failing to provide reasons for decisions. In the Committee's assessment, such a finding would justify stronger sanctions that should include temporary suspension of new case assignments and public censure or reprimand. (After the remand, the circuit judicial council applied these instructions, found no misconduct, and dismissed the complaint; the complainant petitioned for review of that disposition; and the Judicial Conduct and Disability Committee denied the petition, thereby affirming the dismissal.)

Fifth Circuit

In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002, No. 05-14-90120 (5th Cir. Jud. Council Dec. 3. 2015): A special committee found that the subject judge made inappropriate and unwanted sexual advances towards the court employee and failed to understand the gravity of the judge's inappropriate behavior and the effect it had on court operations. Based on the special committee's findings, the Judicial Council publicly reprimanded the subject judge, suspended the judge's case assignments for one year, and required the judge to take sensitivity training at the judge's own expense. The Judicial Council concluded that the subject judge's actions did not warrant a recommendation for impeachment. *See also In re Complaint of Judicial Misconduct*, No. 16-01 (U.S. Jud. Conf. July 8, 2016); *In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002*, No. 05-14-90120 (5th Cir. Jud. Council Sept. 28, 2016).

In re McBryde, 117 F.3d 208 (5th Cir. 1997) (decided before 2008 Rules were enacted): A district chief judge took charge of specified cases pending before another judge of the district after the two disagreed over the propriety of court officers' conduct in those cases. Granting the latter judge's petition for mandamus relief, the court of appeals found that the reassignment had been neither valid as a response to the disagreement nor validated by the approval it later received from the circuit judicial council, and that the council itself could not properly have ordered this action. The court noted that such reassignment relates to the merits, which are subject to traditional appellate review and are beyond the reach of the judicial misconduct complaint process. Citing language in the Act, at 28 U.S.C. § 354(a)(2), that acknowledges an option to suspend temporarily any new assignments to a judge but makes no mention of reassigning the judge's existing cases, the court ordered the cases restored to the petitioning judge's docket. The court noted also that a sanction involving case reassignment would "pose constitutional questions regarding the exclusivity of congressional power to remove a sitting federal judge." *Id.* at 229.

Sixth Circuit

In re Complaint of Judicial Misconduct, Nos. 99-6-372-48, 00-6-372-66 (6th Cir. Jud. Council Nov. 2, 2001) (decided before 2008 Rules were enacted): A judge who engaged in a pattern of "intemperate and abusive" treatment of lawyers—as found by a special investigative committee and conceded by the judge—was suspended from their duties for six months, directed to undergo "behavioral counseling" during that time, barred for three years thereafter from participating in any cases involving specified lawyers, and barred permanently from participating in any case involving a particular lawyer.

Seventh Circuit

In re Complaints Against District Judge Colin S. Bruce, Nos. 07-18-90053, 07-18-90067 (7th Cir. Jud. Council May 14, 2019): A special committee was appointed to investigate a complaint that the subject judge engaged in improper communications with the U.S. Attorney's Office, where he had worked before becoming a judge. The special committee

found that the subject judge had frequent ex parte contacts with the U.S. Attorney's Office after taking the bench in 2013 and that these communications sometimes pertained to criminal matters before him. The special committee found no evidence that the communications impacted any of the subject judge's rulings or advantaged any party. The subject judge adopted new measures to limit ex parte communications. Based on the special committee's findings and recommendations, the Judicial Council: 1) publicly reprimanded the subject judge; 2) kept him removed from cases involving the U.S. Attorney's Office for a year; and 3) required him to watch certain ethics training provided by the FJC.

D.C. Circuit

McBryde v. Committee, 264 F.3d 52, 66–67 (D.C. Cir. 2001) (decided before 2008 Rules were enacted): A one-year suspension of new case assignments was among the sanctions imposed by a circuit council, in an order affirmed by the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders (later known as the Judicial Conduct and Disability Committee), against a judge who had engaged in a pattern of arbitrary and abusive behavior toward attorneys and others. The judge brought suit challenging the sanctions. Because the suspension had lapsed, the court rejected, as moot, the challenge as to that sanction. It found that the exception to mootness for actions "capable of repetition but evading review" was inapplicable: although the suspension, being less than two years in length, could be seen as "evading review," it could not be considered "capable of repetition" because the court could not assume that the subject judge would repeat the misconduct. Nor did the suspension have "continuing reputational effects" sufficient to avert a finding of mootness, because any such effects were merely incremental and collateral and could not be remedied by any relief a court might order. Rejecting a "core assumption that judicial independence requires absolute freedom from . . . sanctions" short of removal from the bench, the court also rejected the argument that the Act's authorization of judiciary-imposed sanctions was in derogation of the Impeachment clause and that it therefore rendered the Act facially unconstitutional.

ADDITIONAL RESOURCES

Related Case Law

Supreme Court

Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 60 (1982): "[O]ur Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent judiciary. It commands that the independence of the judiciary be jealously guarded, and it provides clear institutional protections for that independence. An independent judiciary requires independence not only from the other branches of government, but from pressures and influences of persons within the judicial institution, including the reassignment of cases in order to change their disposition."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 14(f)(2): The judicial council may "order[] that for a fixed temporary period, no new cases be assigned to the judge."

See also Constitutionality of the Act—Challenges.

REMEDIES—CENSURE OR REPRIMAND

Upon considering the report and recommendations of the special committee that investigated a complaint, a circuit judicial council may publicly or privately reprimand a subject judge.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 354(a)(1)(C): Upon receiving a special investigative committee report, a circuit judicial council may, if it does not dismiss the complaint, "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."

28 U.S.C. §§ 354(a)(2)(A)(ii), 354(a)(2)(A)(iii): The action described in § 354(a)(1)(C) may include "censuring or reprimanding such judge by means of private communication" or "censuring or reprimanding such judge by means of public announcement."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 20(b)(1)(D)(i): "[T]he judicial council may . . . take remedial action to ensure the effective and expeditious administration of the business of the courts, including . . . censuring or reprimanding the subject judge, either by private communication or by public announcement."

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. No. 11-01 (U.S. Jud. Conf. Dec. 1, 2011): A complaint alleged that Judge George Paine's membership in a country club that practiced invidious discrimination based on race and sex was misconduct. Following a special committee investigation, a divided Judicial Council did not find misconduct, citing to the subject judge's attempt to change the organization's practices. The JC&D Committee disagreed and found that Judge Paine's membership constituted misconduct. Although Judge Paine's attempt to change the club's policy was laudable, the Code provides that if attempts to get the organization to stop discriminating are not successful within two years, the judge must resign membership. Here, Judge Paine had been a member for twenty years, well outside of the two-year safe harbor. The Committee publicly reprimanded Judge Paine.

In re Complaint of Judicial Misconduct, C.C.D. No. 08-02 (U.S. Jud. Conf. Jan. 14, 2008): Judge Manuel Real's challenge to a Judicial Council's public reprimand because he had been punished enough was rejected. Noting that it generally defers to a judicial council's judgment as to appropriate sanction, the Committee affirmed that public reprimand and explained that a lesser sanction would undermine the seriousness of the misconduct.

Fourth Circuit

In the Matter of Judicial Complaints, Nos. 04-21-90039, 04-21-90119 (4th Cir. Jud. Council July 29, 2022): Following a special committee investigation, the Judicial Council found that a separation agreement Judge Joseph Dawson entered with his former employer just before his appointment to the bench undermined public confidence in the integrity and impartiality of the judiciary. While agreeing that this misconduct was serious, the Judicial Council departed from the special committee's recommendation and imposed a public, rather than private reprimand. The Judicial Council noted that the separation payment was a topic of public concern in local newspapers and that "[t]his public concern requires a public response." Order at 14. In the interest of transparency, the Judicial Council publicly reprimanded Judge Dawson.

