

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street, Brooklyn, NY 11208-1515

tel. (718) 827-9521

DrRCordero@Judicial-Discipline-Reform.org

September 19, 2007

Circuit Judge Ralph Winter
Chair, Committee on Judicial Conduct and Disability
Office of the General Counsel
Administrative Office of the U.S. Courts
Washington, D.C. 20544

tel.(202)502-1100

e-mailed to: JudicialConductRules@ao.uscourts.gov

Re: Request for 20 minutes to comment on Draft Rules at hearing and use of PowerPoint

Dear Judge Winter,

Thank you for your e-mail of August 30 acknowledging and granting my request to appear and testify at the hearing, planned to commence at 10:00 a.m. on September 27, 2007, in the U.S. Courthouse at 225 Cadman Plaza East, Brooklyn, New York, on the Draft Rules Governing Judicial Conduct and Disability Proceedings released by the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States.

To satisfy the requirement that together with the request to appear at the hearing a requester give a written indication of the testimony that he intends to provide on that occasion, I timely submitted a draft of some of the comments that I, as an attorney at Judicial-Discipline-Reform.org, intend to present at the hearing and in writing to the Committee. For every useful purpose, you will find reproduced hereunder the indication of my intended comments.

In your e-mail, you stated that after September 17 you would determine the order in which the witnesses will speak at the hearing. I would appreciate it if you would let me know at your earliest convenience when I will testify.

Moreover, since there is no statement on your part on the length of the testimony and given the structured nature and length of my intended comments, I respectfully request that to make my comments I be given 20 minutes.

I would also like to know:

- a) whether the U.S. Courthouse at 225 Cadman Plaza East, where the hearing will be held, can make available the necessary equipment to make a PowerPoint presentation; if so,
- b) the type of media, such as a CD or DVD, on which I can bring my PowerPoint file, and
- c) whether I can arrive at 9:00 a.m. on day of the hearing to test the equipment.

I look forward to hearing from you and meantime remain,

yours sincerely,

Dr. Richard Cordero, Esq.

Dr. Richard Cordero, Esq.

Ph.D., University of Cambridge, England
M.B.A., University of Michigan Business School
D.E.A., La Sorbonne, Paris

59 Crescent Street, Brooklyn, NY 11208-1515
tel. (718) 827-9521

DrRCordero@Judicial-Discipline-Reform.org

August 23, 2007

(see the final, timely submitted version of October 13, 2007, at
http://Judicial-Discipline-Reform.org/judicial_complaints/DrCordero_draft_rules.pdf)

Indication of the Comments

On the Draft Rules Governing Judicial Conduct and Disability Proceedings intended to be made at the hearing on September 27, 2007, in the U.S. Courthouse at 225 Cadman Plaza East, Brooklyn, New York,

by

Dr. Richard Cordero, Esq.

I. Comments on the Rules (see samples below)

II. Whether the Rules' underlying basis, the Report of the Breyer Committee, provided any analysis not already available in, and not in contradiction with, the statistics since 1996 of the Administrative Office of the U.S. Courts on complaints filed under the Judicial Conduct and Disability Act of 1980

- A. The system of handling judicial conduct and disability complaints is fundamentally flawed due to judges' bias and dominating interest in self-preservation because it is based on the chief circuit judges reviewing complaints against their peers and friends
- B. The conflict of interests inherent in a chief circuit judge reviewing a complaint against the circuit court's or even his own appointee, that is, a bankruptcy judge appointed under 28 U.S.C. §152(a)(1) or (3), respectively

III. Whether the Rules or the Breyer Report deal with the fundamental institutional problems that have affected the application of the Judicial Conduct and Disability Act since its enactment in 1980

- A. The fundamental problem of lack of checks and balances to control the conduct of federal judges and the dynamics of interdependent survivability of members of close and powerful groups, two factors that have prevented the removal of any federal judges from the bench except seven judges in the 218 years since the adoption of the U.S. Constitution in 1789, by the count of the Federal Judicial Center (www.fjc.gov/history/home.nsf >Judges of the United States>Impeachments of Judges)

IV. Whether the Rules have the potential to render effective the Federal Judiciary's current mechanism of self-discipline by requiring that the Judiciary and its members be accountable for their administration of justice and perform their duty to safeguard the integrity of judicial process

- A. Evidence that the Supreme Court has tolerated for years the systematic dismissal of misconduct complaints, thereby signaling that neither the Act nor the Rules were to be taken seriously
- B. The Judicial Conference has known that the Act and the current rules for its implementation are ineffective given that in the 27 years of the Act it has issued only 15 opinions under it, and that for years in a row the judicial councils have not allowed a single complaint to make it even to its Committee for the Review of Judicial Council Conduct and Disability Decisions (now known as the Judicial Conference Committee on Judicial Conduct and Disability)
- C. How self-discipline through peer review is ineffective to prevent that judges appointed for life and as a matter of fact unimpeachable elevate themselves above the law, where they enjoy the privilege of having justice applied to them in private given that complaints against them are treated confidentially and by peer judges, who lack impartiality due to their reputational interest, or even self-preservation interest, in their complained-about peers being found above reproach
- D. The need for an independent board of citizens neither appointed by nor related to the judiciary, otherwise for a panel of three retired judges from circuits other than that of the complained-about judge, to enforce in public proceedings rules of judicial discipline and accountability aimed at providing persons injured by complained-about judges an effective remedy, that is, compensation, and at holding judges to the standard of “Equal Justice Under Law”

I. Comments on the Rules (Sample)

ARTICLE I. GENERAL PROVISIONS

Rule 1. Scope, p2, L3, and purpose

1. The Rules¹ are designed by federal judges to protect their own position above both the law and the other two branches of the federal government, that is, the Executive and the Legislative. They are not designed to enable the attainment of the objective reasonably pursued by a person who bothers to write a complaint and thereby exposes himself to retaliation from the complained-against individual, namely, to cause that individual, here a judge, to cease and desist his complaint-causing conduct and to require such judge or his employer, the Judicial Branch, to compensate the complainant for the harm that he caused the complainant.

¹ Drafts Rules Governing Judicial Conduct and Disability Proceedings, released for public comment by the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States; hereinafter the Rules.

2. This is due to the Act²'s "largely based...administrative perspective", p11, L40, cf. p26, L37-38. This means that the Act is conceived as a set of housekeeping instructions for the internal management by the Federal Judiciary of its personnel, the judges. Neither the Act nor the Rules attempt to provide a system of checks and balances on the exercise by judges of judicial power. Hence, judges are allowed to exercise their considerable power over property, liberty, and even life not only "during Good Behaviour", U.S. Const., Art. III, Sec. 1, but as a matter of fact also 'during Bad Behaviour' for the rest of their lives.
3. The fact is that in the 217 years since the adoption of the U.S. Constitution in 1789, only seven judges have been removed from the bench, according to the Federal Judicial Center (www.fjc.gov/history/home.nsf?category=judges>Judges of the United States>Impeachments of Judges). So, they can behave badly while enjoying the assurance that they will not pay any price therefore because their salary cannot be diminished while they hold office, U.S. Const., Art. III, Sec. 1, or even hold on to office after retirement to protect their sinecure. Hence, power exercised for life without any checks and balances becomes absolute power. Such absolute power has a known effect on those who exercise it: It corrupts them absolutely.³ Such corruption is not limited to the taking of bribes or rendering decisions that protect or advance their economic interests, such as their stockholdings, but also includes the complicit toleration of the wrongdoing that they see other peers practice and that they aid and abet through their silence in exchange for the emotional and social benefit of their friendship and continued camaraderie.
4. Neither the Act nor the Rules recognize the right of complainants to obtain an effective remedy, as the Judiciary, which is part of government, would have to do if it did not in fact hold itself, unlike the two 'lesser' branches of government, above the law, including the First Amendment, which provides "the right of the people peaceably to assemble, and petition the Government for a redress of grievances". Rather, they allow the chief circuit judge to dismiss a complaint without more; if he does not do that, whatever he does is not aimed at providing redress to the complainant, but simply to do something that is "best able to influence a judge's future behavior in constructive ways", p11, L42. There is no attempt to remedy through compensation the harm that the complainant may have suffered at the hands of a judge who showed bias against him or disregarded the law, thereby causing him the loss of rights, property, or liberty and forcing him either to give up the prosecution of his case or to continue litigating in court at enormous additional material and emotional cost.

Rule 2. Effect and Construction, p3, L4

5. A chief circuit judge can suspend the new Rules if he only "finds expressly that

² Judicial Conduct and Disability Act of 1980, 28 U.S.C. §351 et seq.; hereinafter the Act.

³ "Power corrupts, and absolute power corrupts absolutely"; Lord Acton in his Letter to Bishop Mandell Creighton, April 3, 1887.

exceptional circumstances render the application of a Rule in a particular proceeding manifestly unjust or manifestly contrary to the purposes of 28 U.S.C. §§ 351-364 or these Rules”, p3, L11-13.

6. Rule 2 exhibits the same defect that the Breyer Committee⁴ found regarding the evaluation of the original Rules, namely, a lack of “interpretive standards”, p22, L22-25. None of the competent entities for the implementation of the Act through the Rules⁵ is required to provide a reasoned statement equivalent to conclusions of law under FRCivP 52(a) of what makes the application of the Rules “manifestly unjust or contrary to the purpose of the Act or the Rules”.
7. Note that when the Rule drafters wanted to require the chief circuit judge to state reasons for his conduct, they did so expressly: “The Act authorizes the chief circuit judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint”, p9, L4-5.
8. Given the perfunctory decisions by which chief circuit judges systematically dismiss complaints, not to mention the mere forms used by a judicial council to deny review, there is every evidence to support the concern that under the Rules chief circuit judges will continue to dismiss complaints by finding at will and without stating their reasons that in the complaint at hand the Rules are inapplicable due to “exceptional circumstances”.
9. Since a district judge cannot suspend the FRCivP just because he deems their application “manifestly unjust or contrary” to the purpose of the law or the FRCivP, why should the chief circuit judge be allowed to do so with respect to the application of the Rules to one of his peers or even to one of his bankruptcy appointees?
10. In any event, once the chief circuit judge finds the Rules inapplicable, what does he do?: dismiss the complaint for lack regulatory authority or just make up his own rules as he goes along to the detriment of the complainant, who filed her complaint in reliance on those Rules?
11. What the final sentence of Rule 2 does in effect is turn the Rules into suggestions that the chief circuit judge can disregard whenever pressure from his peers or a conflict of interests makes it expedient to do so.

⁴ The Judicial Conduct and Disability Act Study Committee, appointed in 2004 by the Late Chief Justice Rehnquist and chaired by Associate Justice Breyer. It presented a report, known as the “Breyer Report,” 239 F.R.D. 116 (Sept. 2006).

⁵ These entities are the chief circuit judge, the special committee, the judicial council, the Judicial Conduct and Disability Act Committee, and the Judicial Conference.

ARTICLE II. INITIATION OF A COMPLAINT

Rule 5. Identification of a Complaint, p8, L7

12. “(2) A chief judge:...(B) need not identify a complaint if it is clear on the basis of the total mix of information available to the chief circuit judge that the review provided in Rule 11 will result in a dismissal under Rule 11(c), (d), or (e). However, a chief circuit judge may identify a complaint in such circumstances in order to assure the public that highly visible allegations have been investigated. In such a case, appointment of a special committee under Rule 11(f) may not be necessary”, p8L9, 24-30
13. In all but so many words, this Rule allows the chief circuit judge to mislead the public by pretending that he has identified a complaint against a judge and will investigate the information constituting an identifiable complaint, when in fact he has already decided that there is not going to be any such investigation and that the complaint is as good as dismissed but for the signing of the order to that effect.
14. What kind of trust in the integrity of the process did the drafters intend to build in judges, complainants, and the public when they authorized the handling of complaints through deceit? Would stockholders bring a cause of action for negligence, deceit, and mounting a cover up against an investment bank that announced, not just once, but rather as part of an express policy, that it had opened a file on a complaint that some of its officers had engaged in inside trading, falsifying profit figures, and operating illegal offshore accounts, when in fact it had not only not opened any such file, but also never intended to investigate the complaints at all? What would a jury find?
15. This Rule disregards the first and second Laws of Sloth, which precede those of Newton as well as the Magna Carta: first, a person shall not do any work that he can avoid doing; and second, whenever a person, particularly one on a fixed salary, is afforded an excuse not to take onerous action required to perform her duty, especially one that will increase her discomfort by affecting her interests adversely, she will invoke that excuse to minimize discomfort and maximize comfort, her duty notwithstanding. This Law is also known by its popular name, that is, take the easy way out and enjoy your piña colada.

Rule 6. Filing a Complaint, p9, L10

20. “The name of the subject judge should not appear on the envelope”⁶, p.11, L1-2. This is an example of unequal justice, since a complaint against any member of the other two

⁶ “Subject judge” is the term of art for ‘complained about judge’, or as the Rules define it, “The term “subject judge” means any judge described in Rule 4 who is the subject of a complaint”, p4, L23-25.

branches of government is not shrouded in such secrecy. The secrecy protecting the name of a peer only makes it easier for the chief circuit judge to dismiss the complaint at will without any review or examination whatsoever.

21. Such secrecy is misused when it is a means for the Judiciary to protect its reputation interest in appearing not to have rogue judges in its midst. Bad or rotten apples appear in every organization where human beings, with all their virtues and vices, are present. Actually, if “power corrupts, and absolute power corrupts absolutely”, then one would expect to find an above average number of cases of absolute corruption in an institution such as the Federal Judiciary, whose members wield power of over the property, liberty, and life of everybody else and do so for life so long as their peers pretend that theirs is “good Behaviour”.
22. Secrecy may be necessary to protect the complainant, for as the drafters recognize, complainants may fear retaliation by judges against people who make statements accusing them of misconduct, such as “an attorney who practices in federal court, and that [insists on remaining an] unnamed witness...unwilling to be identified or to come forward”, p17, L35-36. But such secrecy should be maintained at the option of the complainant, to the extent that it does not detract from the basic notion of fairness that ensures any person the right to confront his accusers.
23. However, the secrecy that the drafters require is not for the protection of the complainant, but rather for that of the Judiciary and its judges. This is shown by the fact that if the complainant does not agree to remain quiet about her complaint beyond the fact of filing it, she will be penalized by the special committee not letting her know what one could reasonably expect a complainant to be entitled to know if the filing of the complaint were conceived as an act of a victim of a judge’s misconduct seeking a remedy, namely, to know with what zeal, competency, and completeness the judiciary investigated one of its own and to that end, receive as of right a copy of the report of the investigation conducted by the special committee.
24. Under Rule 16(e), by contrast, the possibility –not the certainty- of receiving such report is a carrot dangled in front of the complainant. She may be allowed to eat it depending on “the degree of the complainant’s cooperation in preserving the confidentiality of the proceedings, including the identity of the subject judge”, p26, L30-31. The drafters put it even blunter terms in their Commentary: “In exercising their discretion regarding the role of the complainant, the special committee and the judicial council should protect the confidentiality of the complaint process. As a consequence, Subsection (e) provides that a special committee may consider the degree to which a complainant has cooperated in preserving the confidentiality of the proceedings in determining what role beyond the minimum required by these Rules should be given to that complainant”, p27, L13-17.

25. This means that the drafters accord a higher value to keeping the identity of the subject judge secret than to obtaining the benefit that can result for the Judiciary as well as for the complainant from the latter publicizing her complaint, namely, to cause witnesses and other persons similarly injured by the subject judge come forward. Thereby the complainant can buttress her complaint and ensure that it is not dismissed out of hand by the chief circuit judge and that he not only appoints a special committee, but that the one appointed conducts its investigation as broadly and deeply as the real extent of the problem warrants, which redounds to the benefit of the Judiciary by enabling it to correct the problem...but this could entail finding the subject judge at fault and even having to reprimand her publicly, which impairs the Judiciary's reputational interests and can threaten the chief circuit judge's and his peers' self-preservation interests... 'uhm, better the complainant keep quiet or she will be made to pay a price by not being allowed to learn about the handling of her complaint "beyond the minimum required by these Rules"', p27, L17. Secrecy trumps efficiency and fairness.
26. The Rules' requirement of secrecy and its denial of any meaningful remedy to the complainant for the harm caused her by a subject judge (see comments on Rule 11(d), ¶52 et seq. below) show that the Rules treat the complainant as a mere informant whose only role is to assist a "process view[ed] as fundamentally administrative and inquisitorial, [so that] 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", p26, L37-39. In light of these circumstances, why should a potential complainant ever bother to file a complaint against a judge since there is nothing in it for her except the implicitly acknowledged well-founded fear of retaliation by, not only the subject judge, but also every other judge "in federal court", p17, L35-36 and ¶22 above,?

