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Draft Rules for Judicial-Conduct and Judicial-Disability Proceedings

The Committee on Judicial Conduct and Disability has recommended for adoption by the Judicial Conference a draft of [Rules for Judicial-Conduct and Judicial-Disability Proceedings](#). This draft reflects not only the revisions made after the Public Comment period but also those resulting from a style edit. The Committee does not contemplate making any further changes to the draft prior to its consideration by the Judicial Conference on March 11, 2008.

Draft of 1.23.08
Recommended for Adoption by the Judicial Conference

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

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

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

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

Preface

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

1 **ARTICLE I. GENERAL PROVISIONS**

2
3 **1. Scope**

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

10
11
12 **Commentary on Rule 1**

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

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

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

1 that end, the Judicial Conference Committee proposed rules
2 that were based largely on Appendix E of the Breyer
3 Committee Report and the Illustrative Rules.
4

5 The Illustrative Rules were originally prepared in 1986
6 by the Special Committee of the Conference of Chief Judges
7 of the United States Courts of Appeals, and were
8 subsequently revised and amended, most recently in 2000, by
9 the predecessor to the Committee on Judicial Conduct and
10 Disability. The Illustrative Rules were adopted, with minor
11 variations, by circuit judicial councils, to govern
12 complaints under the Judicial Conduct and Disability Act.
13

14 After being submitted for public comment pursuant to 28
15 U.S.C. § 358(c), the present Rules were promulgated by the
16 Judicial Conference on .
17
18

19 **2. Effect and Construction**

- 20 **(a) Generally. These Rules are mandatory; they supersede**
21 **any conflicting judicial-council rules. Judicial**
22 **councils may promulgate additional rules to implement**
23 **the Act as long as those rules do not conflict with**
24 **these Rules.**
- 25 **(b) Exception. A Rule will not apply if, when performing**
26 **duties authorized by the Act, a chief judge, a special**
27 **committee, a judicial council, the Judicial Conference**
28 **Committee on Judicial Conduct and Disability, or the**
29 **Judicial Conference of the United States expressly**
30 **finds that exceptional circumstances render application**
31 **of that Rule in a particular proceeding manifestly**
32 **unjust or contrary to the purposes of the Act or these**
33 **Rules.**
34
35

36 **Commentary on Rule 2**

37
38 Unlike the Illustrative Rules, these Rules provide
39 mandatory and nationally uniform provisions governing the
40 substantive and procedural aspects of misconduct and
41 disability proceedings under the Act. The mandatory nature
42 of these Rules is authorized by 28 U.S.C. § 358(a) and (c).
43 Judicial councils retain the power to promulgate rules
44 consistent with these Rules. For example, a local rule may
45 authorize the electronic distribution of materials pursuant
46 to Rule 8(b).
47

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

6 **3. Definitions**

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

- 1 (1) is conduct prejudicial to the effective and
2 expeditious administration of the business of the
3 courts. Misconduct includes, but is not limited to:
4 (A) using the judge's office to obtain special
5 treatment for friends or relatives;
6 (B) accepting bribes, gifts, or other personal favors
7 related to the judicial office;
8 (C) having improper discussions with parties or
9 counsel for one side in a case;
10 (D) treating litigants or attorneys in a demonstrably
11 egregious and hostile manner;
12 (E) engaging in partisan political activity or making
13 inappropriately partisan statements;
14 (F) soliciting funds for organizations; or
15 (G) violating other specific, mandatory standards of
16 judicial conduct, such as those pertaining to
17 restrictions on outside income and requirements
18 for financial disclosure.
- 19 (2) is conduct occurring outside the performance of
20 official duties if the conduct might have a
21 prejudicial effect on the administration of the
22 business of the courts, including a substantial and
23 widespread lowering of public confidence in the
24 courts among reasonable people.
- 25 (3) does not include:
26 (A) an allegation that is directly related to the
27 merits of a decision or procedural ruling. An
28 allegation that calls into question the
29 correctness of a judge's ruling, including a
30 failure to recuse, without more, is merits-
31 related. If the decision or ruling is alleged to
32 be the result of an improper motive, e.g., a
33 bribe, ex parte contact, racial or ethnic bias,
34 or improper conduct in rendering a decision or
35 ruling, such as personally derogatory remarks
36 irrelevant to the issues, the complaint is not
37 cognizable to the extent that it attacks the
38 merits.
- 39 (B) an allegation about delay in rendering a decision
40 or ruling, unless the allegation concerns an
41 improper motive in delaying a particular decision
42 or habitual delay in a significant number of
43 unrelated cases.
- 44 (i) Subject Judge. "Subject judge" means any judge
45 described in Rule 4 who is the subject of a complaint.
46
47
48