In the Matter of Judicial Complaints, Nos. 04-18-90137; 04-18-90152 (4th Cir. Jud. Council Oct. 31, 2019): A judicial assistant for a district judge alleged that the judge sexually harassed her by engaging in unwanted physical contact; subjecting her to a hostile work environment; and retaliating against her when she rejected the judge's advances and vetoing a buyout that would have resolved her claims. The special committee found that the physical encounters between the subject judge and the complainant were consensual; that the complainant intentionally led the subject judge on; and that after the complainant unequivocally told the subject judge that the judge's conduct made her uncomfortable, the subject judge stopped trying to pursue a relationship with her. The Judicial Council found that the subject judge had engaged in serious misconduct and that it was somewhat mitigated by the complainant's conduct, the fact that there was no pattern of improper activity, and that the judge had acknowledged the actions were inappropriate. The judicial council issued a private reprimand to the subject judge.

In the Matter of a Judicial Complaint, No. 04-16-90088 (4th Cir. Jud. Council Apr. 24, 2018): A complaint alleged that a magistrate judge harassed a driver based on racial stereotyping and told the driver that, as a federal judge, the "Feds" could be summoned with the push of a button. A special committee found that the judge's actions in accosting the driver created an appearance of impropriety and eroded public confidence in the judiciary. The Judicial Council ultimately found that the judge's conduct constituted judicial misconduct and that the appropriate sanction was a private reprimand. Although the judge took voluntary corrective action, the Judicial Council found that this was not the first time that the judge's temperament had been questioned. Therefore, to preserve public confidence in the judiciary, the Judicial Council issued a private reprimand to the judge.

Fifth Circuit

In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002, No. 05-14-90120 (5th Cir. Jud. Council Dec. 3. 2015): A special committee found that Judge Walter Smith made inappropriate and unwanted sexual advances towards a court employee; failed to understand the gravity of his inappropriate behavior and the effect it had on court operations; and allowed false factual assertions to be made in response to the complaint which contributed to the length and cost of

the investigation. The Judicial Council publicly reprimanded Judge Smith, suspended his case assignments for one year, and required him to take sensitivity training at his own expense. The Judicial Council concluded that Judge Smith's actions did not warrant a recommendation for impeachment. *See also In re Complaint of Judicial Misconduct*, No. 16-01 (U.S. Jud. Conf. July 8, 2016); *In re Complaint of Judicial Misconduct Against United States District Judge Walter S. Smith, Jr., Under the Judicial Improvements Act of 2002*, No. 05-14-90120 (5th Cir. Jud. Council Sept. 28, 2016).

Seventh Circuit

In re Complaints Against District Judge Lynn Adelman, Nos. 07-20-90044 through 07-20-90046 (7th Cir. Jud. Council June 22, 2020): Three complaints were filed after Judge Lynn Adelman published a law review article that contained portions that could be understood as an attack on the integrity of the chief justice. The Judicial Council found that portions of the article "do not promote public confidence in the integrity and impartiality of the judiciary" even if not addressed by specific rules of judicial conduct. Order at 9. The Judicial Council found that the problematic portions of the article amounted to misconduct, publicly reprimanded Judge Adelman, and directed him to publicly acknowledge that parts of the article went too far and to disavow any intention to malign the justices of the Supreme Court.

In re Complaints Against District Judge Colin S. Bruce, Nos. 07-18-90053, 07-18-90067 (7th Cir. Jud. Council May 14, 2019): A special committee was appointed to investigate allegations that Judge Colin Bruce engaged in improper communications with the U.S. Attorney's Office, where he had worked before becoming a judge. The special committee found that the subject judge had frequent ex parte contacts with the U.S. Attorney's Office after taking the bench in 2013 and that these communications sometimes pertained to criminal matters before him, but did not find any evidence that the communications impacted any of the subject judge's rulings or advantaged any party. Based on the special committee's findings and recommendations, the Judicial Council: 1) publicly reprimanded Judge Bruce; 2) kept him removed from cases involving the U.S. Attorney's Office for a year; and 3) required him to watch certain ethics training provided by the FJC. The Judicial Council declined to issue a private reprimand and explained that the "public criticism" of the conduct required "a public response." Order at 12.

Tenth Circuit

In re Complaint Under the Judicial Conduct and Disability Act, No. 10-18-90022 (10th Cir. Jud. Council Sept. 30, 2019): The chief circuit judge identified a complaint against Judge Carlos Murguia and appointed a special committee to investigate. Based on the special committee's report, the Judicial Council found that Judge Murguia sexually harassed judiciary employees, engaged in an extramarital affair with a felon, and was habitually tardy for court proceedings. While Judge Murguia admitted to the misconduct found by the Judicial Council, apologized, and offered to take corrective action, the Judicial Council noted that Judge Murguia was not always candid with the special committee. Based on the severity of the conduct, the Judicial Council publicly reprimanded Judge Murguia. *But see In re Complaints Under the Judicial Conduct and Disability Act*, No. 19-02, at 9 (U.S. Jud. Conf.

Mar. 3, 2020) (noting that the conduct at issue was serious enough to warrant consideration of a referral for impeachment).

In re Complaint under the Judicial Conduct and Disability Act, No. 10-10-90002 (10th Cir. Jud. Council Mar. 22, 2011): The Judicial Council found that Judge Ronald White committed judicial misconduct by using his office to appoint friends to serve as adjunct settlement judges, even though they were unqualified, and making inappropriate statements during court proceedings. The Judicial Council publicly reprimanded Judge White.

REMEDIES—CERTIFICATION OF DISABILITY

Upon considering the report and recommendations of the special committee that investigated a complaint, a circuit judicial council may, for cause, certify the disability of an Article III judge who is eligible to retire for reasons of disability but does not do so, to allow appointment of an additional judge.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 354(a)(1)(C): Upon receiving a special investigative committee report, a circuit judicial council may, if it does not dismiss the complaint, "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."

28 U.S.C. §§ 354(a)(2)(B), 354(a)(2)(B)(i): The action described in § 354(a)(1)(C) may, for a judge "appointed to hold office during good behavior," include "certifying disability of the judge pursuant to the procedures and standards provided under section 372(b)."

28 U.S.C. §§ 372(b): "Whenever any judge of the United States appointed to hold office during good behavior who is eligible to retire [by reason of disability] under this section does not do so and a certificate of his disability signed by a majority of the members of the Judicial Council of his circuit in the case of a circuit or district judge, or by the chief justice of the United States in the case of the chief judge of the Court of International Trade, or by the chief judge of his court in the case of a judge of the Court of International Trade, is presented to the president and the president finds that such judge is unable to discharge efficiently all the duties of his office by reason of permanent mental or physical disability and that the appointment of an additional judge is necessary for the efficient dispatch of business, the president may make such appointment by and with the advice and consent of the Senate. Whenever any such additional judge is appointed, the vacancy subsequently caused by the death, resignation, or retirement of the disabled judge shall not be filled. Any judge whose disability causes the appointment of an additional judge shall, for purpose of precedence, service as chief judge, or temporary performance of the duties of that office, be treated as junior in commission to the other judges of the circuit, district, or court."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 20(b)(1)(D)(vi): "[T]he judicial council may . . . take remedial action to ensure the effective and expeditious administration of the business of the courts, including . . . in the case of a circuit or district judge who is eligible to retire but does not do so, certifying the disability of the judge . . . so that an additional judge may be appointed."

See also Disability.

REMEDIES—IMPEACHMENT

Upon considering the report and recommendations of the special committee that investigated a complaint, if a judicial council determines that a judge may have engaged in conduct which might constitute grounds for impeachment, the judicial council must refer the complaint to the Judicial Conference.

AUTHORITIES

Judicial Conduct and Disability Act

> 28 U.S.C. § 354(b)(2): Upon receiving a special investigative committee report, if the judicial council determines that a judge "may have engaged in conduct . . . which might constitute one or more grounds for impeachment under article II of the Constitution . . . the judicial council shall promptly certify such determination, together with any complaint and a record of any proceedings, to the Judicial Conference."
>
> 28 U.S.C. § 355(b)(1): If the Judicial Conference concurs in the judicial council's determination that impeachment is warranted "it shall so certify and transmit the determination and the record of proceedings to the House of Representatives for whatever action the House of Representatives considers to be necessary. Upon receipt of the determination and record of proceedings in the House of Representatives, the Clerk of the House of Representatives shall make available to the public the determination and any reasons for the determination."
>
> 28 U.S.C. § 355(b)(2): Where a judge has been convicted of a felony and "has exhausted all means of obtaining direct review of the conviction, or the time for seeking further direct review of the conviction has passed and no such review has been sought, the Judicial Conference may, by majority vote and without referral or certification under section 354(b), transmit to the House of Representatives a determination that consideration of impeachment may be warranted, together with appropriate court records, for whatever action the House of Representatives considers to be necessary."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

> Rule 20(b)(2): "A judicial council must refer a complaint to the Judicial Conference if the council determines that a circuit judge or district judge may have engaged in conduct that . . . might constitute ground for impeachment."
>
> Rule 23(b)(6): "If the Judicial Conference determines that consideration of impeachment may be warranted, it must transmit the record of all relevant proceedings to the Speaker of the House of Representatives."