Rule 7. Where to Initiate Complaints, p11, L13

27. "With an exception for judges sitting by designation, the Rule requires the identifying or filing of a misconduct or disability complaint in the circuit in which the judge holds office, largely based **on the administrative perspective of the Act**. Given **the Act's emphasis on the future conduct of the business of the courts**, the circuit in which the judge holds office is the appropriate forum because that circuit is likely best able **to influence a judge's future**", p11, L38-42, "**behavior in constructive ways**", p12, L1. (emphasis added)
28. There are no standards setting forth the circumstances under which a non-home circuit can transfer a complaint to the subject judge's home-circuit, except "where allegations also involve a member of the bar -- ex parte contact between an attorney and a judge, for example -- it may often be desirable to have the judicial and bar misconduct proceedings take place in the same venue. Rule 7(b), therefore,

allows transfer to, or filing or identification of a complaint in, the non-home circuit. The proceeding may be transferred by the judicial council of the filing or identified circuit to the other circuit”, p12, L4-9.

29. There is no consideration of the concerns that warrant the application of the doctrine of forum non-conveniens, or of the practical inconvenience for the complainant who resides in the subject judge’s non-home circuit to pursue his complaint against the local lawyer if the non-home judicial circuit decides nevertheless to split the complaint and transfer the part against the subject judge to his home-circuit. The complainant’s views on the issue of transfer are not taken into consideration because, after all, the Act takes an “administrative perspective” on complaints and considers them merely an internal matter to be decided, not in order to render justice to the complainant, let alone to punish the subject judge, but simply to improve “the future conduct of the business of the courts”, ¶27. If fault the subject judge committed in the past, it has already been forgiven and largely forgotten because the Act is not dealing with even the fault’s impact on the present, but rather with how the subject judge’s conduct may affect other people in the future. Is the complainant supposed to endure all the considerable emotional and material ‘inconvenience’ of filing a complaint and petitions against the statistically overwhelmingly frequent dismissal and denial of review just as a public service for the benefit of others? Would it be from the peers of the subject judge that she would receive the example of such altruism?

Rule 8. Action by Clerk, p12, L11

30. “(b) Distribution of Copies”, p12, L13. Rule 8 does not require the chief circuit judge to discuss the complaint with the subject judge before dismissing it. The accuracy of this statement is corroborated by Rule 11(f), which provides that “Before appointing a special committee, the chief circuit judge must invite the subject judge to respond to the complaint either orally or in writing if such an opportunity was not given during the limited inquiry”, p15, L27-29. The drafters justify the chief circuit judges taking this initiative at this time on behalf of their peers because the drafters validate the chief circuit judges’ prejudice against complaints, that is, their preconceived judgment that complaints are meritless and not worthy of subject judges’ time since “many complaints are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense”, p19, L31-33.
31. Hence, Rule 8 does not require the subject judge to take cognizance of the complaint and put in writing his or her response, which at the very least would have a cautionary effect by giving notice to the subject judge that somebody took exception to his or her conduct. Likewise, it does not require the chief judge of the court on which the subject judge sits to do absolutely anything with the copy of the complaint that the clerk is required to send him; he does not even

have to bother to read it since he does not have to take a position on it at all. The complaint may well be received by the clerk of his court and systematically sent to the slush pile.

32. Constructive knowledge of the complaint may be imputed to such chief judge by the fact of just having been sent a copy of it. However, requiring that such chief judge certify that she has actually received and in fact taken cognizance of the complaint against one of the judges in her court would have the salutary effect of alerting her to a problem with the subject judge in her court or even in her court as a whole. Knowing the complaint's content would afford her the opportunity to take appropriate administrative measures to deal with the problem, if not at the earliest opportunity because she already knew or by exercising her supervisory function with due diligence would have known about such problem, at least from then on. What is more, such knowledge would impose on her an affirmative duty to deal with the problem, similar to that which every single judge is under pursuant to 18 U.S.C. §3057 Bankruptcy investigations, that is, the chief judge would have the duty to communicate to the chief circuit judge 'any reasonable grounds that she had for believing either that the subject judge engaged in the conduct or had the disability complained about or that an investigation should be had in connection with the complaint'.
33. The absence in Rule 8(b), ¶30 above, of any required action by either the subject judge or the chief judge of his court upon receipt of the complaint is in faithful compliance with a corollary to the second Law of Sloth, namely: Do not waste your effort doing anything that you are not required to do because if neither the law, nor the rules, nor a code of conduct requires you to do it, then by the definition it is not important and you have nothing to gain from doing it. This corollary has been translated from legalese into plain English as "do not go looking for trouble; let them chase after you, and if they catch you, then do the minimum indispensable to get away with it".
34. As far as the complaint goes, nobody but the chief circuit judge may ever have to know that a complaint was filed. Consequently, the Rules do not provide for the complainant to be informed of the subject judge's reaction to the complaint, for no such reaction is required. As a result, the complaint may be dismissed by the chief circuit judge under Rule 11 without either the complainant, the subject judge, or his chief judge becoming any the wiser for it.
35. What is more, if reaction there is on the part of the subject judge because the chief circuit judge uses his faculty under Rule 11(b) whereby he "may communicate orally or in writing with...the subject judge", p14, L35-36, the complainant may not know of the tenor of it since the chief circuit judge is not even required to notify the complainant of such communication with the subject judge...and all the better, for what would the chief circuit judge notify about his communication with the subject judge?, which is likely to go off thus:

CCJ: Hey Nicky, how are you!?

SJ: Joey!, How's it going?

CSJ: Real good. I wanted to let you know again how much I enjoyed that last judicial junket.

SJ: Me too. I learned a lot about fly fishing.

CCJ: Listen, my wife just got the photos. I think Millie will like them too.

SJ: You'r right. My wife is making the album for all of us this time.

CCJ: I'll send them to you right away by courier. By the way, I found this thing about you that has been lying on my desk for months, you know... What's the story 'bout it?

SJ: You mean the complaint? Well, so long ago. I think one of the clerks told me that one of those had come in. Joey, there is not'ing to it. You know how things go. These little people come into your court out of their wits 'cause they got sued or are revved up by a petty offense they just whipped up from a tea pot into a stormy lawsuit and they're nervous and misunderstand everything you say and exaggerate everything you do and don't understand not'ing about how things are done in the local practice of a real courtroom.

CCJ: Nicky, you don't have to tell me. If remember how things were when I was in district. Today I just give'em a summary order: Affirmed! Affirmed! Affirmed! and move on.

SJ: How I envy you!, Joey. I try as much I can to get rid of these pesky mud slingers to work on the cases with pedigree names. Anyway, you can't shortchange the honchos with big law firms. They have the means to go up and make you look like a hack...

CCJ: and you end up calling in your IOUs to fix it! Nicky, Nicky! I know the drill. Well, I'm so glad we have discussed this matter fully. Sorry I even mentioned it. But don't you sweat it. I'll give this complaint the good shot; I have a form for them too: Dismissed! Dismissed! Dismissed!

SJ: You do that and thank you so much, I really appreciate what you'r doing for me with those photos. Send them right away. I think you gotta one when Harry was startled awake by his first fish ever...and fell from the boat into the lake! We'r gonna be teasing him until we meet you guys at the circuit conference!

CCJ: You are such a jerk...I'll help you! I'll write a note on the back of that photo that it has been submitted in a disability complaint against him as evidence he also falls asleep on the bench. Make sure the gang is with him when he reads it. With his leaky bladder after dozing for years at boring squabblers, he'll do it in his pampers laughing!

SJ: You genius!

36. Did the Rule drafters honestly expect CCJ Joey to be "administrative and inquisitorial", p5, L5-6, when he called SJ Nicky to fully discuss the complaint against him? Would he be Torquemada inquiring with piercing fact questions the conscience of a heretic who practiced

conduct in opposition to that prescribed in the code of conduct for judges? Or precisely because such code is as weak a basis for any disciplinary action as are other regulations on judicial conduct, p5-L27/p6, L6, would CCJ instead call to administer reassurance to his long-standing friendship with colleagues that he has known for 10, 15, 20 years?

37. During those many years, CCJ has ‘worked’ with his colleagues, not only at judicial junkets and circuit conferences, but also in judicial council meetings and those of the Judicial Conference as well as in several of the many Judicial Conference committees, just as in committees to renovate the courthouse, in those appointed by the Chief Justice to review judicial salary or discipline; at weekend retreats to induct a new judge, or ceremonies to bid farewell to a retiring judge or celebrate taking of office as chief judge; in delegations to other countries to teach at seminars on the American judicial system or to receive foreign delegates, and with whom he shared memorable moments at the wedding of a daughter, trying moments of accident and death, and made plans to go together with the gang on a Caribbean cruise next...stop it right there! ‘cause Dick Schmock just filed a complaint alleging misconduct on SJ Nicky’s part so CCJ Joey, who was nominated by the President solely because of his integrity and legal acumen, and was made incorruptible when confirmed by the Senate, as are made all other federal judges, is going to call SJ Nicky to roast on an inquisitorial skewer his motives, impartiality, and respect for the law, regardless of how that incident will char CCJ’s relationship to SJ and to all the other judges for the rest of CCJ’s career, but Dick Schmock’s one-off complaint is so worth it that...Nonsense! Pure wishful thinking or a knowingly deceitful scenario, for it is contrary to human nature and the evidence of the 218 year history of the federal judiciary and its grand total of seven removals from the bench.
38. This means that if the chief circuit judge does communicate with the subject judge to consider the complaint however circumspectly, the former will go in with the need to believe the latter, who will be aware that the communication is pro forma and his role is simply to satisfy that favorable prejudice with a story believable on its face. After all, like the Act, “these rules do not give the complainant the rights of a party to litigation”, p26, L38, where in an adversarial confrontation with the subject judge in public before an impartial arbiter determined to allow a clash of their respective version of the events the complainant would try to establish his as true and actionable. Instead, the Act and the Rules require the complainant to let his complaint be revealed to the subject judge, while not requiring that he be informed whether the subject judge bothered to give any answer to it, let alone the content of any that he may have given to his friendly colleague, the chief circuit judge.
39. The role of the chief circuit judge is not to let ‘sunshine be the best revealer of truth’; but rather to maintain the confidentiality of not only the proceedings, p26, L29-31, but also of even the name of the subject judge, p15, L35-36, in order to “encourage informal disposition”, p42, L8-9, of the complaint at its earliest stage by her “suggesting”, p18, L33, easy terms of disposition to facilitate the subject judge’s acceptance of “voluntary corrective action”,

p42, L6-7, involving no individual or institutional liability or compensation whatsoever. Does this have anything to do with traditional notions of fair play and substantial justice through due process of law, or is it a device crafted to let ‘friendship be the best cover up for infectious judicial conduct’?

Rule 10. Abuse of the Complaint Procedure, p13, L17

40. “(b) **Orchestrated Complaints.** Where large numbers of essentially identical complaints from different complainants are received and appear to be part of an orchestrated campaign, the judicial council may, on the recommendation of the chief circuit judge, issue a written order instructing the clerk of the court of appeals to accept only one or more of such complaints for filing and to refuse to accept subsequent complaints. A copy of the order shall be sent to the complainants whose complaints were not accepted”, p13, L27-33
41. With this Rule, the judges protect themselves from the equivalent of a class action. No provision is made for the possibility that many people may have had the same cause for complaining against the subject judge or that their complaints may add evidentiary weight to the common tenor of the complaints. Nor is the likelihood considered that the review of similar complaints could allow the detection of a pattern of conduct on the part of the subject judge, much less the possibility that in addition to all the elements common to all complaints, each could contain particular elements so that “on the basis of the total mix of information”, p5, L24-25, a more detailed picture may be drawn of the subject judge, his conduct, personality, working conditions, and characteristics of complainants.
42. Moreover, how can all complainants regardless of their number, except “only one or more”, p13, L31, be deprived of their right to complain against a judge simply because to the latter’s peers it just “appears” that their complaints are “part of an orchestrated campaign”, p13, L29.? Where does the law permit the view that ‘orchestrating a campaign’ to recall a governor of a state or a member of the legislature is a permissible exercise of the right “to assemble, and to petition the Government for a redress of grievances”, U.S. Const, First Amend., because limited to the Executive and Legislative Branches of Government, but if mounted to complain against a federal judge it becomes a conspiratorial act of people scheming an inherently meritless attack on an unfairly target judge and creating such clear and present danger to the Judiciary itself, the Branch above the Constitution, that both need to be protected by breaking the “orchestrated campaign” before the complaints are even filed, let alone reviewed?
43. What logic, let alone principle of law, allows the drafters to conclude that if people use “the Internet or other technology”, p14, L3-4, to search for other people with “essentially identical complaints against the same judge or judges”, p14, L1-2, and “dozens or

hundreds”, p14, L1, respond and decide to assemble to petition for redress jointly, then they reveal themselves as “orchestrators” of complaints carrying the virus of mean-spiritedness and frivolousness requiring that they be deleted in bulk lest they infect the Judiciary?

44. Why not eliminate the thousands of complaints against ENRON and its financial backers, or Dow Corning, the manufacturer of leaky silicone breast implants, or the pharmaceutical company Pfizer that marketed the potentially fatal anti-arthritis Vioxx and Celebrex pills, by applying to them the drafters’ rationale for blocking the filing of “orchestrated” complaints?: “If each complaint submitted as part of such a campaign were accepted for filing and processed according to these rules, there would be a serious drain on court resources without any benefit to the adjudication of the underlying merits”, p14, L4-7.
45. If after “the first complaint or complaints have been dismissed on the merits,... further, essentially identical, submissions follow”, p14, L11-12, why did the drafters not draw from that fact the conclusion that it was necessary for the chief circuit judge to ‘take from among “We the People” out there “an objective view of the appearance of the judicial conduct in question”, p18, L32-33, as improper, biased, or otherwise complainable, and that the “People”’s view should be dealt with by allowing their complaints to be filed and reviewing them in order to understand what gave rise to it? Such course of action would show that responsiveness is “preferable to sanctions”, p18, L31, which “We the People”, not only the subject judge, deserve to be spared because a judiciary that cares to understand public concerns and, if found valid, corrects the underlying problems and, if found invalid, educates the public on why they are so and should be dealt with through other means of action, promotes trust in the courts and in the integrity of their process to administer “Equal Justice Under Law”.
46. It would appear from this Rule that the drafters too are judges who just overdid it with their orchestration of tunes for the protection of the vested interests of their above the law class of judges...but that’s only a thought.

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF CIRCUIT JUDGE, p14, L18

Rule 11. Review by the Chief Circuit Judge, p14, L20

47. **Rule 11 “(c) Dismissal.** A complaint must be dismissed in whole or in part to the extent that the chief circuit judge concludes that the complaint:”, p14, L41-42, is what he prejudged many complaints to be, that is, ‘clearly’ dismissable. This impermissible bias on the part of a chief circuit judge against the merits of complaints about his peers is nevertheless validated by the drafters in their astonishing statement that “many complaints

are clear candidates for dismissal even if their allegations are accepted as true, and there is no need for the subject judge to devote time to a defense”, p19, L31-33.