Rules for Processing Judicial Council Certificates of Potential Impeachment Conduct, *See Guide*, Vol. 2, Part E § 420

Rule 2: Unless the Judicial Conference determines that the full Conference should act on the matter (i.e., where the conduct is premised entirely upon a judgment of conviction of a felony under federal or state law), the Judicial Conference (or its Executive Committee) will refer the matter to an ad hoc committee of Conference members or to the JC&D Committee "for processing and the preparation of a report with recommendations back to the Conference."

Rule 3: Where the Judicial Conference refers the matter to a committee, the committee must provide the subject judge with a copy of the certificate and all papers filed with the Judicial Conference in support of the certificate.

Rule 4: The subject judge has sixty days to file a response.

Rules 5 and 6: The committee can choose to receive a written statement from the complainant and may allow oral argument, although such argument ordinarily will not be allowed.

Rule 7: The subject judge is entitled to representation by counsel at his or her expense in the preparation and filing of any written response or oral argument.

Rule 8: Either the Judicial Conference or the committee may determine that additional investigation is necessary. R. 8(a). In this circumstance, the subject judge ordinarily will be given ten days' notice of the additional investigation. *Id.*

During this investigation, the subject judge can appear (in person or by counsel) at proceedings conducted by the investigating panel, present oral and documentary evidence, compel the attendance of witnesses or the production of documents, cross-examine witnesses, and present argument orally or in writing. *Id.* R. 8(b); *see also* 28 U.S.C. § 358(b)(2). The complainant can appear at proceedings conducted by the investigating panel if the panel concludes that the complainant could offer "substantial information." *Id.*; *see also* 28 U.S.C. § 358(b)(3).

At the conclusion of any investigation, the investigation panel will file a written report and provide a copy to the subject judge and the complainant, if appropriate. *Id.* R. 8(c).

Rule 9: Ultimately, the committee will file a report with the Judicial Conference that includes a recommendation or recommendations. The Conference can adopt this report in its entirety, or adopt it in part and reject it in part.

Rule 10: The subject judge is not entitled to a copy of the committee's report.

Historical Impeachments

Harry E. Claiborne (D. Nev.) (1986): Judge Claiborne was convicted on charges of income tax evasion and of remaining on the bench following criminal conviction. Certiorari was denied on April 21, 1986. The Ninth Circuit Judicial Council issued its certificate to the Judicial Conference that impeachment might be warranted on June 18, 1986. *See* 28 U.S.C.

§ 354(b). The Judicial Conference held a special session on June 30, 1986, where it determined to issue its own certificate to the House of Representatives that impeachment might be warranted. *See* 28 U.S.C. § 355(b)(2). Judge Claiborne was impeached, convicted, and removed from office on October 9, 1986.

Alcee L. Hastings (S.D. Fla.) (1988–89): The Eleventh Circuit Judicial Council received a judicial misconduct complaint from two of its members in March 1983, shortly after Judge Hastings' acquittal on criminal charges of perjury and conspiring to solicit a bribe. The Judicial Council conducted a lengthy investigation and issued a certificate to the Judicial Conference on September 2, 1986. *See* 28 U.S.C. § 354(b). The Judicial Conference adopted a resolution allowing Judge Hastings 30 days to examine and respond to the certificate and supporting files. It further resolved that the chief justice would designate a committee to consider the materials certified to the Conference and any response from Judge Hastings and to make recommendations to the Conference. The committee reported in February 1987 that Judge Hastings' time for examination and response had been extended to a total of 120 days and that he had submitted a statement on January 16, 1987. The committee recommended that the Judicial Conference undertake no additional investigation and act upon the Judicial Council's certificate without further submissions or oral argument. The Judicial Conference certified impeachment to the House of Representatives on March 17, 1987. *See* 28 U.S.C. § 355(b)(1). Judge Hastings was convicted by the Senate and removed from office on October 20, 1989.

Walter L. Nixon (S.D. Miss.) (1989): Judge Nixon was convicted on charges of perjury before a federal grand jury and certiorari was denied on January 19, 1988. The Fifth Circuit Judicial Council issued its certificate to the Judicial Conference that impeachment might be warranted on February 11, 1988, *see* 28 U.S.C. § 354(b), and later confirmed that its certificate was premised entirely on Judge Nixon's conviction on charges of perjury before a federal grand jury. The Judicial Conference accepted the final judgment as conclusive and determined that it would forward a final certificate to the House of Representatives on March 15, 1989. *See* 28 U.S.C. § 355(b)(2). Judge Nixon was impeached, convicted, and removed from office on November 3, 1989.

Samuel B. Kent (S.D. Tex.) (2009): Judge Kent pleaded guilty to sexual assault, obstructing and impeding an official proceeding, and making false and misleading statements on February 23, 2009. The Fifth Circuit Judicial Council issued its certificate to the Judicial Conference that impeachment might be warranted on May 27, 2009. *See* 28 U.S.C. § 354(b)(2)(A). Judge Kent submitted a letter of resignation on June 2, 2009, but not effective for one year. The Judicial Conference certified that impeachment might be warranted on June 9, 2009. *See* 28 U.S.C. § 355(b)(1)–(2). The House of Representatives passed articles of impeachment on June 19, 2009. Judge Kent submitted a revised letter of resignation on June 25, 2009, to be effective June 30, 2009. The House of Representatives subsequently agreed not to pursue articles of impeachment, and the Senate, sitting as court of impeachment, dismissed the articles.

G. Thomas Porteous, Jr. (E.D. La.) (2010): On May 18, 2007, the Department of Justice filed a JC&D complaint alleging that Judge Porteous accepted bribes and made false statements

under penalty of perjury. (DOJ based its complaint on an FBI investigation but ultimately decided not to prosecute Judge Porteous.) The Fifth Circuit Judicial Council issued its certificate to the Judicial Conference that impeachment might be warranted on December 20, 2007. *See* 28 U.S.C. § 354(b)(2)(A). The Judicial Conference referred the matter to the JC&D Committee on February 13, 2008. The JC&D Committee issued a report to the Judicial Conference in June 2008. The Judicial Conference, upon recommendation of the JC&D Committee, certified to the House of Representatives that impeachment might be warranted on June 17, 2008. *See* 28 U.S.C. § 355(b)(1). Judge Porteous was impeached, convicted, and removed from office on December 8, 2010.

Mark E. Fuller (M.D. Ala.) (2015): Following his highly publicized arrest in August 2014 for a domestic violence incident at the Ritz-Carlton hotel in Atlanta, Georgia, Judge Fuller was the subject of numerous complaints. Instead of contesting the charges, Judge Fuller enrolled in a pretrial diversion program and the charges were dismissed in April 2015. A special committee investigated the complaints and in April 2015 recommended that the Judicial Council find that Judge Fuller's conduct might constitute grounds for impeachment and refer such finding to the Judicial Conference. On May 29, 2015, Judge Fuller submitted a resignation letter to President Obama, effective August 1, 2015. On June 1, 2015, the Judicial Council of the Eleventh Circuit issued a certificate pursuant to 28 U.S.C. § 354(b)(2)(A) after determining that Judge Fuller had engaged in conduct that might constitute grounds for impeachment and referred the matter to the Judicial Conference. The matter was referred to the JC&D Committee, which issued a report with recommendations to the Judicial Conference in September 2015. After discussion, the Judicial Conference agreed to certify to the House of Representatives the Conference's determination that impeachment may be warranted. The certificate noted that in light of the severity of the conduct, the Conference was certifying the matter for consideration of impeachment proceedings despite Judge Fuller's resignation. The certificate further explained that the Conference's determination was based on "substantial evidence" that Judge Fuller had physically abused his wife at least eight times, had made repeated false statements under oath, made false statements to the chief judge of the Eleventh Circuit in a way that disrupted the district court's operations and caused a loss of public confidence in the court; and had brought disrepute to the judiciary.