48. This means that out of expediency, a subject judge can skip filing any answer to a complaint against him by simply relying on the chance that it will be dismissed, for he knows that his silence will not be construed as an admission and that the complaint will not be investigated by default, contrary to what happens in lawsuits among people “Under Law” and FRCivP 4(a) and 8(d). Now consider that also out of expediency, a chief circuit judge together with his court routinely disposes of whole appeals by having a blank in a summary order form filled in with “Affirmed” and likewise disposes of motions by having a circle made around either the word “Denied”, mostly, or “Granted”, rarely, on the Motion Information Statement, which is another form for the movant to summarize her motion so that the judge does not have to read it. That same expediency has generated a bias in that same chief circuit judge toward prejudging as many complaints as he can “clear candidates for dismissal” and dismissing them without any inquiry or investigation.
49. The chief circuit judge must also dismiss the complaint if he concludes that it “(5) is otherwise not appropriate for consideration under the Act”, p15, L10. This is a vague and standardless catch-all that allows the chief circuit judge to dismiss a complaint for any reason and no reason. Indeed, Rule 11(g)(1) provides only this: “(g) Notice of Chief Circuit Judge’s Action; Petitions for Review. (1) If the complaint is disposed of under Rule 11(c), (d), or (e), the chief circuit judge must prepare a supporting memorandum that sets forth the reasons for the disposition”, p15, L32-35. This requirement can conceivably be satisfied by the chief circuit judge simply quoting the Rule in his memorandum, where he states that ‘the complaint is dismissed because it is no appropriate for consideration under the Act’.
50. By contrast, when a plaintiff files a complaint against a lesser defendant ‘Under Law’ and the FRCivP, her complaint can be dismissed summarily before discovery only if the defendant publicly files a motion or a pleading stating its reasons for requesting dismissal, such as those provided under FRCivP 12(b). Thereupon the plaintiff has the opportunity to argue against dismissal, challenging in open court or in a publicly filed answer the factual and legal basis of the defendant’s dismissal grounds.
51. It can happen that the district judge dismisses the complaint but fails to perform his duty to state his findings of facts or conclusions of law with sufficient detail to satisfy the purpose of such duty. In such event, the complainant can on appeal at least point to the defendant’s reason for dismissal in its motion or pleading, where they would presumably be as detailed and well grounded as the defendant was capable to provide with a view to prevailing in the context of a public adversarial proceeding. However, ‘subject’ judges are not subject to such proceedings, for they are above the law and entitled to the best defense possible, namely, his peer chief

circuit judge, who can summarily dismiss the complaint because it is just “not appropriate for consideration under the Act”, p15, :10.

52. **Rule 11 “(d) Corrective Action.** The chief circuit judge may conclude the complaint proceeding in whole or in part if the chief circuit judge determines that appropriate corrective action that acknowledges and remedies the problems raised by the complaint has been voluntarily taken by the subject judge;” p15, L14-18.
53. This section of Rule 11 provides no standard for determining what is “appropriate” or what action ‘corrects’ the complained-about conduct of the subject judge, particularly since the subject judge ‘volunteers’ a remedy that suits him but that has nothing to do with any remedy that the complainant may have requested in his complaint.
54. This means that all is needed from the penitent judge is for him to choose his own penance through his “participation [with the chief circuit judge] in formulating the directive...of remedial action’, p18, L36-37, and the chief circuit judge will grant him absolution; in other words: “-O.K., O.K, I won’t do it again. –Then go in peace, my son, and be good”. After all, the chief circuit judge is only interested in doing something that is “best able to influence a judge’s future behavior in constructive ways”, p11, L42, not in providing a remedy for the harm that his peer inflicted upon the complainant in the past. That harm can be considerable, for it can include the loss of rights and the expense of an enormous amount of effort, time, and money trying to recover them and the suffering of tremendous intentional emotional distress caused by the subject judge due to, for example, his bias against out of town pro se litigants that do not play by the rules of ‘local practice’ and insist on applying the law of the land of Congress.
55. That harm constitutes injury in fact. Hence, to offer only to “redress the harm, if possible, such as by an apology, recusal from a case, and a pledge to refrain from similar conduct in the future”, p19, L3-4, is nothing but insincere lip-service. Moreover, to say in the same breath that “any corrective action should, to the extent possible, serve to correct a specific harm to an individual, if such harm can reasonably be remedied”, p19, L5-6, is disingenuous. By not including among the remedies the payment of compensation to the complainant by the subject judge or his institutional employer, the Judiciary, for the injury that either or both have caused the complainant, the drafters exempt the judge and the institution from all liability. Apologetic words by a subject judge are cheap, as are those of “a private or public reprimand”, p19, L13-14, of him by the chief circuit judge. Why is it, by contrast, that the “extent possible” of the remedy that a company can be required to provide is so vast that it may even force the company into bankruptcy to compensate the victims of its officers’ conduct?, e.g. Pan Am had to file for bankruptcy after being ordered to compensate the victims of the downing of its Boeing 747 on Flight 103 at Lockerbie, Scotland.

56. This divergent ‘extent of the possible’ reveals a double standard of justice: a compensatory one for “We the People Under Law” and an exonerating one for the judicial class above the law. Just as is the sanction of the subject judge by a mere reprimand, a remedy for the complainant of a mere apology is a mockery of justice.
57. There is no “Equal Justice Under Law” when the subject judge can voluntarily choose his remedy for the future and leave the complaint holding the bag of damages that the judge caused the complainant in the past. Nor is the chief circuit judge under the same law and its tort principles that would require him to hold the Judiciary to its institutional responsibility for the harm caused to a party to a lawsuit by one of its employees during the performance of his duties in the course of business.
58. The fact is that judges are not employees of the Federal Judiciary; rather, they are independent contractors that hold office in their own right “during good Behaviour”, U.S. Const., Art. III, Sec. 1. Not even the Chief Justice of the Supreme Court of the United States can remove from the bench a judge due to his ‘bad Behaviour’, not to mention that “Neither the chief circuit judge nor an appellate court has authority under the Act to impose a formal remedy or sanction”, p18, L38-39, and a judicial council cannot be used as proxy to dock his compensation, “which shall not be diminished during [his] Continuance in Office”, Const., id.
59. The only real sanction that has any meaningful impact on the subject judge is a referral for impeachment to the House of Representatives...a very risky move, indeed. It may lead to the subject judge adopting the retaliatory position “*If you bring me down, I take you with me!*” and to that end, pointing the finger in turn at the judges higher up in the judicial hierarchy either for the wrongdoing that they actively participated in for their benefit or quietly tolerated out of fear of being ostracized as treasonous pariahs, which could cause them to point the finger at those even higher up. Thereby a domino effect could be triggered that would threaten the Judiciary’s reputational interests and the independence that through the Act and the Rules’ mechanism of self-discipline it enjoys from effective control by law enforcement agencies or Congressional judicial committees. Given such dismal prospect, some conciliatory and appeasing words, uttered against the continued bass of self-preservation, such as “Then go in peace, my son, and let you and me be good to each other”, sound, oh!, so much more reasonable and promising.
60. In light of those circumstances, the best a chief circuit judge can do is forgive and forget and hope that the subject judge will behave better in future...and tough luck for the complainant, for his injuries are in the past and nobody is here now to ensure that “appropriate corrective action....remedies” them, p15, L15-16. “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”, p18, L28-30. The Rules have been drafted to ensure self-preservation, not to

establish checks and balances between “We the People Under Law” and the class of federal judges above the law, let alone to provide “Equal Justice” for both.

61. **“Commentary to Rule 11:** The chief circuit judge is not required to act solely on the face of the complaint. The power to conclude a complaint proceeding on the basis that corrective action has been taken implies some power to determine whether the facts alleged are true. But the boundary line of that power -- the point at which a chief circuit judge invades the territory reserved for special committees -- is unclear.” P17, L10-14.
62. What a pertinent opportunity the drafting of this Rules was to render “clear” such boundary line by providing “authoritative interpretive standards” together with examples in order to cure the “lack of” them found by the Breyer Committee, p2, L22-25. If the drafters did not have the authority or will to provide such needed clarification, what exactly could and did they provide other than cosmetic touch-ups?
63. So rare and inconsequential for complainants are the Rules’ ‘new’ provisions that when the drafters did provide something of some relevant novelty, they had to celebrate their accomplishment by pointing it out. This is what they did with a provision concerning, not complainants and the effectiveness of their complaints, but rather a committee for the administration of the Rules: “The provision requiring clerks to send copies of all complaints to the Judicial Conference Committee on Judicial Conduct and Disability is new. It is necessary to enable the Committee to monitor administration of the Act, to anticipate upcoming issues, and to carry out its new jurisdictional responsibilities under Article VI”; p13, L1-4.
64. **Rule 11 “(e) Intervening Events.** The chief circuit judge may conclude the complaint proceeding in whole or in part if the chief circuit judge determines that intervening events render some or all allegations of the complaint moot or remedial action impossible”; p15, L19-22.
65. This provision is illustrative of how the federal judiciary has managed to place itself above the law applicable to the rest of “We the People”: The latter’s complainants in civil lawsuits may seek damages against a party even after the party’s death by suing its estate and may even recover against the estate. This means that not even the death of the defendant renders ‘impossible” a remedy claimed against people “Under Law” and thus, of lesser statute than a subject judge.
66. By contrast, this Rule allows the chief circuit judge to dismiss a complaint whenever the chief circuit judge deems that “remedial action [is] impossible”, without having to state specifically what remedial action the chief circuit judge considered to be impossible, let alone

why it is "impossible". Nor does the chief circuit judge have to give the complainant the opportunity to state how that 'impossible remedial action' could be rendered possible or what alternative remedial action is possible.

67. Moreover, the absence of any obligation on the chief circuit judge to identify specifically what "remedial action" she considered in connection with the complaint and why she deemed it "impossible" deprives the complainant of the possibility to challenge in a petition for review to the judicial council the chief circuit judge's application of that ground of dismissal to dismiss the complaint. Consequently, how could a judicial council reviewing an order of dismissal effectively determine whether an undetermined "remedial action" was possible or "impossible"? Lacking such information, the judicial council has nothing on which to base its determination other than its bias toward its peer.

Sincerely,

Dr. Richard Cordero, Esq.

Dr. Richard Cordero, Esq.
<http://Judicial-Discipline-Reform.org>
DrRCordero@Judicial-Discipline-Reform.org
59 Crescent Street
Brooklyn, NY 11208
tel. (718)827-9521



Library

- [Publications and Reports](#)
- [Periodicals](#)
- [Judicial Ethics and Conduct](#)
- [Statistical Reports](#)
- [Forms](#)
- [Court Fees](#)
- [Return to Library](#)

For Public Comment: Draft *Rules Governing Judicial Conduct and Disability Proceedings*

On July 16, 2007, the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States released its draft *Rules Governing Judicial Conduct and Disability Proceedings* for 90 days of public comment, **to conclude on October 15, 2007**. From this web page, you may review those rules and submit your comments by e-mail.

- [Review Draft *Rules Governing Judicial Conduct and Disability Proceedings* \(pdf\)](#)
- E-mail your comments to JudicialConductRules@ao.uscourts.gov

With any comments you submit, please specify your:

- Name,
- Mailing address,
- Organization, if any, and
- Occupation (federal judge, state judge, lawyer in private practice, government lawyer, professor, or non-lawyer).

Although submissions will not receive a response, those that are timely will be considered by the Judicial Conduct and Disability Committee as it prepares the draft rules for Judicial Conference consideration.

The draft rules were developed at the direction of the Judicial Conference as a means of ensuring that the Judicial Conduct and Disability Act, 28 U.S.C. §§ 351-364, operates consistently throughout the federal court system. If adopted

by the Conference, they will constitute binding guidance for chief judges, circuit judicial councils, and circuit staff on the full spectrum of issues noted in *Implementation of the Judicial Conduct and Disability Act of 1980, A Report to the Chief Justice*, 239 F.R.D. 116 (September 2006) ("Breyer Committee Report"). Those issues, and the historical and policy context of these rules, are discussed fully in that report.

You may also comment on these rules at a public hearing being planned for that purpose, to commence at 10:00 a.m. on September 27, 2007, in the U.S. Courthouse at 225 Cadman Plaza East, Brooklyn, New York. Requests to appear and testify at the hearing must be e-mailed by August 27 to the Office of the General Counsel, Administrative Office of the U.S. Courts, at JudicialConductRules@ao.uscourts.gov. Those who submit such requests will be asked to give a written indication of the testimony they intend to provide.

This web page and its links are for use only in reviewing, and commenting upon, the draft Rules Governing Judicial Conduct and Disability Proceedings. No complaints and no communication on any other topic will be accepted here.

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

TABLE OF CONTENTS

	Page
Preface.....	1
ARTICLE I. GENERAL PROVISIONS.....	2
Rule 1. Scope.....	2
Rule 2. Effect and Construction.....	3
Rule 3. Definitions.....	3
(a) Complaint.....	3
(b) Misconduct.....	4
(c) Disability.....	4
(d) Subject Judge.....	4
(e) Chief Circuit Judge.....	4
(f) Judicial Council and Circuit.....	4
Rule 4. Covered Judges.....	7
ARTICLE II. INITIATION OF A COMPLAINT.....	8
Rule 5. Identification of a Complaint.....	8
(a) Identifying a Complaint.....	8
Rule 6. Filing a Complaint.....	10
(a) Brief Statement of Facts.....	10
(b) Form.....	10
(c) Legibility; Number of Copies.....	10
(d) Signature.....	11
Rule 7. Where to Initiate Complaints.....	11
(a) Where to File.....	11
(b) Transfer; Misconduct in Another Circuit.....	11

DRAFT FOR PUBLIC COMMENT - 6/13/07

Rule 8. Action by Clerk.	12
(a) Receipt of Complaint.	12
(b) Distribution of Copies.	12
(c) Complaints Against Non-Covered Persons.	12
(d) Receipt of Complaint about a Judge and Another Non-Covered Person.	12
Rule 9. Time for Filing or Identifying a Complaint.	13
(a) No Time Limitations.	13
Rule 10. Abuse of the Complaint Procedure.	13
(a) Abusive Complaints	13
(b) Orchestrated Complaints.	13
ARTICLE III: REVIEW OF A COMPLAINT BY THE CHIEF CIRCUIT JUDGE.	14
Rule 11. Review by the Chief Circuit Judge	14
(a) Purpose of Chief Circuit Judge’s Review	14
(b) Inquiry by Chief Circuit Judge	14
(c) Dismissal.	14
(d) Corrective Action.	15
(e) Intervening Events.	15
(f) Appointment of Special Committee	15
(g) Notice of Chief Circuit Judge’s Action; Petitions for Review	15
(h) Public Availability of Chief Circuit Judge’s Decision	16
(i) Report to the Judicial Council	16
ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL COMMITTEE	20
Rule 12. Composition of Special Committees	20
(a) Membership	20
(b) Presiding Officer.	20
(c) Bankruptcy Judge or Magistrate Judge as Adviser.	20
(d) Provision of Documents	20
(e) Continuing Qualification of Committee Members.	20
(f) Inability of Committee Member to Complete Service	21
(g) Voting.	21
Rule 13. Conduct of an Investigation	22
(a) Extent and Methods of Special Committee Investigation.	22
(b) Criminal Conduct	22
(c) Staff	22

DRAFT FOR PUBLIC COMMENT - 6/13/07

(d) Delegation 23

Rule 14. Conduct of Hearings by Special Committee 24

(a) Purpose of Hearings 24

(b) Committee Witnesses 24

(c) Counsel for Witnesses. 24

(d) Witness Fees 24

(e) Oath 24

(f) Rules of Evidence 24

(g) Record and Transcript 24

Rule 15. Rights of Subject Judge 25

(a) Notice 25

(b) Presentation of Evidence 25

(c) Presentation of Argument 25

(d) Attendance at Hearings 25

(e) Representation by Counsel 25

Rule 16. Rights of Complainant 26

(a) Notice 26

(b) Opportunity to Provide Evidence 26

(c) Presentation of Argument. 26

(d) Representation by Counsel 26

(e) Cooperation. 26

Rule 17. Special Committee Report. 27

(a) Report 27

ARTICLE V. JUDICIAL COUNCIL REVIEW 27

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

(a) Petitions for Review 27

(b) Time; Form; Where to File 28

(c) Receipt and Distribution of Petition. 28

(d) Receipt of Untimely Petition. 28

(e) Receipt of Timely Petition not in Proper Form 28

Rule 19. Judicial Council Disposition of Petitions for Review. 29

(a) Rights of Subject Judge. 29

(b) Judicial Council Action. 29

(c) Notice of Council Decision 29

DRAFT FOR PUBLIC COMMENT - 6/13/07

(d) Memorandum of Council Decision 29
(e) Review of Judicial Council Decision 30
(f) Public Availability of Judicial Council Decision. 30