REMEDIES—VOLUNTARY RETIREMENT

Upon considering the report and recommendations of the special committee that investigated a complaint, a circuit judicial council may request that the judge voluntarily retire with the length of service requirements waived.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 354(a)(1): Upon receiving a special investigative committee report, a circuit judicial council may, if it does not dismiss the complaint, "take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit."

28 U.S.C. § 354(a)(2)(B)(ii): The actions described in § 354(a)(1)(C) may, for a judge "appointed to hold office during good behavior," include "requesting that the judge voluntarily retire, with the provision that the length of service requirements under section 371 of this title shall not apply."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 20(b)(1)(D)(v): "[T]he judicial council may . . . take remedial action to ensure the effective and expeditious administration of the business of the courts, including . . . in the case of a circuit or district judge, requesting the judge to retire voluntarily with the provision (if necessary) that ordinary length-of-service requirements be waived."

Orders

Tenth Circuit

In re Complaint Under the Judicial Conduct and Disability Act, No. 10-20-90049 (10th Cir. Jud. Council June 18, 2021): A complainant who had observed a judge during court proceedings filed a complaint alleging that a judge suffered from a disability. A special committee was appointed to investigate. The special committee interviewed the judge's colleagues, staff, reviewed the judge's medical records, and consulted with the circuit's Certified Medical Professional. The judge agreed to undergo "several clinical examinations." Based on the medical expert's report and its investigation, the special committee concluded that the judge could not "maintain the full workload of an active judge," that the judge's medical condition "justified [the judge's] retirement into senior status" under 28 U.S.C. § 354(a)(2)(B)(ii), and recommended that the Judicial Council waive the years of service requirement under § 371. The Judicial Council accepted the special committee's findings and recommendations. The judge was permitted to perform "judicial duties only 'when designated' by the chief circuit judge," and the chief circuit judge "will designate the judicial duties he believes [the judge] is able to perform based on further evaluation."

DISQUALIFICATION AND RULE OF NECESSITY

CHIEF CIRCUIT JUDGE

Although a circuit chief judge cannot consider a complaint against himself or herself, a circuit chief judge is not automatically disqualified from considering a complaint that he or she has identified or a complaint against a judge serving on the same court. A chief judge is disqualified from participating, as a circuit judicial council member, in the council's review of an order of that chief judge dismissing a complaint or concluding proceedings on a complaint.

SUBJECT JUDGE

The subject judge is disqualified in participating in the consideration of the complaint unless the Rule of necessity is applied. Where the subject judge is under investigation by a special committee, the subject judge is disqualified from participating in the consideration or identification of a complaint, even if unrelated to the pending matter, until all the proceedings are finally terminated.

JUDICIAL COUNCIL AND RULE OF NECESSITY

The judicial council can invoke the rule of necessity to dispose of a complaint on the merits subject to the standards set forth in Rule 25(g).

JUDICIAL CONDUCT & DISABILITY COMMITTEE

A member of the JC&D Committee is not automatically disqualified from considering a matter because of consultation with a chief judge, a member of a special committee, or a judicial council about the interpretation of the Act or the Rules. A member of the JC&D Committee from the same circuit as the subject judge is disqualified from considering a petition for review related to that matter.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 351(c): Prevents a chief judge from considering a complaint against himself or herself by requiring the clerk to transmit a complaint against a chief judge "to that circuit judge in regular active service next senior in date of commission." For purposes of the Act, the other circuit judge acts as chief judge with respect to that complaint.

28 U.S.C. § 359(a): Prevents a subject judge who is under investigation by a special committee from serving on a judicial council, the Judicial Conference, or the JC&D Committee until actions on the complaint have concluded. (*But see* Rule 25(e) and Commentary, described below.)

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 21(c): "Any member of the [JC&D] Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review related to that subject judge… If only six members are qualified to consider a petition for review, the Chief

Justice shall select an additional judge to join the qualified members to consider the petition. If four or fewer members are qualified to consider a petition for review, the Chief Justice shall select a panel of five judges, including the qualified Committee members, to consider it."

Rule 25(a): "Any judge is disqualified from participating in any proceeding under these Rules if the judge concludes that circumstances warrant disqualification. . . . A chief judge who has identified a complaint under Rule 5 is not automatically disqualified from considering the complaint."

Rule 25(b): "A subject judge is disqualified from considering the complaint except to the extent that these Rules provide for participation by a subject judge."

Rule 25(c): "If a petition for review of the chief judge's order entered under Rule 11(c), (d), or (e) is filed with the judicial council in accordance with Rule 18, the chief judge is disqualified from participating in the council's consideration of the petition."

Rule 25(d): "A member of the judicial council who serves on a special committee, including the chief judge, is not disqualified from participating in council consideration of the committee's report."

Rule 25(e): "Upon appointment of a special committee, the subject judge is disqualified from participating in the identification or consideration of any complaint, related or unrelated to the pending matter, under the Act or these Rules. The disqualification continues until all proceedings on the complaint against the subject judge are finally terminated with no further right of review."

Rule 25(f): "If the chief judge is disqualified from performing duties that the Act and these Rules assign to a chief judge (including where a complaint is filed against a chief judge), those duties must be assigned to the most-senior active circuit judge not disqualified. If all circuit judges in regular active service are disqualified, the judicial council may determine whether to request a transfer under Rule 26, or, in the interest of sound judicial administration, to permit the chief judge to dispose of the complaint on the merits. Members of the judicial council who are named in the complaint may participate in this determination if necessary to obtain a quorum of the council."

Rule 25(g): "Notwithstanding any other provision in these Rules to the contrary,

(1) a member of the judicial council who is a subject judge may participate in its disposition if:

(A) participation by one or more subject judges is necessary to obtain a quorum of the judicial council;

(B) the judicial council finds that the lack of a quorum is due to the naming of one or more judges in the complaint for the purpose of disqualifying that judge or those judges, or to the naming of one or more judges based on their participation in a decision excluded from the definition of misconduct under Rule 4(b); and

(C) the judicial council votes that it is necessary, appropriate, and in the interest of sound judicial administration that one or more subject judges be eligible to act.

(2) otherwise disqualified members may participate in votes taken under (g)(1)(B) and (g)(1)(C)."

Rule 25(h): "No member of the Committee on Judicial Conduct and Disability is disqualified from participating in any proceeding under the Act or these Rules because of consultations with a chief judge, a member of a special committee, or a member of a judicial council about the interpretation or application of the Act or these Rules, unless the member believes that the consultation would prevent fair-minded participation."

Commentary to Rule 25: "[A] judge is not disqualified simply because the subject judge is on the same court. However, . . . there may be cases in which an appearance of bias or prejudice is created by circumstances other than an association with the subject judge as a colleague. For example, a judge may have a familial relationship with a complainant or subject judge. When such circumstances exist, a judge may, in his or her discretion, conclude that disqualification is warranted."

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

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

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

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

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

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

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

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

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

Orders

Fourth Circuit

In the Matter of Judicial Complaints under 28 U.S.C. § 351, Nos. 04-17-90056 through 04-17-90102 (4th Cir. C.J. July 31, 2017): Where a complaint named all active circuit judges in the circuit, the Judicial Council found it to be necessary, appropriate, and in the interest of judicial administration to allow the chief judge to dispose of the meritless complaints on the merits pursuant to Rule 25(f).

Eighth Circuit

In re Complaint of Doe, 642 F.3d 663 (8th Cir. Jud. Council May 24, 2011): "If the usual rules of recusal were to apply, the practical effect of complainant's decision to name all members of the Judicial Council as subject judges is to deprive complainant of any review whatsoever[.]" Pursuant to Rule 25, the Judicial Council voted to allow the chief circuit judge to consider the merits of the complaint instead of transferring it to another circuit under Rule 26.

In re Complaint of Doe, 2 F.3d 308, 309–10 (8th Cir. Jud. Council 1993) (decided before 2008 Rules were enacted): Noting that the Judicial Conduct and Disability Act is silent as to what happens when a majority of a judicial council is disqualified, the judicial council concluded: "Considering the doubtful legality of a cross-circuit designation, the burdensomeness of that procedure, and the patent insubstantiality of the pending petition, we think the best course is to decide this case ourselves, using the Rule of Necessity." *See* Commentary to Rule 25 (applying a rule of necessity to situations involving complaints against multiple judges and noting that "[t]here is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit [and] there is no unfairness in permitting subject judges . . . to participate in the review of a chief judge's dismissal of an insubstantial complaint.").

Ninth Circuit

In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council June 24, 1992) (decided before 2008 Rules were enacted): In addressing a complaint brought against five members of the judicial council, the council noted: "The common law doctrine of necessity holds that a judge may take part in the resolution of a matter even though the judge may have a personal interest, if the matter cannot be heard otherwise" (citing *United States v. Will*, 449 U.S. 200, 213 (1980)).

Tenth Circuit

In re Charge of Judicial Misconduct, Nos. 2004-10-372-10, 2004-10-372-11, 2004-10-372-12, 2004-10-372-13 (10th Cir. C.J. Apr. 28, 2004) (decided before 2008 Rules were enacted): Where a complaint named the chief circuit judge as a respondent, the next most senior circuit judge not otherwise disqualified addressed the matter.

Eleventh Circuit

In re Petition to Inspect and Copy Grand Jury Materials, 735 F.2d 1261, 1266–67 (11th Cir. 1984) (decided before 2008 Rules were enacted): In rejecting a request under 28 U.S.C. § 455 to disqualify all Article III judges from hearing a challenge to a judicial misconduct investigation that allegedly undermined Article III independence, the court relied on a passage from the Supreme Court opinion in *United States v. Will*, 449 U.S. at 217: "The public might be denied resolution of this crucial matter if first the District Judge, and now all the Justices of this Court, were to ignore the mandate of the Rule of Necessity and decline to answer the question presented." *See* Commentary to Rule 25 (applying a rule of necessity to situations involving complaints against multiple judges and noting that "[t]here is no unfairness in permitting the chief judge to dispose of a patently insubstantial complaint that names all active circuit judges in the circuit [and] there is no unfairness in permitting subject judges . . . to participate in the review of a chief judge's dismissal of an insubstantial complaint.").

ADDITIONAL RESOURCES

Contrasting Statute

Being administrative, the judicial misconduct and disability complaint process is not subject to all the procedural constraints of litigation. The standard of disqualification under the Act and Rules is, in some situations, substantially more discretionary than its litigation counterpart, 28 U.S.C. § 455(a), which would require a judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

Related Case Law

Supreme Court

United States v. Will, 449 U.S. 200, 213, 214 (1980): Discussed the history of the Rule of Necessity and noted that the rule, "a well-settled principle at common law . . . has been consistently applied in this country in both state and federal courts."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 18(c) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability provided: "If a petition for review of a chief judge's order dismissing a complaint or concluding a proceeding is filed with the judicial council . . . , the chief judge will not participate in the council's consideration of the petition. In such a case, the chief judge may address a written communication to all of the members of the judicial council, with copies provided to the complainant and to the judge complained about. The chief judge may not communicate with individual council members about the matter, either orally or in writing."

See also Disqualification and Rule of Necessity.

FINALITY OF ORDERS

With respect to a complaint under the Judicial Conduct and Disability Act, any of the following decisions are final: (1) a decision of the Judicial Conference of the United States; (2) a decision of the Judicial Conference Committee on Judicial Conduct and Disability, if the Judicial Conference has not opted to review it; and (3) a decision that the Act renders reviewable but that has not been the subject of a petition for review within the time allowed by the Rules for Judicial-Conduct and Judicial-Disability Proceedings. There is no right of review of such decisions. (This does not preclude judicial review, in litigation, of the constitutionality of the Act.)

AUTHORITIES

Judicial Conduct and Disability Act

> 28 U.S.C. § 352(c): "A complainant or judge aggrieved by a final order of the chief judge under this section may petition the judicial council of the circuit for review thereof. The denial of a petition for review of the chief judge's order shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."
>
> 28 U.S.C. § 357(a): "A complainant or judge aggrieved by an action of the judicial council . . . may petition the Judicial Conference of the United States for review thereof."
>
> 28 U.S.C. § 357(c): "Except as expressly provided in this section and section 352(c), all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

> Rule 21(a): "The Judicial Conference of the United States may, in its sole discretion, review any . . . Committee [on Judicial Conduct and Disability] decision, but a complainant or subject judge does not have a right to this review."
>
> Rule 21(g): "All orders of the Judicial Conference or of the Committee (when the Conference does not exercise its power of review) are final."
>
> Commentary to Rule 21: "[A]ll Committee decisions are final in that they are unreviewable unless the Judicial Conference, in its discretion, decides to review a decision. Committee decisions, however, do not necessarily constitute final action on a complaint for purposes of Rule 24 [which addresses public availability of decisions]."

Orders

First Circuit

Overton v. Torruella, 183 F. Supp. 2d 295, 306 (D. Mass. 2001): Held that the finality clause of the Judicial Conduct and Disability Act [formerly 28 U.S.C. § 372(c)(10), now 28 U.S.C. §§ 352(c), 357(c)] "does not bar judicial review of the constitutionality of the Act itself, but . . . does preclude judicial review of all claims that do not rise to the level of constitutional challenges."

Second Circuit

In re Charge of Judicial Misconduct, No. 07-9080 (2d Cir. Jud. Council Jan. 9, 2008): Where it was alleged in a complaint that the chief circuit judge was guilty of misconduct based on how the judge handled the complainant's prior complaint against another judge, the judicial council held that "[a] new judicial misconduct complaint is not a substitute for a petition for review of a decision on a prior judicial misconduct complaint."

Third Circuit

Cunningham v. Becker, 96 F. Supp. 2d 369, 373 (D. Del. 2000): In a suit brought against a chief circuit judge and the circuit judicial council by a former complainant under the Judicial Conduct and Disability Act, the court held that a court has jurisdiction to consider the facial constitutionality of the Act (or of a rule promulgated by the circuit judicial council under the authority of the Act), but is barred from reviewing constitutional challenges to the statute's application in a given case.

Fifth Circuit

In re McBryde, 117 F.3d 208, 220 n.7 (5th Cir. 1997): In concluding that it did not have jurisdiction to hear an appeal from, or to issue a writ of mandamus to, a circuit judicial council with respect to its action on a complaint under the Judicial Conduct and Disability Act, the court of appeals reasoned that "Congress has made crystal clear its intent that the federal courts as such exercise no appellate jurisdiction" over judicial misconduct proceedings.

D.C. Circuit

McBryde v. Committee to Rev. Circuit Council Conduct & Disability Orders, 264 F.3d 52, 58–63 (D.C. Cir. 2001): Held that the Judicial Conduct and Disability Act's finality clause does not preclude challenges to the Act's constitutionality because a federal statute that was construed to deny any judicial forum for a colorable constitutional claim would raise serious constitutional concerns**.** Further, Congress "clear[ly] and convincing[ly]" intended to preclude review of as-applied, but not facial, constitutional claims. As noted by the court, the Supreme Court has stated that "preclusion of judicial review of constitutional claims might raise constitutional questions."

Hastings v. Judicial Conference, 593 F. Supp. 1371, 1377–78 (D.D.C. 1984), *aff'd in part and vacated in part on other grounds*, 770 F.2d 1093 (D.C. Cir. 1985): Observing that the statutory language and legislative history plainly show congressional intent to "establish an absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the [Judicial Conduct and Disability] Act," affirmed dismissal of a judge's challenge to the "present and possible future application of the Act to him."