**Rule 20. Judicial Council Consideration of Reports and Recommendations of
Special Committees 30**
(a) Rights of Subject Judge 30
(b) Judicial Council Actions 30
(c) Inadequate Basis for Decision 31
(d) Council Vote 31
(e) Recommendation for Fee Reimbursement 32
(f) Council Action 32
(g) Public Availability of Council Action 32

**ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON
CONDUCT AND DISABILITY 33**

Rule 21. Committee on Conduct and Disability. 33
(a) Review by Committee 33
(b) Reviewable Matters 33
(c) Committee Vote 34
(d) Additional Investigation 34
(e) Oral Argument; Personal Appearance. 34
(f) Committee Decisions. 34
(g) Finality. 34

Rule 22. Procedures for Review 35
(a) Filing a Petition for Review. 35
(b) Form and Contents of Petition for Review 35
(c) Time. 36
(d) Copies. 36
(e) Action on Receipt of Petition for Review. 36

ARTICLE VII. MISCELLANEOUS RULES 36

Rule 23. Confidentiality 36
(a) General Rule 36
(b) Files. 36
(c) Disclosure in Decisions 36
(d) Availability to Judicial Conference. 36
(e) Availability to District Court 37
(f) Impeachment Proceedings 37

DRAFT FOR PUBLIC COMMENT - 6/13/07

(g) Consent of Subject Judge	37
(h) Disclosure in Special Circumstances	37
(i) Disclosure of Identity by Subject Judge	37
(j) Assistance and Consultation	37
Rule 24. Public Availability of Decisions	40
(a) General Rule; Specific Cases	40
(b) Manner of Making Public	40
(c) Orders of Judicial Conference Committee.	40
(d) Complaints Referred to the Judicial Conference of the United States	40
Rule 25. Disqualification	42
(a) Complainant	42
(b) Subject Judge	42
(c) Disqualification of Chief Circuit Judge on Consideration of a Petition fo2 Review of a Chief Circuit Judge’s Order.	42
(d) Member of Special Committee not Disqualified	42
(e) Subject Judge Following Appointment of a Special Committee	43
(f) Substitute for Disqualified Chief Circuit Judge	43
(g) Judicial Council Action where Multiple Judges are Disqualified	43
Rule 26. Transfer to Another Judicial Council.	45
(a) Transfer of a Proceeding.	45
Rule 27. Withdrawal of Complaints and Petitions for Review .	46
(a) Complaint Pending Before Chief Circuit Judge	46
(b) Complaint Pending Before Special Committee or Judicial Council	46
(c) Petition for Review	46
Rule 28. Availability of Rules and Forms	47
Rule 29. Effective Date	47

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

Preface

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

ARTICLE I. GENERAL PROVISIONS

Rule 1. Scope.

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

Commentary to Rule 1

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

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

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

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

DRAFT FOR PUBLIC COMMENT - 6/13/07

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

14
15 An allegation of misconduct or disability filed under Rule 6 is most assuredly a
16 “complaint,” and the Rule so provides in (a)(1). But both the nature of the process and the use of
17 the term “identify” suggest that the word “complaint” covers more than a document formally
18 triggering the process. The process relies on chief circuit judges considering known information
19 and triggering the process when appropriate. “Identifying” a “complaint,” therefore, is best
20 understood as concluding -- “identifying” -- that information known to a chief circuit judge
21 constitutes reasonable grounds for an inquiry into possible misconduct or disability -- a
22 “complaint” -- whether or not the information is framed as, or intended to be an accusation. This
23 definition is codified in (a)(2).

24
25 The term “prejudicial to the effective and expeditious administration of the business of
26 the courts” is not subject to precise definition, and the Rule therefore provides some specific
27 examples. The Code of Conduct for United States Judges may provide standards of conduct
28 applicable to proceedings under the Act, although it is not intended that disciplinary action be
29 appropriate for every violation of the Code’s provisions. As noted in the Introduction to the
30 Code:

31 “Whether disciplinary action is appropriate, and the degree of
32 discipline to be imposed, should be determined through a
33 reasonable application of the text and should depend on such
34 factors as the seriousness of the violation, the intent of the judge,
35 whether there is a pattern of improper activity, and the effect of the
36 improper activity on others or on the judicial system. Many of the
37 proscriptions in the Code are necessarily cast in general terms, and
38 it is not suggested that disciplinary action is appropriate where
39 reasonable judges might be uncertain as to whether or not the
40 conduct is proscribed. Furthermore, the Code is not designed or
41 intended as a basis for civil liability or criminal prosecution.
42 Finally, the purpose of the Code would be subverted if the Code

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 were invoked by lawyers for mere tactical advantage in a
2 proceeding.”
3

4 Similarly, the regulations governing the receipt of gifts by judges, outside earned income,
5 and financial disclosure obligations provide guidance in proceedings under the Act, although
6 disciplinary action may not be appropriate for every violation of the regulations.
7

8 An allegation can meet the statutory standard even though the judge’s alleged conduct did
9 not occur in the course of the performance of official duties. The Code of Conduct for United
10 States Judges expressly covers a wide range of extra-official activities, and some of these
11 activities may constitute misconduct. For example, allegations that a judge participated in
12 fundraising for a charity or a partisan political event are cognizable under the Act.
13

14 On the other hand, judges are entitled to some leeway in extra-official activities. For
15 example, misconduct may not include a judge being repeatedly and publicly discourteous to a
16 spouse (not including physical abuse) even though this might be an embarrassment to other
17 judges.
18

19 Rule 3(b)(1)(A)(i) tracks the Act in excluding from the definition of misconduct
20 allegations “[d]irectly related to the merits of a decision or procedural ruling.” The complaint
21 procedure is not a means for a collateral attack on the substance of a judge’s rulings. This
22 exclusion also preserves the independence of judges in the exercise of judicial power. Any
23 allegation that calls into question the correctness of an official action of a judge -- without more
24 -- is merits-related. The phrase “decision or procedural ruling” is not limited to rulings issued in
25 deciding Article III cases or controversies. Thus, a complaint challenging the correctness of a
26 chief circuit judge’s determination to dismiss a prior misconduct complaint would be properly
27 dismissed as merits-related -- i.e., as challenging the substance of the judge’s administrative
28 determination to dismiss the complaint -- even though it does not concern the judge’s rulings in
29 Article III litigation. Similarly, an allegation that a judge had incorrectly declined to approve a
30 Criminal Justice Act voucher is merits-related under this standard.
31

32 Conversely, an allegation -- however unsupported -- that a judge conspired with a
33 prosecutor to make a particular ruling is not merits-related, even though it “relates” to a ruling in
34 a colloquial sense. Such an allegation attacks the propriety of conspiring with the prosecutor and
35 goes beyond a challenge to the correctness -- “the merits” -- of the ruling itself. Similarly, an
36 allegation that a judge ruled against the complainant because the complainant was a member of a
37 particular racial or ethnic group, or because the judge dislikes the complainant personally, is not
38 merits-related. Such an allegation attacks the propriety of arriving at rulings with an illicit or
39 improper motive.
40

41 The same standard applies to allegations concerning a judge’s failure to recuse. An
42 allegation that a judge should have recused is merits-related. The very different allegation that the

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 judge failed to recuse for improper reasons is not merits-related. Similarly, an allegation that a
2 judge used an inappropriate term to refer to a class of people is not merits-related even if the
3 judge used it on the bench or in an opinion. The correctness of the judge’s rulings is not at stake.
4 An allegation that a judge was rude to counsel or others while on the bench is also not merits-
5 related.

6
7 The existence of an appellate remedy is irrelevant to whether an allegation is merits-
8 related. The merits-related ground for dismissal exists to protect judges’ independence in making
9 rulings, not to protect or promote the appellate process. A complaint alleging an incorrect ruling
10 is merits-related even though the complainant has no recourse from that ruling. By the same
11 token, an allegation that is otherwise cognizable under the Act should not be dismissed merely
12 because an appellate remedy appears to exist (e.g., vacating a ruling that resulted from an
13 improper ex parte communication).

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

23
24 With regard to Rule 3(b)(1)(A)(ii), a complaint of delay in a single case is excluded as
25 merits-related. Such an allegation may be said to challenge the correctness of an official action of
26 the judge, i.e., assigning a low priority to deciding the particular case. But, by the same token, an
27 allegation of a habitual pattern of delay in a significant number of unrelated cases, or an
28 allegation of deliberate delay in a single case arising out of an illicit motive, is not merits-related.
29

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

32
33 **Rule 4. Covered Judges.**

34
35 **A complaint under these Rules may concern the actions or capacity only of judges of**
36 **United States courts of appeals, judges of United States district courts, judges of United**
37 **States bankruptcy courts, United States magistrate judges, and judges of the courts**
38 **specified in 28 U.S.C. § 363.**

39
40 **Commentary on Rule 4**

41
42 This Rule tracks the statute. Rule 8(c) and (d) contain provisions as to the handling of

1 complaints against persons not covered by the Act, such as other court personnel, or against both
2 covered judges and non-covered persons.
3
4

5 **ARTICLE II. INITIATION OF A COMPLAINT**
6

7 **Rule 5. Identification of a Complaint.**
8

9 **(a) Identifying a Complaint.**

10 **(1) Subject to Rule 7, where information known to a chief circuit judge meets the**
11 **standard of Rule 3(a)(2) and no complaint containing such information has been**
12 **filed under Rule 6, a chief circuit judge must identify a complaint and, by**
13 **written order stating the reasons, begin the review provided in Rule 11. Where a**
14 **complaint filed under Rule 6 contains information constituting an identifiable**
15 **complaint of misconduct or disability but the complainant does not claim it as**
16 **such, the chief circuit judge must identify a complaint.**

17 **(2) A chief circuit judge:**

18 **(A) may not decline to identify a complaint:**

19 **(i) because the chief circuit judge deems otherwise cognizable allegations**
20 **not to be credible, unless the sole source of information has been**
21 **unreliable in the past; or**

22 **(ii) because the person or persons making such allegations have not filed**
23 **a complaint under Rule 6.**

24 **(B) need not identify a complaint if it is clear on the basis of the total mix of**
25 **information available to the chief circuit judge that the review provided in**
26 **Rule 11 will result in a dismissal under Rule 11(c), (d), or (e). However, a**
27 **chief circuit judge may identify a complaint in such circumstances in order to**
28 **assure the public that highly visible allegations have been investigated. In**
29 **such a case, appointment of a special committee under Rule 11(f) may not be**
30 **necessary.**

31 **(C) may decline to identify a complaint if the matter has been resolved by**
32 **informal means.**

33 **(3) Complaints filed under Rule 6 that do not comply with Rule 6(d) must be**
34 **considered under this Rule.**
35

36 **Commentary to Rule 5**
37

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

40 The phrase "Subject to Rule 7" in (a)(1) is intended to establish that only: (i) the chief
41 circuit judge of the home circuit of a potential subject judge, or (ii) the chief circuit judge of a
42 circuit in which misconduct is alleged to have occurred in the course of official business while

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 the potential subject judge was sitting by designation, shall have power or a duty under this Rule
2 to identify a complaint.
3

4 The Act authorizes the chief circuit judge, by written order stating reasons, to identify a
5 complaint and thereby dispense with the filing of a written complaint. A chief circuit judge who
6 has identified a complaint will not be considered a complainant and need not automatically
7 recuse from further proceedings on the complaint. The identification of a complaint merely
8 begins the process described in Rule 11, leaving the chief circuit judge with the same options
9 available in the case of a complaint filed under Rule 6. Where a complaint has been filed under
10 Rule 6, the ordinary doctrines of waiver do not apply, and a chief circuit judge must identify as a
11 complaint any misconduct or disability issues implicitly presented even if the complainant makes
12 no claim with regard to those issues. For example, a claim limited to misconduct in fact-finding
13 that mentions periods during a trial when the judge was asleep must be identified as a complaint
14 regarding disability. The identification may occur as a new complaint under Rule 5 or as a
15 formal expansion by written order of an inquiry under Rule 11, but some formal order giving
16 notice of the expanded scope of the proceeding to the subject judge and reviewing tribunal is
17 necessary.
18

19 The chief circuit judge's decision whether to identify a complaint under Rule 5 is
20 fundamentally different from the decision whether to appoint a special committee under Rule 11.
21 The threshold under Rule 5 is much lower. If an identified complaint is ultimately dismissed
22 without appointment of a special committee, this does not mean that the complaint should not
23 have been identified. However, a chief circuit judge may determine not to identify a complaint
24 under circumstances in which the total mix of information available to the chief circuit judge
25 makes it clear that such a complaint would be dismissed under Rule 11(c), (d), or (e). For
26 example, when the sole source of information's identity or even existence is unknown, a chief
27 circuit judge may, depending on the entire circumstances and the seriousness of the issues,
28 decline to identify a complaint.
29

30 A chief circuit judge should not decline to identify a complaint solely on the basis that
31 allegations that appear cognizable under the statute, for which there appears to be some potential
32 evidentiary support, are not deemed by the chief circuit judge to be credible. However, when
33 allegations are based solely on the word of one who has been unreliable in prior misconduct or
34 disability proceedings, a chief circuit judge may decline to act without more. Nor should a chief
35 circuit judge decline to identify a complaint solely on the basis that the unfiled allegations could
36 be raised by one or more persons in a filed complaint, but none of these persons has opted to do
37 so.
38

39 A chief circuit judge may properly treat identifying a complaint as a resort to be
40 considered after informal approaches at a resolution, if feasible, have failed. However, in high-
41 visibility situations, it may be particularly desirable for the chief circuit judge to identify a
42 complaint (and then, if the circumstances warrant, dismiss or conclude the identified complaint

1 without appointment of a special committee) in order to assure the public that the allegations
2 have not been ignored.

3
4 Rule 11 provides that once the chief circuit judge has identified a complaint, the chief
5 circuit judge, subject to the disqualification provisions of Rule 25, will perform, with respect to
6 that complaint, all functions assigned to the chief circuit judge for the determination of
7 complaints filed by a complainant.

8
9 **Rule 6. Filing a Complaint.**

10
11 **(a) Brief Statement of Facts.**

12 **A complaint must contain a concise statement setting forth with particularity the**
13 **facts on which the claim of misconduct or disability is based. The statement should not be**
14 **longer than five standard pages. The statement of facts should include:**

- 15 (1) a statement of what occurred;
16 (2) the time and place of the occurrence or occurrences;
17 (3) all available information that would assist an investigator in checking the
18 facts, including, but not limited to, relevant documents and the names and
19 addresses of witnesses. If documents are submitted, the statement of facts
20 should refer to the specific pages in the documents on which relevant material
21 appears; and
22 (4) in the case of an allegation of disability, any facts forming the basis of that
23 allegation not included in the above.

24 **(b) Form.**

25 (1) Complaints may be filed on a form reproduced in the appendix to these
26 rules or a form designated by the rules of the circuit in which the complaint is
27 filed. The complaint form is to be made available on each court of appeals
28 website, and may be obtained from the clerk of the court of appeals, district
29 court, or bankruptcy court within the circuit. Failure to use the complaint form
30 is not grounds for rejecting or dismissing the complaint so long as the
31 information described in (a) is provided.

32 **(c) Legibility; Number of Copies.**

33 **Complaints should be typewritten if possible. If not typewritten, they must be**
34 **legible. An illegible complaint will be returned to the complainant with a request to**
35 **resubmit it in legible form, failing which the complaint will not be considered. If the**
36 **complaint is about a single judge of the court of appeals, the complainant must provide**
37 **three copies of the complaint, the statement of facts, and any documents submitted. If it is**
38 **about a single district judge or magistrate judge, four copies must be provided; if about a**
39 **single bankruptcy judge, five copies. If the complaint is about more than one judge, copies**
40 **must be provided for the clerk of the court, the chief judge of the circuit, each subject**
41 **judge, and each judge to whom the clerk must send a copy under Rule 8(b). Complaints**
42 **under this Rule should be in an envelope marked “Complaint of Misconduct” or**

1 **“Complaint of Disability.”** The name of the subject judge should not appear on the
2 envelope.

3 **(d) Signature.**

4 The form must be signed and the truth of the statements verified in writing under
5 penalty of perjury. The complainant’s address must also be provided. Failure to comply
6 with this subsection will not be grounds for rejecting a complaint, but no further review
7 shall take place unless the chief circuit judge identifies a complaint under Rule 5.