JUDICIAL CONFERENCE—STANDARD OF REVIEW

In reviewing an action of a circuit judicial council under 28 U.S.C. § 354, the Judicial Conference and its Committee on Judicial Conduct and Disability defer to the factual findings made by the judicial council, overturning those findings only where clearly erroneous.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 357(a): "A complainant or judge aggrieved by an action of the judicial council under section 354 may petition the Judicial Conference of the United States for review thereof."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 21(a): "The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review . . . in conformity with the Committee's jurisdictional statement. Its review of judicial-council orders is for errors of law, clear errors of fact, or abuse of discretion."

Rule 21(b)(1): A complainant or subject judge may petition the JC&D Committee to review judicial council orders dismissing, concluding, or taking remedial action on a complaint. A complainant or subject judge may also petition the JC&D Committee to review judicial council orders affirming a chief judge's disposition denying a complaint "if one or more members of the judicial council dissented from the order."

Rule 21(b)(2): The JC&D Committee may on its own initiative review any judicial council order affirming a chief judge's disposition denying a complaint, "but only to determine whether a special committee should be appointed."

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. 11-01 (U.S. Jud. Conf. Dec. 1, 2011): Although the JC&D Committee defers to a Judicial Council's findings, overturning them only if clearly erroneous, the Committee found that the Judicial Council's conclusion that a country club did not engage in invidious discrimination was clearly erroneous. The Committee found that the subject judge's membership in the club therefore was misconduct and publicly reprimanded the subject judge.

In re Memorandum of Decision of Judicial Conference Committee on Judicial Conduct and Disability, 517 F.3d 563, 569 (U.S. Jud. Conf. 2008) (decided before 2008 Rules were enacted): "Ordinarily, we will defer to the findings of the Judicial Council and the special

committee, and will overturn those findings only if, upon examination of the record, they are clearly erroneous."

FEE REIMBURSEMENT

When a complaint against a judge has been dismissed by the judicial council following a special committee investigation, the subject judge can request that the judicial council recommend that the Director of the AO reimburse the judge for reasonable expenses, including attorney's fees, incurred by the judge during the proceeding.

AUTHORITIES

Judicial Conduct and Disability Act

> 28 U.S.C. § 361: "Upon the request of a judge whose conduct is the subject of a complaint under this chapter, the judicial council may, if the complaint has been finally dismissed under section 354(a)(1)(B), recommend that the Director of the Administrative Office of the United States Courts award reimbursement, from funds appropriated to the Federal judiciary, for those reasonable expenses, including attorneys' fees, incurred by that judge during the investigation which would not have been incurred but for the requirements of this chapter."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

> Rule 20(e): "If the complaint has been finally dismissed or concluded under (b)(1)(A) or (B) of this Rule, and if the subject judge so requests, the judicial council may recommend that the Director of the Administrative Office use funds appropriated to the judiciary to reimburse the judge for reasonable expenses incurred during the investigation, when those expenses would not have been incurred but for the requirements of the Act and these Rules. Reasonable expenses include attorneys' fees and expenses related to a successful defense or prosecution of a proceeding under Rule 21(a) or (b)."
>
> Commentary to Rule 20: "[T]he judicial council, on the request of the subject judge, may recommend to the Director of the Administrative Office that the subject judge be reimbursed for reasonable expenses incurred, including attorneys' fees. The judicial council has the authority to recommend such reimbursement where, after investigation by a special committee, the complaint has been finally dismissed or concluded under subsection (b)(1)(A) or (B) of this Rule. It is contemplated that such reimbursement may be provided for the successful prosecution or defense of a proceeding under Rule 21(a) or (b), in other words, one that results in a Rule 20(b)(1)(A) or (B) dismissal or conclusion."

CONFIDENTIALITY

In general, the consideration of a complaint under the Judicial Conduct and Disability Act is confidential. This extends to Judicial Conference consideration of the complaint, which, ordinarily, occurs only upon a petition for review of a judicial council order on a special investigative committee report. (Such consideration would be carried out by the Judicial Conference's Committee on Judicial Conduct and Disability Committee, the standing committee that the Conference has designated for this purpose under the Judicial Conduct and Disability Act.) Except in limited circumstances, no person—including a judge, judicial branch employee, or other individual involved in recording proceedings and preparing transcripts—may disclose information about a complaint's consideration or any paper, document, or record related to the investigation of a complaint. The rule of confidentiality does not apply to complaint-related communications or exchanges of information and documents among chief judges, judicial councils, the Judicial Conference, and the Judicial Conduct and Disability Committee. Also, the Judicial Conduct and Disability Committee's written decisions, including dissenting opinions and separate statements of committee members, may contain information and exhibits that the authors consider appropriate to include, and such information and exhibits may be made public.

AUTHORITIES

Judicial Conduct and Disability Act

28 U.S.C. § 360(a): Except in a matter referred to Congress, under 28 U.S.C. § 355, for consideration of possible impeachment, "all papers, documents, and records of proceedings related to investigations conducted under this chapter shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that—

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

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

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

28 U.S.C. § 360(b): "Each written order to implement any action under section 354(a)(1)(C), which is issued by a judicial council, the Judicial Conference, or the standing committee established under section 331, shall be made available to the public through the appropriate clerk's office of the court of appeals for the circuit. Unless contrary to the interests of justice, each such order shall be accompanied by written reasons therefor."

Rules for Judicial-Conduct and Judicial-Disability Proceedings

Rule 23(a): "Confidentiality under these Rules is intended to protect the fairness and thoroughness of the process by which a complaint is filed or initiated, investigated (in specific circumstances), and ultimately resolved, as specified under these Rules."

Rule 23(b)(1): "The consideration of a complaint by the chief judge, a special committee, the judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability is confidential. Information about this consideration must not be disclosed by any judge or employee of the judicial branch or by any person who records or transcribes testimony except as allowed by these Rules. A chief judge, a judicial council, or the Committee on Judicial Conduct and Disability may disclose the existence of a proceeding under these Rules when necessary or appropriate to maintain public confidence in the judiciary's ability to redress misconduct or disability."

Rule 23(b)(8): "The Judicial Conference [or] its Committee on Judicial Conduct and Disability . . . may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that disclosure is justified by special circumstances and is not prohibited by the Act. . . . ."

Rule 23(c): "Nothing in these Rules and Commentary concerning the confidentiality of the complaint process, or in the Code of Conduct for Judicial Employees concerning the use or disclosure of confidential information received in the course of official duties, prevents a judicial employee from reporting or disclosing misconduct or disability."

Commentary to Rule 23: "Rule 23(b)(1) applies the rule of confidentiality broadly to consideration of a complaint at any stage. . . . The disclosure of . . . information in high-visibility or controversial cases is [intended to] reassure the public that the judiciary is capable of redressing judicial misconduct or disability."

Orders

Judicial Conference

In re Complaint of Judicial Misconduct, C.C.D. No. 13-02 (U.S. Jud. Conf. Jan. 17, 2014): After a Judicial Council dismissed a complaint based on intervening events due to the subject judge's retirement, the subject judge filed a petition for review arguing that the order dismissing the complaint improperly disclosed the judge's name and referred the matter to the Department of Justice and seeking an order "preserving the confidentiality of these proceedings." Finding no error in the Judicial Council's disposition, the JC&D Committee explained that the disclosure of the subject judge's name was appropriate under the circumstances and consistent with the Rules. Rule 24(a)(2) gives a judicial council the discretion to disclose a subject judge's identity when a complaint is concluded due to intervening events. Lastly, the referral to DOJ was not impermissible because: "In the judgment of the Second Circuit Judicial Council, sound administration of the Act in this

matter rested on public awareness that potentially actionable conduct may be at issue." *See also In re Charge of Judicial Misconduct*, 12-90069 (2d Cir. Jud. Council June 20, 2013).

In re Complaint of Judicial Misconduct, 37 F.3d 1511, 1513–14 (U.S. Jud. Conf. 1994) (decided before 2008 Rules were enacted): The "information about the consideration of a complaint" that must remain confidential most reasonably includes the identity of the complainant as well as the identity of the subject judge. This conclusion is supported by provisions in the circuit misconduct rules in effect at the time, which limited disclosure of a complainant's name; and by policy considerations, such as the need to protect a complainant's reputation and to limit any fear of retaliation. It is, moreover, consistent with the fact that subject judges are also bound by the confidentiality requirements. *See* Commentary to Rule 23 (including subject judges among those subject to Rule 23 confidentiality requirements).