8
9 **Commentary to Rule 6**

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

12
13 **Rule 7. Where to Initiate Complaints.**

14
15 **(a) Where to File.**

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

25 **(b) Transfer; Misconduct in Another Circuit.**

26 **If a complaint alleges misconduct in the course of official business while the**
27 **subject judge was sitting on a court by designation under 28 U.S.C. §§ 291-93 and 294(d),**
28 **the complaint may be filed or identified with the clerk of the court of appeals of that circuit**
29 **or the subject judge’s home circuit. The proceeding will continue in the circuit of the first**
30 **filed or identified complaint. However, the judicial council of the circuit in which the**
31 **complaint was first filed or identified may transfer the complaint to the subject judge’s**
32 **home circuit or circuit where the alleged misconduct occurred, as the case may be.**

33
34 **Commentary to Rule 7**

35
36 Section 351 uses the term “the circuit” in a way that suggests that either the home circuit
37 of the subject judge or the circuit in which misconduct is alleged to have occurred is the proper
38 venue for complaints. With an exception for judges sitting by designation, the Rule requires the
39 identifying or filing of a misconduct or disability complaint in the circuit in which the judge
40 holds office, largely based on the administrative perspective of the Act. Given the Act’s
41 emphasis on the future conduct of the business of the courts, the circuit in which the judge holds
42 office is the appropriate forum because that circuit is likely best able to influence a judge’s future

1 behavior in constructive ways.
2

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

10
11 **Rule 8. Action by Clerk.**
12

13 **(a) Receipt of Complaint.**

14 **On receipt of a complaint against a judge filed under Rules 5 or 6, the clerk of the**
15 **court of appeals must open a file, assign a docket number, and acknowledge receipt.**

16 **(b) Distribution of Copies.**

17 **The clerk must promptly send copies of a complaint filed under Rule 6 to the chief**
18 **circuit judge of the circuit or the judge authorized to act as chief circuit judge under Rule**
19 **25(f), and complaints filed under Rules 5 or 6 to each subject judge. Such complaints must**
20 **also be sent to the Judicial Conference Committee on Judicial Conduct and Disability. The**
21 **original complaint must be retained by the clerk. If a district judge or magistrate judge is**
22 **the subject of a complaint, the clerk must also send a copy of the complaint to the chief**
23 **judge of the district court in which the judge or magistrate judge holds his or her**
24 **appointment. If a bankruptcy judge is the subject of a complaint, the clerk must send**
25 **copies to the chief judges of the district court and the bankruptcy court. However, if the**
26 **chief judge of a district court or bankruptcy court is a subject of the complaint, the chief**
27 **judge's copy must be sent to the judge of such court in regular active service who is most**
28 **senior in date of commission among those who are not subjects of the complaint.**

29 **(c) Complaints Against Non-Covered Persons.**

30 **If the clerk receives a complaint about a person not holding an office described in**
31 **Rule 4, the clerk must not accept the complaint for filing under these Rules.**

32 **(d) Receipt of Complaint about a Judge and Another Non-Covered Person.**

33 **If a complaint is received about a judge described in Rule 4 and a person not**
34 **holding an office described in Rule 4, the clerk must accept the complaint for filing under**
35 **these Rules only with regard to the judge and must advise the complainant accordingly.**
36

37 **Commentary to Rule 8**
38

39 This Rule is adapted from the Illustrative Rules and is largely self-explanatory.
40 Complaints against non-covered persons are not to be accepted for processing under these Rules
41 but may, of course, be accepted under other circuit rules or procedures for grievances.
42

DRAFT FOR PUBLIC COMMENT - 6/13/07

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

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

16
17
18 **ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF CIRCUIT JUDGE**

19
20 **Rule 11. Review by the Chief Circuit Judge.**

21
22 **(a) Purpose of Chief Circuit Judge's Review.**

23 **When a complaint is filed or is identified by the chief circuit judge, the chief circuit**
24 **judge, subject to Rule 25, must review the complaint and determine whether it should be:**

- 25 **(1) dismissed;**
26 **(2) concluded on the ground that corrective action has been taken;**
27 **(3) concluded because intervening events have made action on the complaint no**
28 **longer necessary; or**
29 **(4) referred to a special committee.**

30 **(b) Inquiry by Chief Circuit Judge.**

31 **In determining what action to take under Rule 11(a), the chief circuit judge may**
32 **conduct a limited inquiry. In conducting such an inquiry, the chief circuit judge may not**
33 **make findings of fact about any matter that is reasonably in dispute or determinations**
34 **concerning the credibility of the complainant or putative witnesses. The chief circuit judge,**
35 **or a designee, may communicate orally or in writing with the complainant, the subject**
36 **judge, and any others who may have knowledge of the matter and review transcripts or**
37 **other relevant documents. The chief circuit judge may make findings of fact to the extent**
38 **that the limited inquiry shows that the factual allegations are frivolous under (c)(3) of this**
39 **Rule.**

40 **(c) Dismissal.**

41 **A complaint must be dismissed in whole or in part to the extent that the chief circuit**
42 **judge concludes that the complaint:**

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

5 (2) is directly related to the merits of a decision or procedural ruling;

6 (3) is frivolous because it is based on allegations that are wholly unsupported,
7 plainly untrue, refuted by objective evidence, or incapable of being established
8 through investigation;

9 (4) has been filed in the wrong circuit under Rule 7; or

10 (5) is otherwise not appropriate for consideration under the Act.

11 A complaint may not be dismissed solely because it repeats allegations of a previously
12 dismissed complaint if it contains material information not previously considered and does
13 not constitute harassment of the subject judge.

14 (d) Corrective Action.

15 The chief circuit judge may conclude the complaint proceeding in whole or in part if
16 the chief circuit judge determines that appropriate corrective action that acknowledges and
17 remedies the problems raised by the complaint has been voluntarily taken by the subject
18 judge.

19 (e) Intervening Events.

20 The chief circuit judge may conclude the complaint proceeding in whole or in part if
21 the chief circuit judge determines that intervening events render some or all allegations of
22 the complaint moot or remedial action impossible.

23 (f) Appointment of Special Committee.

24 If some or all of the complaint is not dismissed or concluded, the chief circuit judge
25 must promptly appoint a special committee to investigate the complaint or relevant portion
26 thereof and to make recommendations to the judicial council. Before appointing a special
27 committee, the chief circuit judge must invite the subject judge to respond to the complaint
28 either orally or in writing if such an opportunity was not given during the limited inquiry.
29 In the discretion of the chief circuit judge, separate complaints may be joined and assigned
30 to a single special committee; similarly, a single complaint about more than one judge may
31 be severed and more than one special committee appointed.

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

33 (1) If the complaint is disposed of under Rule 11(c), (d), or (e), the chief circuit
34 judge must prepare a supporting memorandum that sets forth the reasons for
35 the disposition. The memorandum must not include the name of the
36 complainant or of the subject judge. The order and the supporting
37 memorandum must be provided to the complainant, the subject judge, any judge
38 entitled to receive a copy of the complaint pursuant to Rule 8(b), and the
39 Judicial Conference Committee on Judicial Conduct and Disability. The
40 complainant and subject judge must be notified of the right to petition the
41 judicial council for review of the decision under (g)(2) of this Rule. If a petition
42 for review is filed as provided in Rule 18(a), the chief circuit judge must

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 witnesses all support the subject judge. For example, consider a complaint alleging that the
2 subject judge said X, where the complaint mentions, or it is independently clear, that five people
3 may have heard what the judge said. The chief circuit judge is told by the judge complained
4 against and one witness that the judge did not say X, and the chief circuit judge dismisses the
5 complaint without questioning the other four possible witnesses. In this example, the matter
6 remains reasonably in dispute. If all five witnesses say the judge did not say X, dismissal is called
7 for. But if potential witnesses, reasonably accessible, have not been questioned, then the matter
8 remains reasonably in dispute.
9

10 The chief circuit judge is not required to act solely on the face of the complaint. The
11 power to conclude a complaint proceeding on the basis that corrective action has been taken
12 implies some power to determine whether the facts alleged are true. But the boundary line of that
13 power -- the point at which a chief circuit judge invades the territory reserved for special
14 committees -- is unclear. Rule 11(b) allows the chief circuit judge to determine whether the facts
15 alleged in a complaint are “frivolous” as the term is used in Subsection (c)(3), but also states that
16 the chief circuit judge will not undertake to make findings of fact about any matter that is
17 reasonably in dispute.
18

19 Subsection (c) describes the grounds on which a complaint may be dismissed. These are
20 adapted from the Act and the Breyer Committee Report. 28 U.S.C. § 352(b); Breyer Report, 239
21 F.R.D. at 239-45. Subsection (c)(1) permits dismissal of an allegation that, even if true, does not
22 constitute misconduct or disability under the statutory standard. The proper standards are set out
23 in Rule 3 and discussed in the Commentary to that Rule. Subsection (c)(2) permits dismissal of
24 complaints related to the merits of a decision by a subject judge, also governed by Rule 3 and
25 accompanying Commentary.
26

27 Subsection (c)(3) implements the statutory standard allowing dismissal of complaints that
28 are “frivolous, lacking sufficient evidence to raise an inference that misconduct has occurred.”
29 The standard is intended to cover situations where the only source of evidence is unidentified or
30 unavailable. For example, a complaint alleges that an unnamed attorney told the complainant that
31 the judge did X. The subject judge denies it. The chief circuit judge requests that the complainant
32 (who does not purport to have observed the judge do X) identify the unnamed witness, or that the
33 unnamed witness come forward so that the chief circuit judge can learn the unnamed witness’s
34 account. The complainant responds that he has spoken with the unnamed witness, that the
35 unnamed witness is an attorney who practices in federal court, and that the unnamed witness is
36 unwilling to be identified or to come forward. The allegation is then properly dismissed as
37 incapable of being established through investigation.
38

39 Another example would be a complainant who alleges an impropriety and asserts that he
40 knows of it because it was observed and reported to him by a person who is identified. The
41 judge denies that the event occurred. When contacted, the source also denies it. In such a case,
42 the chief circuit judge’s proper course of action may well turn on whether the source had any role

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 in the allegedly improper conduct. If the complaint were based on a lawyer’s statement that he or
2 she had had an improper *ex parte* contact with a judge, the lawyer’s denial of the impropriety
3 might not be taken as wholly persuasive, and it would be appropriate to conclude that a real
4 factual issue is raised. On the other hand, if the complaint quoted a disinterested third party and
5 the disinterested party denied that the statement had been made, there would be no value in
6 opening a formal investigation. In such a case, it would be appropriate to dismiss the complaint
7 as frivolous because there is no support for the allegation of misconduct.

8
9 If, however, the situation involves a simple credibility conflict, the matter should proceed.
10 For example, the complainant alleges an impropriety and alleges that he or she observed it and
11 there were no other witnesses; the subject judge denies that the event occurred. Unless the
12 complainant’s allegations are inherently incredible, it would appear that a special committee
13 must be appointed because there is a factual question that is reasonably in dispute.

14
15 Similar situations may arise when a complaint is filed so long after an alleged event that
16 memory loss, death, or changes to unknown residences prevent a proper investigation.

17
18 Subsection (c) also indicates that the investigative nature of the process prevents the
19 application of claim preclusion principles where new and material evidence becomes available.
20 However, it also recognizes that at some point a renewed investigation may constitute
21 harassment of the subject judge and should be foregone, depending of course on the seriousness
22 of the issues and the weight of the new evidence.

23
24 Rule 11(d) implements the Act’s provision for dismissal if “appropriate corrective action”
25 has been taken. It is adapted from the Breyer Committee Report. Breyer Report, 239 F.R.D.
26 244-45. The Act authorizes the chief circuit judge to conclude the proceedings if “appropriate
27 corrective action has been taken.” Under Rule 11(d), action taken is “appropriate” when it serves
28 to acknowledge and remedy the problem raised by the complaint. Because the Act deals with the
29 conduct of judges, the emphasis is on correction of the judicial conduct that was the subject of
30 the complaint. Terminating a complaint based on corrective action is premised on the implicit
31 understanding that voluntary self-correction of misconduct is preferable to sanctions. The chief
32 circuit judge may facilitate this process by giving the subject judge an objective view of the
33 appearance of the judicial conduct in question and by suggesting appropriate corrective measures.

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

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 Where a judge’s conduct has resulted in identifiable, particularized harm to the
2 complainant or another individual, appropriate corrective action should include steps taken by
3 that judge to acknowledge and redress the harm, if possible, such as by an apology, recusal from
4 a case, and a pledge to refrain from similar conduct in the future. While the Act is generally
5 forward-looking, any corrective action should, to the extent possible, serve to correct a specific
6 harm to an individual, if such harm can reasonably be remedied. Ordinarily, corrective action
7 will not be “appropriate” to justify conclusion of a complaint unless the complainant or other
8 individual harmed is meaningfully apprised of the nature of the corrective action in the chief
9 circuit judge’s order, in a direct communication from the judge complained against, or otherwise.

10
11 Voluntary corrective action should be proportionate to any plausible allegations of
12 misconduct in the complaint. The form of corrective action should also be proportionate to any
13 sanctions that a judicial council might impose under Rule 20(b), such as a private or public
14 reprimand or a change in case assignments. In other words, minor corrective action will not
15 suffice to dispose of a serious allegation.

16
17 Rule 11(e) implements Section 352(b)(2) of the Act, which permits the chief circuit judge
18 to “conclude the proceeding,” if “action on the complaint is no longer necessary because of
19 intervening events,” such as a resignation from judicial office. Ordinarily, however, stepping
20 down from an administrative post such as chief circuit judge, judicial council member, or court
21 committee chair does not constitute an event rendering unnecessary any further action on a
22 complaint alleging judicial misconduct. As long as the subject of the complaint performs judicial
23 duties, a complaint alleging judicial misconduct must be addressed.

24
25 If a complaint is not disposed of pursuant to Rule 11(c), (d), or (e), a special committee
26 must be appointed. Rule 11(f) states that a subject judge will be invited to respond to the
27 complaint before a special committee is appointed, if no earlier response was invited.

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

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

41
42 When complaints are disposed of by chief circuit judges, the statutory purposes are best

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 served by providing the complainant with a full, particularized, but concise explanation, giving
2 reasons for the conclusions reached. See also the Commentary to Rule 24, dealing with public
3 availability.
4

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

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

11 **Rule 12. Composition of Special Committees.**

12
13
14 **(a) Membership.**

15 **Except as provided in (e), a special committee appointed pursuant to Rule 11(f)**
16 **must consist of the chief circuit judge and equal numbers of circuit and district judges. If**
17 **the complaint is about a district judge, bankruptcy judge, or magistrate judge, the district**
18 **judge members of the committee must be from districts other than the district of the**
19 **subject judge.**
20

21 **(b) Presiding Officer.**

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

27 **(c) Bankruptcy Judge or Magistrate Judge as Adviser.**

28 **If the judicial officer complained about is a bankruptcy judge or magistrate judge,**
29 **the chief circuit judge may designate a bankruptcy judge or magistrate judge, as the case**
30 **may be, to serve as an adviser to the committee. The chief circuit judge must designate**
31 **such an adviser if, within ten days of notification of the appointment of the committee, the**
32 **subject bankruptcy judge or magistrate judge requests that an adviser be designated. The**
33 **adviser must be from a district other than the district of the subject bankruptcy judge or**
34 **subject magistrate judge. The adviser will not vote but will have the other privileges of a**
35 **member of the committee.**

36 **(d) Provision of Documents.**

37 **The chief circuit judge must certify to each other member of the committee and to**
38 **the adviser, if any, copies of the complaint form and statement of facts in whole or relevant**
39 **part, and any other documents on file pertaining to the complaint or to the relevant part**
40 **referred to the special committee.**

41 **(e) Continuing Qualification of Committee Members.**

42 **A member of a special committee who was qualified to serve at the time of**

1 **appointment may continue to serve on the committee even though the member relinquishes**
2 **the position of chief circuit judge, active circuit judge, or active district judge, as the case**
3 **may be, but only if the member continues to hold office under Article III, Section 1, of the**
4 **Constitution of the United States.**

5 **(f) Inability of Committee Member to Complete Service.**

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

12 **(g) Voting.**

13 **All actions by a committee shall be by vote of a majority of all members of the**
14 **committee.**

15
16 **Commentary on Rule 12**

17
18 This Rule is adapted from the Act and the Illustrative Rules.

19
20 Rule 12 leaves the size of a special committee flexible, to be determined on a case-by-
21 case basis. The question of committee size is one that should be weighed with care in view of
22 the potential for consuming the members' time; a large committee should be appointed only if
23 there is a special reason to do so.

24
25 Although the Act requires that the chief circuit judge be a member of each special
26 committee, it does not require that the chief circuit judge preside.

27
28 The Act provides that a special committee will have subpoena powers as provided in 28
29 U.S.C. § 332(d). This section provides that subpoenas will be issued on behalf of judicial
30 councils by the clerk of the court of appeals "at the direction of the chief judge of the circuit or
31 his designee." Rule 12(b) allows the chief circuit judge, when designating someone else as
32 presiding officer, to make an explicit delegation of the authority to direct the issuance of
33 subpoenas related to committee proceedings.

34
35 Rule 12(c) provides that the chief circuit judge may appoint a bankruptcy judge or
36 magistrate judge as an adviser to a special committee, either sua sponte or at the request of the
37 subject judge.

38
39 The Rule provides that the adviser will have all the privileges of a member of a
40 committee except a vote. The adviser may therefore participate in all deliberations of the
41 committee, may question witnesses at hearings, and may write a separate statement to accompany
42 the report of the special committee to the judicial council.

DRAFT FOR PUBLIC COMMENT - 6/13/07

1
2 Rule 12(e) provides that a member of a special committee who remains an Article III
3 judge may continue to serve on the committee even though the member's status otherwise
4 changes. Thus, a committee that originally consisted of the chief circuit judge and an equal
5 number of circuit and district judges, as required by the law, may continue to function even
6 though changes of status alter that composition. This provision reflects the belief that stability of
7 membership will contribute to the quality of the work of such committees.

8
9 Stability of membership is also the principal concern animating Rule 12(f), which deals
10 with the case in which a special committee loses a member before its work is complete. The rule
11 would permit the chief circuit judge to determine whether a replacement member should be
12 appointed. Generally, appointment of a replacement member is desirable in these situations
13 unless the committee has conducted evidentiary hearings before the vacancy occurs. However,
14 cases may arise in which a committee is in the late stages of its work, and in which it would be
15 difficult for a new member to play a meaningful role. The Rule preserves the collegial character
16 of the committee process by prohibiting a single surviving member from serving as a committee
17 and by providing that a committee of two surviving members will, in essence, operate under a
18 unanimity rule.

19
20 Rule 12(g) provides that actions of a special committee will be by vote of a majority of all
21 the members. All the members of a committee should participate in committee decisions. In that
22 circumstance, it seems reasonable to require that committee decisions be made by a majority of
23 the membership, rather than a majority of some smaller quorum.

24
25 **Rule 13. Conduct of an Investigation.**

26
27 **(a) Extent and Methods of Special Committee Investigation.**

28 Each special committee must determine the extent and methods of the investigation
29 as it deems appropriate in light of the allegations of the complaint. If, in the course of the
30 investigation, the committee has cause to believe that the subject judge may have engaged
31 in misconduct or has a disability that is beyond the scope of the complaint, the committee
32 must, with written notice to the subject judge, expand the scope of the investigation or refer
33 the new matter to the chief circuit judge for action under Rule 5 or Rule 11.

34 **(b) Criminal Conduct.**

35 In the event the complaint alleges criminal conduct or the committee becomes aware
36 of possible criminal conduct, the committee must consult with the appropriate
37 prosecutorial authorities to the extent permitted by 28 U.S.C. §§ 351-364 in an effort to
38 avoid compromising any criminal investigation. However, the committee has final
39 authority regarding the timing and extent of its investigation and formulation of its
40 recommendations.

41 **(c) Staff.**

42 The committee may arrange for staff assistance in the conduct of the investigation.

1 **It may use existing staff of the judicial branch or may arrange, through the Director of the**
2 **Administrative Office of the United States Courts, for the hiring of special staff to assist in**
3 **the investigation.**

4 **(d) Delegation.**

5 **The authority to exercise the committee’s subpoena powers may be delegated to the**
6 **presiding officer. In the case of failure to comply with such subpoena, the judicial council**
7 **or special committee may institute a contempt proceeding consistent with 28 U.S.C. §**
8 **332(d).**

9
10 **Commentary on Rule 13**

11
12 **This Rule is adapted from the Illustrative Rules.**

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

23
24 **One of the difficult questions that can arise under the Act is the relationship between**
25 **proceedings under this statute and criminal investigations. Rule 13(b) assigns coordinating**
26 **responsibility to the special committee in cases in which criminal conduct is suspected but gives**
27 **the committee the authority to determine the appropriate pace of its activity in light of any**
28 **criminal investigation. A special committee may be barred from disclosing some information to**
29 **a prosecutor or grand jury under the Act. This provision is discussed in the Commentary to Rule**
30 **23.**

31
32 **Rule 13(d) permits the committee, in its discretion, to delegate any of its duties to**
33 **subcommittees, individual committee members, or staff. This is consistent with the general**
34 **principle, expressed in Rule 13(a), that each special committee will determine the methods of**
35 **conducting the investigation that are appropriate in light of the allegations of the complaint. The**
36 **ultimate duty of adopting a report may not be delegated. Rule 13(d) suggests that, where the**
37 **chief circuit judge designates someone else as presiding officer of a special committee, the**
38 **presiding officer also be delegated the authority to direct the clerk of the court of appeals to issue**
39 **subpoenas related to committee proceedings. That is not intended to imply, however, that the**
40 **decision to use the subpoena power is exercisable by the presiding officer alone. Under Rule**
41 **13(d), the committee must decide whether to delegate that decision-making authority.**
42

Rule 14. Conduct of Hearings by Special Committee.

(a) Purpose of Hearings.

The committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. If the committee is investigating allegations against more than one judge, it may, in its discretion, hold joint or separate hearings.

(b) Committee Witnesses.

All persons who are believed to have material, non-redundant evidence must be called as witnesses. Such witnesses may include the complainant and the subject judge. In the committee's discretion, the witnesses may be questioned by committee members, staff, or both.

(c) Counsel for Witnesses.

Whether witnesses may have counsel present when they testify is left to the discretion of the special committee.

(d) Witness Fees.

Witness fees must be paid as provided in 28 U.S.C. § 1821.

(e) Oath.

All testimony taken at such a hearing must be given under oath or affirmation.

(f) Rules of Evidence.

The Federal Rules of Evidence do not apply to special committee hearings.

(g) Record and Transcript.

A record and transcript must be made of any hearing held.

Commentary on Rule 14

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

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

Rule 14(b) contemplates that all witnesses with material evidence will be called by the committee. Staff or others who are organizing the hearings should regard it as their role to present the entire picture, and not to act as prosecutors. The subject judge should normally be called as a committee witness. Cases may arise in which the judge will not testify voluntarily. In such cases, subpoena powers are available, subject to the normal testimonial privileges.

1 Although Rule 15(b) affords the statutory right of the subject judge to call witnesses on his or her
2 own behalf, exercise of this right should not usually be necessary.

3
4 **Rule 15. Rights of Subject Judge.**

5
6 **(a) Notice.**

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

14 **(b) Presentation of Evidence.**

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

21 **(c) Presentation of Argument.**

22 **The subject judge may submit written argument to the special committee, and must**
23 **be given a reasonable opportunity to present oral argument at an appropriate stage of the**
24 **investigation.**

25 **(d) Attendance at Hearings.**

26 **The subject judge must have the right to attend any hearing held pursuant to Rule**
27 **14 and to receive copies of the transcript and any documents introduced, as well as to**
28 **receive copies of any written arguments submitted by the complainant to the committee.**

29 **(e) Representation by Counsel.**

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

33
34 **Commentary on Rule 15**

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

37
38 **The Act states that these rules must contain provisions requiring that “the judge whose**
39 **conduct is the subject of a complaint . . . be afforded an opportunity to appear (in person or by**
40 **counsel) at proceedings conducted by the investigating panel, to present oral and documentary**
41 **evidence, to compel the attendance of witnesses or the production of documents, to cross-**
42 **examine witnesses, and to present argument orally or in writing.” 28 U.S.C. § 358(b)(2). To**

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 implement this provision, Rule 15(d) gives the judge the right to attend any hearing for the
2 purpose of receiving evidence of record or hearing argument under Rule 14.
3

4 The Act does not require that the subject judge be permitted to attend all proceedings of
5 the special committee. Accordingly, the rules do not give a right to attend other proceedings, e.g.,
6 meetings at which the committee is engaged in investigative activity, such as interviewing a
7 possible witness or examining for relevance purposes documents delivered pursuant to a
8 subpoena duces tecum, or meetings in which the committee is deliberating on the evidence or its
9 recommendations.
10

11 **Rule 16. Rights of Complainant in Investigation.**
12

13 **(a) Notice.**

14 The complainant is entitled to written notice of the investigation as provided in Rule
15 11(g)(3). When the special committee's report to the judicial council is filed, the
16 complainant must be notified of the filing. The judicial council may, in its discretion,
17 provide a copy of the report of a special committee to the complainant.

18 **(b) Opportunity to Provide Evidence.**

19 The complainant must be interviewed by a representative of the committee. If the
20 complainant has material evidence, the complainant must be called as a witness.

21 **(c) Presentation of Argument.**

22 The complainant may submit written argument to the special committee. In the
23 discretion of the special committee, the complainant may be permitted to offer oral
24 argument.

25 **(d) Representation by Counsel.**

26 A complainant may submit written argument through counsel and, if permitted to
27 offer oral argument, may do so through counsel.

28 **(e) Cooperation.**

29 In the exercise of discretion under this Rule, a special committee may take into
30 account the degree of the complainant's cooperation in preserving the confidentiality of the
31 proceedings, including the identity of the subject judge.
32

33 **Commentary on Rule 16**
34

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

37 In accordance with the view of the process as fundamentally administrative and
38 inquisitorial, these rules do not give the complainant the rights of a party to litigation, and leave
39 the complainant's role largely to the discretion of the special committee. However, Rule 16(b)
40 provides that, where a special committee has been appointed, the complainant will be
41 interviewed by a representative of the committee. Such an interview may, of course, be in person
42 or by telephone, and the representative of the committee may be either a member or staff.

1
2 Rule 16 does not contemplate that the complainant will ordinarily be permitted to attend
3 proceedings of the special committee except when testifying or presenting oral argument. A
4 special committee may exercise its discretion to permit the complainant to be present at its
5 proceedings, or to permit the complainant, individually or through counsel, to participate in the
6 examination or cross-examination of witnesses.
7

8 The Act authorizes an exception to the normal confidentiality provisions where the
9 judicial council in its discretion provides a copy of the report of the special committee to the
10 complainant and to the subject judge. The rules do not accord the complainant the rights of a
11 litigant and do not entitle the complainant to a copy of the report of the special committee.
12

13 In exercising their discretion regarding the role of the complainant, the special committee
14 and the judicial council should protect the confidentiality of the complaint process. As a
15 consequence, Subsection (e) provides that a special committee may consider the degree to which
16 a complainant has cooperated in preserving the confidentiality of the proceedings in determining
17 what role beyond the minimum required by these Rules should be given to that complainant.
18

19 **Rule 17. Special Committee Report.**

20
21 **(a) Report.**

22 **The committee must file with the judicial council a comprehensive report of its**
23 **investigation, including findings and recommendations for council action. The report must**
24 **be accompanied by a statement of the vote by which it was adopted, any separate or**
25 **dissenting statements of committee members, and the record of any hearings held pursuant**
26 **to Rule 14. A copy of the report and accompanying statement must be sent to the Judicial**
27 **Conference Committee on Judicial Conduct and Disability.**
28

29 **Commentary to Rule 17**

30
31 This Rule is adapted from the Illustrative Rules and is self-explanatory. The provision for
32 sending a copy of the special committee report and accompanying statement to the Judicial
33 Conference Committee is new.
34

35
36 **ARTICLE V. JUDICIAL COUNCIL REVIEW**
37

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

40
41 **(a) Petitions for Review.**

42 **A complainant or subject judge aggrieved by an order of the chief circuit judge**

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 under Rule 11(c), (d), or (e) may petition the judicial council of the circuit for review of the
2 order. A judicial council may, by rules promulgated under 28 U.S.C. § 358, refer a petition
3 for review filed under this Rule to a panel of no less than 5 members of the council, at least
4 2 of whom must be district judges.

5 **(b) Time; Form; Where to File.**

6 A petition for review must be filed in the office of the clerk of the court of appeals
7 within 30 days of the date of the clerk's letter to the complainant and subject judge
8 transmitting the chief circuit judge's order. The petition should be in letter form,
9 addressed to the clerk of the court of appeals, and in an envelope marked "Misconduct
10 Petition" or "Disability Petition" but without the name of the subject judge. The letter
11 should begin "I hereby petition the judicial council for review of . . .," should be
12 typewritten or otherwise legible, and be signed. The letter should state the reasons why the
13 petition should be granted.

14 **(c) Receipt and Distribution of Petition.**

15 On receipt of a petition for review filed within the time allowed and in proper form
16 under these Rules, the clerk of the court of appeals must acknowledge receipt of the
17 petition and send copies to all persons entitled to notice under Rule 8(b). The clerk must
18 promptly send to each member of the judicial council, except for any member disqualified
19 under Rule 25, copies of the complaint, all materials obtained by the chief circuit judge in
20 connection with the chief circuit judge's inquiry, the chief circuit judge's order disposing of
21 the complaint, any memorandum in support of the chief circuit judge's order, the petition
22 for review, and an appropriate ballot. The clerk must send copies of the materials obtained
23 by the chief circuit judge and the petition for review to the Judicial Conference Committee
24 on Judicial Conduct and Disability.

25 **(d) Receipt of Untimely Petition.**

26 The clerk must refuse to accept a petition that is received after the deadline set forth
27 in (b).

28 **(e) Receipt of Timely Petition not in Proper Form.**

29 On receipt of a petition filed within the time allowed but in a form that is improper
30 to a degree that would substantially impair its consideration by the judicial council,
31 including a document that is ambiguous about whether a petition for review is intended,
32 the clerk must acknowledge receipt of the petition, call the petitioner's attention to the
33 deficiencies, and give the petitioner the opportunity to correct the deficiencies within fifteen
34 days of the date of the clerk's letter or within the original deadline for filing the petition,
35 whichever is later. If the deficiencies are corrected within the time allowed, the clerk will
36 proceed in accordance with paragraphs (a) and (c) of this Rule. If the deficiencies are not
37 corrected, the clerk must reject the petition.

38
39 **Commentary on Rule 18**

40
41 Rule 18 is adapted largely from the Illustrative Rules.
42

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 Rule 18(b) contains a time limit of 30 days to file a petition for review. It is important to
2 establish a time limit on petitions for review of chief circuit judges' dispositions in order to
3 provide finality to the process. If the complaint requires an investigation, the investigation
4 should proceed; if it does not, the subject judge should know that the matter is closed.
5

6 The standards for timely filing under the Federal Rules of Appellate Procedure should be
7 applied to petitions for review. See F.R.A.P. 25(a)(2)(A) and 25(a)(2)(C).
8

9 Rule 18(e) provides for an automatic extension of the time if a person files a petition that
10 is rejected for failure to comply with formal requirements.
11

12 **Rule 19. Judicial Council Disposition of Petitions for Review.**
13

14 **(a) Rights of Subject Judge.**

15 **(1) At any time after the filing of a petition for review by a complainant, the**
16 **subject judge may file a written response with the clerk of the court of appeals.**
17 **The clerk must promptly distribute copies of the response to each member of the**
18 **judicial council who is not disqualified under Rule 25, to the chief circuit judge,**
19 **to the complainant, and to the Judicial Conference Committee on Judicial**
20 **Conduct and Disability. The judge may not otherwise communicate with**
21 **individual council members about the matter.**

22 **(2) The subject judge must be provided with copies of any communications to**
23 **the judicial council by the complainant.**

24 **(b) Judicial Council Action.**

25 **Upon consideration of a petition for review and after consideration of the materials**
26 **before it, a judicial council may:**

27 **(1) affirm the chief circuit judge's disposition;**

28 **(2) return the matter to the chief circuit judge with directions to conduct a**
29 **further inquiry under Rule 11(b) or to identify a complaint under Rule 5;**

30 **(3) return the matter to the chief circuit judge with directions to appoint a**
31 **special committee under Rule 11(f); or**

32 **(4) in exceptional circumstances, take other appropriate action.**

33 **(c) Notice of Council Decision.**

34 **The order of the judicial council, together with any accompanying memorandum in**
35 **support of the order or separate concurring or dissenting statements, must be provided to**
36 **the complainant, the subject judge, any judge entitled to receive a copy of the complaint**
37 **pursuant to Rule 8(b), and the Judicial Conference Committee on Judicial Conduct and**
38 **Disability.**

39 **(d) Memorandum of Council Decision.**

40 **If the order of the council affirms the chief circuit judge's disposition, a supporting**
41 **memorandum must be prepared only if the judicial council concludes that there is a need to**
42 **supplement the chief circuit judge's explanation. A memorandum supporting a council**

1 order must not include the name of the complainant or the subject judge.