Second Circuit

In re Charge of Judicial Misconduct, No. 02-21-90017 (2d Cir. C.J. Jan. 10, 2022):
A complaint alleged judicial misconduct in connection with a judge's ownership of a condominium and the judge's election as a board member of the condominium association, including an allegation that the judge violated the confidentiality of misconduct proceedings by contacting a lawyer whom the complainant identified as a corroborating witness. In the order dismissing the complaint, the chief circuit judge found that the judge may have "inadvertently violated Rule 23" by failing to get the chief circuit judge's consent before telling the lawyer that he had been identified as a witness. The order notes that the chief judge could have communicated with the lawyer as part of a limited inquiry, which would have revealed the complaint's existence to the witness. The chief circuit judge dismissed the allegations, finding that even if the judge technically violated Rule 23, that violation did not rise to the level of misconduct under the Act.

Eighth Circuit

In re Complaint of John Doe, No. 02-033 (8th Cir. C.J. Feb. 11, 2003) (decided before 2008 Rules were enacted): Complainant violated the confidentiality requirements of the Judicial Conduct and Disability Act by disclosing the name of the subject judge and the filing of the complaint. The Act prohibits "the premature disclosure of these proceedings including the fact that a judicial complaint has been filed," and violations of the required confidentiality "may, in certain circumstances, justify dismissal of the complaint among other sanctions." *But see* Commentary to new Rule 23 (only "judges, employees of the judicial branch, and those persons involved in recording proceedings and preparing transcripts" are bound by the confidentiality requirements).

D.C. Circuit

Rafferty v. Judicial Council for the D.C. Cir., 1996 WL 451052, at *4 (D.D.C. Aug. 5, 1996) (decided before 2008 Rules were enacted): Complainant lacked standing to challenge the

alleged chilling effect of confidentiality requirements for judicial misconduct complaints because "the confidentiality requirement does not apply to persons such as plaintiff."

ADDITIONAL RESOURCES

Related Case Law

Supreme Court

Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 835 (1978): Discussed the importance of confidentiality in state judicial misconduct proceedings in the context of overturning the conviction of a corporate newspaper publisher for publishing an article that accurately reported on a state judicial misconduct proceeding. The Supreme Court noted that "confidentiality is thought to encourage the filing of complaints and the willing participation of relevant witnesses by providing protection against possible retaliation or recrimination[,] . . . protect[] judges from the injury which might result from publication of unexamined and unwarranted complaints[,]" and maintain confidence in the judiciary "by avoiding premature announcement of groundless claims of judicial misconduct or disability."

HISTORICAL NOTE

[Former] Illustrative Rules Governing Complaints of Judicial Misconduct and Disability

Rule 16(a): "Consideration of a complaint by the chief judge, a special committee, or the judicial council will be treated as confidential business, and information about such consideration will not be disclosed by any judge or employee of the judicial branch or any person who records or transcribes testimony except in accordance with these rules."

Rule 16(h): "The judicial council may authorize disclosure of information about the consideration of a complaint, including the papers, documents, and transcripts relating to the investigation, to the extent that the council concludes that such disclosure is justified by special circumstances. . . ."

CONSTITUTIONALITY OF THE ACT—CHALLENGES

A complainant or subject judge may, to a limited degree, challenge the constitutionality of the Judicial Conduct and Disability Act by seeking judicial review outside the Act's own complaint-resolution procedures. No court has ever found the Act unconstitutional either in whole or in part.

AUTHORITIES

Orders

Judicial Conference

In re Opinion of Judicial Conduct and Disability Committee, C.C.D. No. 17-01 (U.S. Jud. Conf. Aug. 14, 2017): Judge Adams filed a petition for review of the Sixth Circuit Judicial Council's finding that he committed misconduct by issuing a show cause order to a magistrate judge and by refusing to cooperate with the investigation by declining to undergo a psychiatric exam. In considering Judge Adams's challenge to the request that he undergo a psychiatric exam, the Committee explained that "the ultimate measure of the constitutionality of a government search is 'reasonableness'" and that, here, balancing Judge Adams's privacy interest against the judiciary's responsibility to the public, the judicial council's order was reasonable (citing *Veronica Sch. Dist. 47J v. Acton*, 515 U.S. 646, 652 (1995)). The Committee also evaluated Judge Adams's privacy interest in the context of his responsibilities as a federal judge, noting that "judges are subject to requirements and restrictions to which private citizens are not," including filing financial disclosure forms and complying with ethics restrictions.

First Circuit

Overton v. Torruella, 183 F. Supp. 2d 295, 306 (D. Mass. 2001): The finality clause of the Judicial Conduct and Disability Act "does not bar judicial review of the constitutionality of the Act itself, but . . . does preclude judicial review of all claims that do not rise to the level of constitutional challenges." Where no cognizable ground is stated for challenging the constitutionality of the Act, the finality clause bars an attempt to overturn judicial council decisions under the Act through a *Bivens* action alleging deprivation of the complainant's constitutional rights. In those circumstances, "[t]he appropriate remedy . . . is an appeal to the Judicial Conference of the United States."

Third Circuit

Cunningham v. Becker, 96 F. Supp. 2d 369, 373 (D. Del. 2000): A court is precluded from reviewing "as-applied" constitutional challenges to the Judicial Conduct and Disability Act but can consider the statute's "facial" constitutionality.

D.C. Circuit

Adams v. Judicial Council of the Sixth Circuit, No. CV 17-1894, 2020 WL 5409142 (D.D.C. Sept. 9, 2020): After the JC&D Committee upheld the Sixth Circuit Judicial Council's finding that Judge Adams committed misconduct in issuing a show cause order to a magistrate judge and by refusing to cooperate with the investigation by declining to undergo a psychiatric exam, Judge Adams brought a lawsuit alleging, *inter alia*, that the JC&D Act was facially unconstitutional and that the definition of a disability is too vague to comport with the 5th Amendment's due process clause. While the lawsuit was ongoing, the Sixth Circuit Judicial Council issued an order discontinuing further investigation into the complaint and withdrawing the request to undergo a mental health exam, and stating that the complaint would be dismissed if there were no further issues for a year. After a year passed, the Judicial Council dismissed the complaint. As a result, the district court found that the case was moot and that the intervening events "completely and irrevocably eradicated the effects of the alleged violation," and that Judge Adams' claims about ongoing reputational harm did not overcome mootness. *Id*. at 7. (Note: Judge Adam's appealed the ruling to the D.C. Circuit. Following oral argument, both parties agreed to engage in mediation. On March 18, 2022, the Sixth Circuit Judicial Council entered an order vacating the directive that Judge Adams undergo a mental health evaluation and the finding that he committed misconduct by not undergoing a mental health evaluation, and on March 23, 2022, the parties filed a stipulation to voluntarily dismiss Judge Adams' appeal. On March 30, 2022, the court dismissed the appeal.)

McBryde v. Committee, 264 F.3d 52, 58–63 (D.C. Cir. 2001): Although the Supreme Court has said that "preclusion of judicial review of constitutional claims might raise constitutional questions," Congress "clear[ly] and convincing[ly]" intended to preclude review of as-applied, but not facial, constitutional claims involving the Judicial Conduct and Disability Act.

Hastings v. Judicial Conference, 829 F.2d 91, 107 (D.C. Cir. 1987): Rejecting a ripe facial challenge to the constitutionality of the Judicial Conduct and Disability Act, the court of appeals remanded a claim that the Act was unconstitutional as applied, instructing the district court to decide on remand, first, if the subject judge had "exhausted [the judge's] administrative remedies" provided by the Act and, second, if the Act permitted judicial review of as-applied claims.

Hastings v. Judicial Conference of the U.S., 593 F. Supp. 1371, 1377–78 (D.D.C. 1984): "[T]he language of the Act and its legislative history plainly show that Congress intended to establish an absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act. . . . However, the Act does not bar judicial review of the facial validity of the statute itself."