2 **(e) Review of Judicial Council Decision.**

3 If the judicial council's decision is adverse to the petitioner and no member of the
4 council dissented on the ground that a special committee should be appointed pursuant to
5 Rule 11(f), the complainant must be notified that there is no right of review of the decision.
6 If there was such a dissent, the petitioner must be informed that he or she can file a petition
7 for review under Rule 21(b) solely of the issue of whether a special committee should be
8 appointed.

9 **(f) Public Availability of Judicial Council Decision.**

10 Materials related to the council's decision must be made public at the time and in
11 the manner set forth in Rule 24.

12
13 **Commentary to Rule 19**

14
15 This Rule is largely adapted from the Act and is self-explanatory.

16
17 The council should ordinarily review the decision of the chief circuit judge on the merits,
18 treating the petition for review for all practical purposes as an appeal. The judicial council may
19 respond to a petition by affirming the chief circuit judge's order, remanding the matter, or, in
20 exceptional cases, taking other appropriate action. The "exceptional cases" language would,
21 inter alia, permit the council to deny review rather than affirm in a case in which the process was
22 obviously being abused.

23
24 **Rule 20. Judicial Council Consideration of Reports and Recommendations of Special**
25 **Committees.**

26
27 **(a) Rights of Subject Judge.**

28 Within twenty-one days after the filing of the report of a special committee, the
29 subject judge may send a written response to the members of the judicial council. The
30 judge must also be given an opportunity to present oral argument to the council, personally
31 or through counsel. The judge may not otherwise communicate with council members
32 about the matter.

33 **(b) Judicial Council Actions.**

34 Subject to the rights of the subject judge in Subsection (a), the judicial council,
35 acting on the basis of the report and recommendations of, and record before, the special
36 committee, may:

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

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

42 **(B) the complaint is directly related to the merits of a decision or procedural**

1 ruling;

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

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

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

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

12 (A) that might constitute ground for impeachment; or

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

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

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

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

21 (C) in the case of a magistrate judge, ordering the chief judge of the district
22 court to take action specified by the council, including the initiation of
23 removal proceedings pursuant to 28 U.S.C. § 631(i);

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

26 (E) in the case of a circuit or district judge, requesting the judge to retire
27 voluntarily with the provision (if necessary) that ordinary length-of-service
28 requirements will be waived; and

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

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

34 (c) Inadequate Basis for Decision.

35 If the judicial council finds that the report, recommendations, and record of a
36 special committee provide an inadequate basis for decision, it may return the matter to the
37 committee for further investigation and a new report or conduct such further investigation
38 as it deems appropriate. If the judicial council decides to conduct additional investigation,
39 the subject judge must be given adequate prior notice in writing of that proposed decision
40 and of the general scope and purpose of the additional investigation. The conduct of the
41 additional investigation must be generally in accordance with the procedures and powers
42 set forth in Rules 13 through 16 for the conduct of an investigation by a special committee.

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 accordance with the procedures set forth in Rules 13 through 16 for the conduct of an
2 investigation by a special committee. However, if hearings are held, the council may limit
3 testimony or the presentation of evidence to avoid unnecessary repetition of testimony and
4 evidence before the special committee.
5

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

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

22 Rule 20(f) requires that council action normally be supported with a memorandum of
23 factual determinations and reasons and that notice of the action be given to the complainant and
24 the subject judge. Rule 20(f) also requires that the notification to the complainant and the subject
25 judge include notice of any right to petition for review of the council's decision under Rule 21(b).
26
27

28 **ARTICLE VI. REVIEW BY JUDICIAL CONFERENCE COMMITTEE ON CONDUCT**
29 **AND DISABILITY**
30

31 **Rule 21. Committee on Judicial Conduct and Disability.**
32

33 **(a) Review by Committee.**

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

40 **(b) Reviewable Matters.**

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

1 **(A) pursuant to Rule 20(b)(1), (2), (4) or (5); or**
2 **(B) pursuant to Rule 19(b)(1) or (4), if one or more members of the judicial**
3 **council dissented from the order on the ground that a special committee**
4 **should be appointed under Rule 11(f). In such a case, the Committee’s**
5 **review will be limited to the issue of whether a special committee should be**
6 **appointed.**

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

17 **(c) Committee Vote.**

18 **Committee decisions under (b) of this Rule shall be by majority vote of the members**
19 **of the Committee not from the same circuit as the subject judge. If only six members are**
20 **qualified to vote on a petition for review, the decision shall be made by a majority of a**
21 **panel of five members drawn from a randomly selected list that rotates after each decision**
22 **by a panel drawn from the list. If only four members are qualified to vote, the Chief**
23 **Justice must appoint an ex-member of the Committee, if available, or other United States**
24 **judge, if not, to consider the petition.**

25 **(d) Additional Investigation.**

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

31 **(e) Oral Argument; Personal Appearance.**

32 **There will ordinarily be no oral arguments or personal appearances before the**
33 **Committee. In its discretion, the Committee may permit written submissions from the**
34 **petitioner, complainant, or subject judge.**

35 **(f) Committee Decisions.**

36 **Committee decisions under this Rule shall be transmitted promptly to the Judicial**
37 **Conference of the United States. Other distribution will be by the Administrative Office at**
38 **the direction of the Committee chair. Such orders must be maintained as public documents**
39 **by the Administrative Office and by the clerk of the court for the circuit in which the**
40 **complaint arose.**

41 **(g) Finality.**

42 **All orders of the Judicial Conference or of the Committee (when the Conference**

1 **does not exercise its power of review) are final and conclusive.**

2
3 **Commentary on Rule 21**

4
5 This Rule is largely self-explanatory.

6
7 Rule 21(a) is intended to clarify that the delegation of power to the Judicial Conference
8 Committee on Judicial Conduct and Disability to dispose of petitions does not preclude review of
9 such dispositions by the Conference. However, there is no right to such review in any party.

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

19
20 Rule 21(c) provides for review only by Committee members from circuits other than that
21 of the subject judge. To avoid tie votes, the Committee will decide petitions for review by
22 rotating panels of five when only six members are qualified. If only four members are qualified,
23 the Chief Justice must appoint an additional judge to consider that petition for review.

24
25 **Rule 22. Procedures for Review.**

26
27 **(a) Filing a Petition for Review.**

28 **A petition for review of a decision of the judicial council may be filed by sending a**
29 **brief written statement to the Judicial Conference Committee on Judicial Conduct and**
30 **Disability, addressed to:**

31 **Judicial Conference Committee on Judicial Conduct and Disability**
32 **Attn: Office of General Counsel**
33 **Administrative Office of the United States Courts**
34 **Washington, D.C. 20544**

35 **(b) Form and Contents of Petition for Review.**

36 **No particular form is required. The petition must contain a short statement of the**
37 **basic facts underlying the complaint, the history of its consideration before the appropriate**
38 **judicial council, a copy of the decision of the judicial council, and the grounds on which the**
39 **petitioner seeks review. The petition for review must specify the date and docket number**
40 **of the order of the judicial council for which review is sought. The petitioner may attach**
41 **any documents or correspondence arising in the course of the proceeding before the**
42 **judicial council or its special committee that the petitioner deems essential or useful to the**

1 **prompt disposition of the review petition. A petition should not normally exceed 20 pages,**
2 **plus necessary attachments.**

3 **(c) Time.**

4 **A petition must be submitted within 60 days of the date of the order for which**
5 **review is sought.**

6 **(d) Copies.**

7 **Five copies of the petition for review must be submitted, at least one of which must**
8 **be signed by the petitioner or his or her attorney. If the petitioner submits a signed**
9 **declaration of inability to pay the expense of duplicating the petition, the Administrative**
10 **Office must accept the original petition and must reproduce copies at its expense.**

11 **(e) Action on Receipt of Petition for Review.**

12 **The Administrative Office must acknowledge receipt of a petition for review**
13 **submitted under this Rule, and must notify the chair of the Judicial Conference Committee**
14 **on Judicial Conduct and Disability. The Administrative Office must distribute the petition**
15 **to the members of the Committee for their deliberation.**

16
17 **Commentary on Rule 22**

18
19 **Rule 22 is self-explanatory.**

20
21
22 **ARTICLE VII. MISCELLANEOUS RULES**

23
24 **Rule 23. Confidentiality.**

25
26 **(a) General Rule.**

27 **The consideration of a complaint by the chief circuit judge, a special committee, the**
28 **judicial council, or the Judicial Conference Committee on Judicial Conduct and Disability**
29 **is confidential. Information about such consideration must not be disclosed by any judge**
30 **or employee of the judicial branch or by any person who records or transcribes testimony**
31 **except in accordance with these rules.**

32 **(b) Files.**

33 **All files related to complaints must be separately maintained with appropriate**
34 **security precautions to ensure confidentiality.**

35 **(c) Disclosure in Decisions.**

36 **Written decisions of the chief circuit judge, the judicial council, or Judicial**
37 **Conference Committee on Judicial Conduct and Disability, and dissenting opinions or**
38 **separate statements of members of the council or Committee, may contain such**
39 **information and exhibits as the authors deem appropriate, and such information and**
40 **exhibits may be made public pursuant to Rule 24.**

41 **(d) Availability to Judicial Conference.**

42 **On request of the Judicial Conference or its Committee on Judicial Conduct and**

1 **Disability, the clerk of a court of appeals must furnish any records related to a complaint**
2 **that are requested.**

3 **(e) Availability to District Court.**

4 **In the event that the judicial council directs the initiation of proceedings for removal**
5 **of a magistrate judge under Rule 20(b)(4)(C), the clerk of the court of appeals must provide**
6 **to the chief judge of the district court copies of the report of the special committee and any**
7 **other documents and records that were before the judicial council at the time of its**
8 **determination. On request of the chief judge of the district court, the judicial council may**
9 **authorize release to that chief judge of any other records relating to the investigation.**

10 **(f) Impeachment Proceedings.**

11 **If the Judicial Conference determines that consideration of impeachment may be**
12 **warranted, it must transmit the record of all relevant proceedings to the Speaker of the**
13 **House of Representatives.**

14 **(g) Consent of Subject Judge.**

15 **Any materials from the files may be disclosed to any person on the written consent**
16 **of both the subject judge and the chief circuit judge. In any such disclosure, the chief**
17 **circuit judge may require that the identity of the complainant, or of witnesses in an**
18 **investigation conducted by a special committee or the judicial council, not be revealed.**

19 **(h) Disclosure in Special Circumstances.**

20 **The Judicial Conference, its Committee on Judicial Conduct and Disability, or a**
21 **judicial council may authorize disclosure of information about the consideration of a**
22 **complaint, including the papers, documents, and transcripts relating to the investigation, to**
23 **the extent that such disclosure is justified by special circumstances and is not prohibited by**
24 **the Act. Such disclosure may be made to Judiciary researchers engaged in the study or**
25 **evaluation of experience under the Act and related modes of judicial discipline, but only**
26 **where such study or evaluation has been specifically approved by the Judicial Conference**
27 **or by the Judicial Conference Committee on Judicial Conduct and Disability. Appropriate**
28 **steps must be taken to protect the identities of the judge complained against, the**
29 **complainant, and witnesses from public disclosure, and other appropriate safeguards to**
30 **protect against the dissemination of confidential information may be imposed.**

31 **(i) Disclosure of Identity by Subject Judge.**

32 **Nothing in this Rule precludes the subject judge from acknowledging that he or she**
33 **is the judge referred to in documents made public pursuant to Rule 24.**

34 **(j) Assistance and Consultation.**

35 **Nothing in this Rule precludes the chief circuit judge or judicial council, for**
36 **purposes of acting on a complaint filed under the Act, from seeking the assistance of**
37 **qualified staff, or from consulting other judges who may be helpful in the process of**
38 **complaint disposition.**

39
40 **Commentary on Rule 23**

41
42 **Rule 23 was adapted from the Illustrative Rules.**

DRAFT FOR PUBLIC COMMENT - 6/13/07

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

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

13 With regard to the second question, Rule 23(a) applies the rule of confidentiality broadly
14 to consideration of a complaint at any stage.
15

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

24 The confidentiality requirement does not prevent the chief circuit judge from
25 “communicat[ing] orally or in writing with . . . [persons] who may have knowledge of the
26 matter,” as part of a limited inquiry conducted by the chief circuit judge under Rule 11(b).
27

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

38 On the other hand, the Act makes it clear that there is a barrier of confidentiality between
39 the judicial branch and the legislative. It provides that material may be disclosed to Congress
40 only if it is believed necessary to an impeachment investigation or trial of a judge.
41

42 The Act provides that confidential materials may be disclosed if authorized in writing by

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 the subject judge and by the chief circuit judge.
2

3 Rule 23 recognizes that there must be some exceptions to the Act's confidentiality
4 requirement. For example, the Act requires that certain orders and the reasons for them must be
5 made public. Rule 23(c) makes it explicit that memoranda supporting chief circuit judge and
6 council orders, as well as dissenting opinions and separate statements, may contain references to
7 information that would otherwise be confidential and that such information may be made public.
8

9 Section 355(b) of the Act requires the Judicial Conference to transmit the record of the
10 proceeding to the House of Representatives if the Conference believes that impeachment of a
11 subject judge may be appropriate. Rule 23(f) implements this requirement.
12

13 Rule 23(h) permits disclosure of additional information in circumstances not enumerated.
14 For example, disclosure may be appropriate to permit a prosecution for perjury based on
15 testimony given before a special committee. Another example might involve evidence of
16 criminal conduct by a judge discovered by a special committee.
17

18 Rule 23(h) specifically permits the authorization of disclosure of information about the
19 consideration of a complaint, including the papers, documents, and transcripts relating to the
20 investigation, to Judiciary researchers engaged in the study or evaluation of experience under the
21 Act and related modes of judicial discipline.
22

23 The Rule envisions disclosure of information from the official record of complaint
24 proceedings to a limited category of persons for appropriately authorized research purposes only,
25 and with appropriate safeguards to protect individual identities in any published research results
26 that ensue. In authorizing disclosure, the judicial council may refuse to release particular
27 materials when such release would be contrary to the interests of justice, or that constitute purely
28 internal communications. The Rule does not envision any disclosure of purely internal
29 communications between judges and their colleagues and staff.
30

31 Once the subject judge has consented to the disclosure of confidential materials related to
32 a complaint, the chief circuit judge ordinarily will refuse consent only to the extent necessary to
33 protect the confidentiality interests of the complainant or of witnesses who have testified in
34 investigatory proceedings or who have provided information in response to a limited inquiry
35 undertaken pursuant to Rule 11. It will generally be necessary, therefore, for the chief circuit
36 judge to require that the identities of the complainant or of such witnesses, as well as any
37 identifying information, be shielded in any materials disclosed, except insofar as the chief circuit
38 judge has secured the consent of the complainant or of a particular witness to disclosure, or there
39 is a demonstrated need for disclosure of the information that, in the judgment of the chief circuit
40 judge, outweighs the confidentiality interest of the complainant or of a particular witness (as may
41 be the case where the complainant was delusional or where the complainant or a particular
42 witness has already demonstrated a lack of concern about maintaining the confidentiality of the

1 proceedings).

2
3 **Rule 24. Public Availability of Decisions.**

4
5 **(a) General Rule; Specific Cases.**

6 When final action on a complaint has been taken and is no longer subject to review,
7 all orders entered by the chief circuit judge and judicial council, including any supporting
8 memoranda and any dissenting opinions or separate statements by members of the judicial
9 council, must be made public. However:

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

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

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

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

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

26 **(b) Manner of Making Public.**

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

35 **(c) Orders of Judicial Conference Committee.**

36 To the extent consistent with the policy of the Judicial Conference Committee on
37 Judicial Conduct and Disability, orders of that Committee relating to complaints arising
38 from a particular circuit must also be made available to the public in the office of the clerk
39 of the relevant court of appeals. The Committee also must make its public orders available
40 on the judiciary website, www.uscourts.gov.

41 **(d) Complaints Referred to the Judicial Conference of the United States.**

42 If a complaint is referred to the Judicial Conference pursuant to Rule 20(b)(3),

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 **materials relating to the complaint will be made public only as may be ordered by the**
2 **Judicial Conference.**

3
4 **Commentary on Rule 24**

5
6 Rule 24 is adapted from the Illustrative Rules and the recommendations of the Breyer
7 Committee.

8
9 The Act requires the circuits to make available only written orders of a judicial council or
10 the Judicial Conference imposing some form of sanction. The Judicial Conference, however, has
11 long recognized the desirability of public availability of a broader range of orders and other
12 materials. In 1994, the Judicial Conference “urge[d] all circuits and courts covered by the Act to
13 submit to the West Publishing Company, for publication in Federal Reporter 3d, and to Lexis all
14 orders issued pursuant to [the Act] that are deemed by the issuing circuit or court to have
15 significant precedential value to other circuits and courts covered by the Act.” Report of the
16 Proceedings of the Judicial Conference of the United States, Mar. 1994, at 28. Following this
17 recommendation, the 2000 revision of the Illustrative Rules contained a public availability
18 provision very similar to Rule 24. In 2002, the Judicial Conference again voted to encourage the
19 circuits “to submit non-routine public orders disposing of complaints of judicial misconduct or
20 disability for publication by on-line and print services.” Report of the Proceedings of the Judicial
21 Conference of the United States, Sept. 2002, at 58. The Breyer Report further emphasized that
22 “[p]osting such orders on the judicial branch’s public website would not only benefit judges
23 directly, it would also encourage scholarly commentary and analysis of the orders.” Breyer
24 Report, 239 F.R.D. at 216. With these considerations in mind, Rule 24 provides for public
25 availability of a wide range of materials.

26
27 Rule 24 provides for public availability of orders of the chief circuit judge, the judicial
28 council, and the Judicial Conference Committee on Judicial Conduct and Disability and the texts
29 of any memoranda supporting their orders, together with any dissenting opinions or separate
30 statements by members of the judicial council. However, these orders and memoranda are to be
31 made public only when final action on the complaint has been taken and any right of review has
32 been exhausted. The provision that decisions will be made public only after final action has been
33 taken is designed in part to avoid public disclosure of the existence of pending proceedings.
34 Whether the name of the subject judge is disclosed will then depend on the nature of the final
35 action. If the final action is an order predicated on a finding of misconduct or disability (other
36 than a privately communicated censure or reprimand) the name of the judge must be made
37 public. If the final action is dismissal of the complaint, or a conclusion of the proceeding by the
38 chief circuit judge on the basis of corrective action taken, the name of the subject judge must not
39 be disclosed.

40
41 If a complaint is dismissed as moot, or because intervening events have made action on
42 the complaint unnecessary, after appointment of a special committee, Rule 24(a)(2) allows the

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 judicial council to determine whether the subject judge will be identified. In such a case, no final
2 decision has been rendered on the merits, but it may be in the public interest -- particularly if a
3 judicial officer resigns in the course of an investigation -- to make the identity of the judge
4 known.
5

6 Rule 24(a)(1) provides that where a proceeding is concluded by the chief circuit judge on
7 the basis of voluntary corrective action, the name of the subject judge must not be disclosed.
8 Shielding the name of the subject judge in this circumstance should encourage informal
9 disposition. Once a special committee has been appointed, and a proceeding is concluded by the
10 full council on the basis of a remedial order of the council, Rule 24(a)(4) provides for disclosure
11 of the name of the subject judge.
12

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

21 **Rule 25. Disqualification.**
22

23 **(a) Complainant.**

24 **If the complaint is filed by a judge, that judge will be disqualified from participation**
25 **in any consideration of the complaint except to the extent that these rules provide for**
26 **participation by a complainant. A chief circuit judge who has identified a complaint under**
27 **Rule 5 will not be automatically disqualified from participating in the consideration of the**
28 **complaint but may consider in his or her discretion whether the circumstances warrant**
29 **disqualification.**

30 **(b) Subject Judge.**

31 **A subject judge will be disqualified from participating in any consideration of the**
32 **complaint except to the extent that these rules provide for participation by a subject judge.**

33 **(c) Disqualification of Chief Circuit Judge on Consideration of a Petition for**
34 **Review of a Chief Circuit Judge's Order.**

35 **If a petition for review of a chief circuit judge's order entered under Rule 11(c), (d),**
36 **or (e) is filed with the judicial council pursuant to Rule 18, the chief circuit judge must not**
37 **participate in the council's consideration of the petition. In such a case, the chief circuit**
38 **judge may address a written communication to all of the members of the judicial council,**
39 **with copies provided to the complainant and to the subject judge. The chief circuit judge**
40 **may not otherwise communicate with council members about the matter.**

41 **(d) Member of Special Committee not Disqualified.**

42 **A member of the judicial council who serves on a special committee, including the**

1 chief circuit judge, will not be disqualified from participating in council consideration of
2 the committee's report.

3 (e) Subject Judge Following Appointment of a Special Committee.

4 On appointment of a special committee, the subject judge will automatically be
5 disqualified from participation in any proceeding arising under the Act or these Rules by
6 serving on any special committee, the judicial council of the circuit, the Judicial Conference
7 of the United States, and the Judicial Conference Committee on Judicial Conduct and
8 Disability. The disqualification will continue until all proceedings regarding the complaint
9 against the subject judge are finally terminated, with no further right of review.

10 (f) Substitute for Disqualified Chief Circuit Judge.

11 If the chief circuit judge is disqualified from participating in consideration of the
12 complaint, the duties and responsibilities of the chief circuit judge under these rules must
13 be assigned to the circuit judge in regular active service who is the most senior in date of
14 commission of those who are not disqualified. If all circuit judges in regular active service
15 are disqualified, the judicial council may determine whether to request a transfer under
16 Rule 26, or whether, in the interest of sound judicial administration, to permit the chief
17 circuit judge to dispose of the complaint on the merits. Members of the judicial council
18 who are named in the complaint may participate in this determination if necessary to
19 obtain a quorum of the judicial council.

20 (g) Judicial Council Action where Multiple Judges are Disqualified.

21 Notwithstanding any other provision in these rules to the contrary, a member of the
22 judicial council who is a subject of the complaint may participate in the disposition thereof
23 if:

- 24 (1) participation by subject judge(s) is necessary to obtain a quorum of the
25 judicial council;
- 26 (2) the judicial council finds that the lack of a quorum is due to the naming of
27 one or more judges in the complaint for the purpose of disqualifying that judge or judges
28 or to the naming of one or more judges based on their participation in a decision excluded
29 from the definition of misconduct under Rule 3(b)(1)(A); and
- 30 (3) the judicial council votes that it is necessary, appropriate and in the interest
31 of sound judicial administration that such subject judges be eligible to act.

32
33 Commentary on Rule 25

34
35 Rule 25 is adapted from the Illustrative Rules.

36
37 Rule 25(e) makes it clear that the disqualification of the subject judge relates only to the
38 subject judge's participation in any proceeding arising under the Act or these Rules as a member
39 of a special committee, judicial council, Judicial Conference, or the Judicial Conference
40 committee. The Illustrative Rule, based on Section 359(a), was ambiguous and could have been
41 read to disqualify a subject judge from any service of any kind on each of the bodies mentioned.
42 This was undoubtedly not the intent of the Act. Such a disqualification would be anomalous in

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 light of the Act’s allowing a subject judge to continue to decide cases and to continue to exercise
2 the powers of chief circuit or district judge. It would also create a substantial deterrence to the
3 appointment of special committees, particularly where a special committee is needed solely
4 because the chief circuit judge may not decide matters of credibility in his or her review under
5 Rule 11. The subject judge is barred by Rule 25(b) from participating in the disposition of that
6 complaint. Rule 25(e) recognizes that participation in proceedings arising under the Act or these
7 Rules by a judge who is the subject of a special committee investigation may lead to an
8 appearance of self-interest in creating substantive and procedural precedents governing such
9 proceedings, and Rule 25 (e) bars such participation.

10
11 Under the Act, a complaint against the chief circuit judge is to be handled by “that circuit
12 judge in regular active service next senior in date of commission.” 28 U.S.C. § 351(c). Rule
13 25(f) provides that seniority among judges other than the chief is to be determined by date of
14 commission, with the result that complaints against the chief circuit judge may be routed to a
15 former chief circuit judge or other judge who was appointed earlier than the chief circuit judge.
16 The rules do not purport to prescribe who is to preside over meetings of the judicial council.
17 Consequently, where the presiding member of the judicial council is disqualified from
18 participating under these rules, the order of precedence prescribed by Rule 25(f) for performing
19 “the duties and responsibilities of the chief circuit judge under these rules” does not apply to
20 determine the acting presiding member of the judicial council. That is a matter left to the internal
21 rules or operating practices of each judicial council. In most cases the most senior active circuit
22 judge who is a member of the judicial council and who is not disqualified will preside.

23
24 Sometimes a single complaint is filed against a large group of judges. If the normal
25 disqualification rules are observed in such a case, no court of appeals judge can serve as acting
26 chief circuit judge of the circuit, and the judicial council will be without appellate members.
27 Where the complaint is against all circuit and district judges, no member of the judicial council
28 can perform the duties assigned to the council under the statute.

29
30 A similar problem is created by successive complaints arising out of the same underlying
31 grievance. For example, a complainant files a complaint against a district judge based on alleged
32 misconduct, and the complaint is dismissed by the chief circuit judge under the statute. The
33 complainant may then file a complaint against the chief circuit judge for dismissing the first
34 complaint, and when that complaint is dismissed by the next senior judge, still a third complaint
35 is filed. The threat is that the complainant will bump down the seniority ladder until, once again,
36 there is no member of the court of appeals who can serve as acting chief circuit judge for the
37 purpose of the next complaint. Similarly, complaints involving the merits of litigation may
38 involve a series of decisions in which many judges participated or in which a rehearing in banc
39 was denied by the court of appeals, and the complaint may name a majority of the judicial
40 council as subject judges.

41
42 In recognition that these multiple-judge complaints are virtually always meritless, the

DRAFT FOR PUBLIC COMMENT - 6/13/07

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

8
9 Applying a rule of necessity in these situations is consistent with the appearance of
10 justice. See, e.g., In re Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993) (invoking the
11 rule of necessity); In re Complaint of Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council
12 6/24/92) (same). There is no unfairness in permitting the chief circuit judge to dispose of a
13 patently insubstantial complaint that names all active circuit judges in the circuit.

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

21
22 In the unlikely event that a quorum of the judicial council cannot be obtained to consider
23 the report of a special committee, it would normally be necessary to request a transfer under Rule
24 26.

25
26 **Rule 26. Transfer to Another Judicial Council.**

27
28 **(a) Transfer of a Proceeding.**

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

36
37 **Commentary to Rule 26**

38
39 Rule 26 is new but implements the Breyer Committee's recommended use of transfers.
40 Breyer Report, 239 F.R.D. at 214-15.

41
42 Rule 26 authorizes the transfer of a complaint proceeding to another judicial council

DRAFT FOR PUBLIC COMMENT - 6/13/07

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

10 Upon receipt of a transferred proceeding, the transferee council shall determine the proper
11 stage at which to begin consideration of the complaint, i.e., reference to the transferee chief
12 circuit judge, appointment of a special committee, etc.
13

14 **Rule 27. Withdrawal of Complaints and Petitions for Review.**
15

16 **(a) Complaint Pending Before Chief Circuit Judge.**

17 A complaint that is before the chief circuit judge for a decision under Rule 11 may
18 be withdrawn by the complainant with the consent of the chief circuit judge. The
19 withdrawal of a complaint will not prevent a chief circuit judge from identifying, or reduce
20 the chief circuit judge's duty to identify, a complaint under Rule 5 based on the withdrawn
21 complaint.

22 **(b) Complaint Pending before Special Committee or Judicial Council.**

23 After a complaint has been referred to a special committee for investigation, the
24 complaint may be withdrawn by the complainant only with the consent of both the subject
25 judge and either the special committee (before its report has been filed) or the judicial
26 council.

27 **(c) Petitions for Review.**

28 A petition for review addressed to a judicial council under Rule 18 or to the Judicial
29 Conference Committee on Judicial Conduct and Disability under Rule 22, pursuant to Rule
30 21(b)(1), may be withdrawn by the petitioner at any time before action has been taken on
31 the petition.
32

33 **Commentary on Rule 27**
34

35 Rule 27 is adapted from the Illustrative Rules.
36

37 Rule 27 treats the complaint proceeding, once begun, as a matter of public business rather
38 than as the property of the complainant. Accordingly, the chief circuit judge or the judicial
39 council remains responsible for addressing any complaint under the Act, even a complaint that
40 has been formally withdrawn by the complainant.
41

42 Under Rule 27(a), a complaint pending before the chief circuit judge may be withdrawn if

DRAFT FOR PUBLIC COMMENT - 6/13/07

1 the chief circuit judge consents. Where the complaint clearly lacked merit, the chief circuit judge
2 may accordingly be saved the burden of preparing a formal order and supporting memorandum.
3 However, the chief circuit judge may, or be obligated under Rule 5 to, identify a complaint based
4 on allegations in a withdrawn complaint.
5

6 If the chief circuit judge appoints a special committee, Rule 27(b) provides that the
7 complaint may be withdrawn only with the consent of both the body before which it is pending
8 (the special committee or the judicial council) and the subject judge. Once a complaint has
9 reached the stage of appointment of a special committee, a resolution of the issues may be
10 necessary to preserve public confidence. Moreover, the subject judge is given the right to insist
11 that the matter be resolved on the merits, thereby eliminating any ambiguity that might remain if
12 the proceeding were terminated by withdrawal of the complaint.
13

14 With regard to all petitions for review, Rule 27(c) grants the petitioner unrestricted
15 authority to withdraw the petition. It is thought that the public's interest in the proceeding is
16 adequately protected, because there will necessarily have been a decision by the chief circuit
17 judge and often by the judicial council as well in such a case.
18

19 **Rule 28. Availability of Rules and Forms.**

20
21 **These rules and copies of the complaint form as provided in Rule 6(b) must be**
22 **available without charge in the office of the clerk of each court of appeals, district court,**
23 **bankruptcy court, or other federal court whose judges are subject to the Act. Each court**
24 **must also make these rules and the complaint form available on the court's website, or**
25 **provide an internet link to the rules and complaint form that are available on the**
26 **judiciary's national website, www.uscourts.gov.**
27

28 **Rule 29. Effective Date.**

29
30 **These rules will become effective 30 days after promulgation by the Judicial**
31 **Conference of the United States.**
32
33
34

APPENDIX: COMPLAINT FORM

JUDICIAL COUNCIL OF THE _____
COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

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

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

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

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

1. Complainant's name: _____

Address: _____

Daytime telephone: (___) _____

2. Subject Judge(s):

Name: _____

Court: _____

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

[] Yes [] No

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

DRAFT FOR PUBLIC COMMENT - 6/13/07

Case Number:

Docket numbers of any appeals to the ____th Circuit:

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

Party Lawyer Neither

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

4. Have you filed any lawsuits against the judge?

Yes No

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

Court:

Docket Number:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

5. On separate sheets of paper, please provide a statement of the facts that the claim of misconduct or disability is based on. The statement should not be longer than five standard pages. For further information about what to include in your statement of facts, see Rule 6(a).

Declaration and signature:

I declare under penalty of perjury that:

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

DRAFT FOR PUBLIC COMMENT - 6/13/07

1
2
3
4
5
6
7
8
9

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

(Signature) _____

(Date) _____