ADDITIONAL AUTHORITIES

Legislative History

S. Rep. No. 96-362, 96th Cong., 1st Sess. at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4318: "Congress has never before expressly provided for such a procedure for federal judges. In consideration of prior legislative proposals in this area, several constitutional questions have been raised. The Committee is satisfied that the Act leaves no potential violations of the Constitution."

See also Finality of Orders.

CONSTITUTIONALITY OF THE ACT—FIRST AMENDMENT

The Judicial Conduct and Disability Act is not unconstitutionally vague or overbroad so as to impinge upon the First Amendment rights of federal judges.

AUTHORITIES

Orders

Supreme Court

DECIDED PRIOR TO PASSAGE OF THE ACT

Chandler v. Judicial Council, 398 U.S. 74, 86–89 (1970): A petition for writ of mandamus challenging a judicial council order under 28 U.S.C. §§ 137 and 332 must be denied when a case has not been made for that extraordinary remedy. Although the majority did not consider the potential impact of the council order on the constitutional rights of the subject judge, the dissent argued as follows:

> "[A]n end [should] be put to these efforts of federal judges to ride herd on other federal judges. This is a form of 'hazing' having no place under the Constitution. Federal judges are entitled, like other people, to the full freedom of the First Amendment." *Id*. at 140.

D.C. Circuit

McBryde v. Committee, 83 F. Supp. 2d 135, 174–78 (D.D.C. 1999), *vacated as moot*, *McBryde v. Comm. to Rev. Cir. Council Conduct*, 264 F.3d 52, 55 (D.C. Cir. 2001): Although the confidentiality provisions of the Act, as applied to the subject judge, violated the judge's First Amendment rights, the judge's constitutional claims were barred by the Judicial Conduct and Disability Act's preclusion of judicial review.

Hastings v. Judicial Conference, 829 F.2d 91, 105–08 (D.C. Cir. 1987): The Judicial Conduct and Disability Act is not unconstitutionally vague or overbroad. The Act regulates conduct, as opposed to speech, and "the legislative history demonstrates that the Act was directed against serious judicial transgressions, not against protected speech."

ADDITIONAL AUTHORITIES

Legislative History

S. Rep. No. 96-362, 96th Cong., 1st Sess., at 4 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4318: "Congress has never before expressly provided for such a procedure for federal judges. In consideration of prior legislative proposals in this area, several constitutional questions have been raised. The Committee is satisfied that the Act leaves no potential violations of the Constitution."

Law Review Articles

Bryan E. Keyt, *Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment: A Justification Based Analysis*, 7 Geo. J. Legal Ethics 959 (1994): Discussed limitations placed on state judicial misconduct confidentiality provisions by the First Amendment.

See also Constitutionality of the Act—Challenges.

CONSTITUTIONALITY OF THE ACT—SEPARATION OF POWERS

The complaint procedure established by the Judicial Conduct and Disability Act does not impair judicial independence, but, rather, enables the judiciary to maintain reasonable order in the administration of the courts. It also does not violate the separation of powers, because impeachment remains solely the prerogative of Congress.

AUTHORITIES

Orders

Supreme Court

Chandler v. Judicial Council, 398 U.S. 74, 85 (June 1, 1970): Distinguished independence "in deciding cases or in any phase of the decisional function" from independence in the "manner of conducting judicial business." The majority noted that the judiciary has a limited right to "put [its] own house in order." The dissent argued that the Constitution permits discipline of judges only through impeachment, and that the ideal of an independent judiciary would otherwise be "no more than an evanescent dream." *Id*. at 143.

Eleventh Circuit

In the Matter of Certain Complaints, 783 F.2d 1488, 1507–10 (11th Cir. 1986): The court noted that (1) it is reasonable to find, as Congress did, a need for internal procedures to address complaints of judicial misconduct and to preserve the independence and integrity of the judicial branch as a whole; (2) federal judges themselves (as opposed to officers from the other branches) are in the best position to protect judicial independence because they are familiar with the issues they face and are the subjects of any disciplinary precedents they establish; and (3) sanctions available under the Judicial Conduct and Disability Act do not threaten judicial independence because most require voluntary compliance by the subject judge, are confidential, or are actions that could be taken absent the explicit authority provided by the Judicial Conduct and Disability Act. The court held that sanctions such as private censure and encouragement of voluntary retirement do not threaten judicial independence, but noted that a public reprimand and temporary suspension of case assignments might present constitutional issues (which the court did not have to address in this case). *But see* Rule 20(b)(1)(D) of the since-enacted Rules for Judicial-Conduct and Judicial-Disability Proceedings, which, mirroring 28 U.S.C. § 354(a)(2)(A), provides that a judicial council may take remedial action to ensure the effective and expeditious administration of the business of the courts, including public reprimand and temporary suspension of case assignments.

D.C. Circuit

McBryde v. Committee, 264 F.3d 52, 64–67 (D.C. Cir. 2001): In rejecting a facial challenge to the constitutionality of the Judicial Conduct and Disability Act, the court of appeals noted that the principle of judicial independence implicit in Article III is the independence of the

judiciary as a whole vis-à-vis the other two branches, rather than the independence of every individual judge from every other judge. According to the court, "[t]hat individual judges are direct beneficiaries of the . . . protections of Article III by itself hardly shows that the overarching purpose of these provisions was to insulate individual judges against the world as a whole." The court further concluded that the Constitution's vesting of impeachment power in the legislative branch does not implicitly bar Congress from conferring internal disciplinary authority on the judiciary.

Hastings v. Judicial Conference, 593 F. Supp. 1371, 1379–81 (D.D.C. 1984), *vacated on ripeness grounds by Hastings v. Judicial Conference*, 770 F.2d 1093, 1098–103 (D.C. Cir. 1985): Held that the Judicial Conduct and Disability Act does not violate separation of powers as either a congressional intrusion into the judiciary's constitutionally guaranteed independence or a judicial intrusion into Congress's exclusive power to impeach and remove judges. The court of appeals stated that "[t]he independence of the judiciary depends both on the courage and integrity of individual judges and on the public perception of the institution as fair, impartial and efficient," and that "[t]he judiciary has the inherent power to govern itself in a manner that will achieve these ends." Rather than intrude upon judicial independence, the court noted, Congress "was simply recognizing the need to give the courts reasonable means to put the judiciary's own house in order." The court also concluded that "the Act's provision for recommending impeachment to the House of Representatives does nothing to impinge on the exclusive power of Congress over impeachment," and that "[t]he Judicial Conference . . . is surely entitled with or without benefit of the Act to seek the aid of Congress where removal of a judge is appropriate."

ADDITIONAL RESOURCES

Legislative History

S. Rep. No. 96-362, at 6 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4320: The Judicial Conduct and Disability Act poses no threat to the independence of the judiciary because "judges are shielded from the influence of public disapproval with the substance of the law itself and judicial interpretations of it" and "it is not to be expected that the filing of a complaint will often result in formal procedures for a judge."

H.R. Rep. 96-1313, at 19 (1980): "[T]he Committee believes that the process elaborated in [the Judicial Conduct and Disability Act]—combined with increased vigilance on the part of Congress for the possible impeachment of a Federal judicial officer—affords the public adequate protection from the occasional corrupt judge without creating open season on judicial officers. The informality, the screening, the nature of the inquisitive process all are structured so that the potential for disruption is controlled to the degree that separation of powers problems, while often present in our governmental system, does [*sic*] not rise to a level at which constitutionality is in question."

Related Case Law

Supreme Court

Mistretta v. United States, 488 U.S. 361, 404–06 (1989): Addressed separation of powers concerns about the 1984 Sentencing Reform Act provision that required at least three federal judges to perform non-judicial functions as members of the United States Sentencing Commission.In upholding the Act's constitutionality in that regard, the Supreme Court observed that "the ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch." Noting that the Court had previously found no constitutional obstacle to Congress vesting administrative functions in bodies (e.g., the Judicial Conference and circuit judicial councils) composed of judges, the majority concluded that "absent a more specific threat to judicial independence, the fact that Congress has included federal judges on the Commission does not itself threaten the integrity of the Judicial Branch."

See also Remedies—Impeachment.