Commentary on Rule 3

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

41 **4. Covered Judges**

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

Commentary on Rule 4

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

ARTICLE II. INITIATION OF A COMPLAINT

5. Identification of a Complaint

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

Commentary on Rule 5

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

The Act authorizes the chief judge, by written order stating reasons, to identify a complaint and thereby dispense with the filing of a written complaint. See 28 U.S.C. § 351(b). Under Rule 5, when a chief judge becomes aware of information constituting reasonable grounds to inquire into possible misconduct or disability on the part of a covered judge, and no formal complaint has been filed,

1 the chief judge has the power in his or her discretion to
2 begin an appropriate inquiry. A chief judge's decision
3 whether to informally seek a resolution and/or to identify a
4 complaint is guided by the results of that inquiry. If the
5 chief judge concludes that there is probable cause to
6 believe that misconduct has occurred or a disability exists,
7 the chief judge may seek an informal resolution, if
8 feasible, and if failing in that, may identify a complaint.
9 Discretion is accorded largely for the reasons police
10 officers and prosecutors have discretion in making arrests
11 or bringing charges. The matter may be trivial and
12 isolated, based on marginal evidence, or otherwise highly
13 unlikely to lead to a misconduct or disability finding. On
14 the other hand, if the inquiry leads the chief judge to
15 conclude that there is clear and convincing evidence of
16 misconduct or a disability, and no satisfactory informal
17 resolution has been achieved or is feasible, the chief judge
18 is required to identify a complaint.
19

20 An informal resolution is one agreed to by the subject
21 judge and found satisfactory by the chief judge. Because an
22 informal resolution under Rule 5 reached before a complaint
23 is filed under Rule 6 will cause a subsequent Rule 6
24 complaint alleging the identical matter to be concluded, see
25 Rule 11(c), the chief judge must be sure that the resolution
26 is fully appropriate before endorsing it. In doing so, the
27 chief judge must balance the seriousness of the matter
28 against the particular judge's alacrity in addressing the
29 issue. The availability of this procedure should encourage
30 attempts at swift remedial action before a formal complaint
31 is filed.
32

33 When a complaint is identified, a written order stating
34 the reasons for the identification must be provided; this
35 begins the process articulated in Rule 11. Rule 11 provides
36 that once the chief judge has identified a complaint, the
37 chief judge, subject to the disqualification provisions of
38 Rule 25, will perform, with respect to that complaint, all
39 functions assigned to the chief judge for the determination
40 of complaints filed by a complainant.
41

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

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

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

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

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

30 31 **6. Filing a Complaint**

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

- 1 (3) any information that would help an investigator
2 check the facts; and
3 (4) for an allegation of disability, any additional
4 facts that form the basis of that allegation.
5 (c) Legibility. A complaint should be typewritten if
6 possible. If not typewritten, it must be legible. An
7 illegible complaint will be returned to the complainant
8 with a request to resubmit it in legible form. If a
9 resubmitted complaint is still illegible, it will not
10 be accepted for filing.
11 (d) Complainant's Address and Signature; Verification. The
12 complainant must provide a contact address and sign the
13 complaint. The truth of the statements made in the
14 complaint must be verified in writing under penalty of
15 perjury. If any of these requirements are not met, the
16 complaint will be accepted for filing, but it will be
17 reviewed under only Rule 5(b).
18 (e) Number of Copies; Envelope Marking. The complainant
19 shall provide the number of copies of the complaint
20 required by local rule. Each copy should be in an
21 envelope marked "Complaint of Misconduct" or "Complaint
22 of Disability." The envelope must not show the name of
23 any subject judge.
24
25

26 Commentary on Rule 6
27

28 The Rule is adapted from the Illustrative Rules and is
29 self-explanatory.
30
31

32 **7. Where to Initiate Complaints**

- 33 (a) Where to File. Except as provided in (b),
34 (1) a complaint against a judge of a United States
35 court of appeals, a United States district court, a
36 United States bankruptcy court, or a United States
37 magistrate judge must be filed with the circuit
38 clerk in the jurisdiction in which the subject
39 judge holds office.
40 (2) a complaint against a judge of the United States
41 Court of International Trade or the United States
42 Court of Federal Claims must be filed with the
43 respective clerk of that court.
44 (3) a complaint against a judge of the United States
45 Court of Appeals for the Federal Circuit must be
46 filed with the circuit executive of that court.

1 be transferred by the judicial council of the filing or
2 identified circuit to the other circuit.
3

4 **8. Action by Clerk**

- 5 (a) **Receipt of Complaint.** Upon receiving a complaint
6 against a judge filed under Rule 5 or 6, the circuit
7 clerk must open a file, assign a docket number
8 according to a uniform numbering scheme promulgated by
9 the Judicial Conference Committee on Judicial Conduct
10 and Disability, and acknowledge the complaint's
11 receipt.
- 12 (b) **Distribution of Copies.** The clerk must promptly send
13 copies of a complaint filed under Rule 6 to the chief
14 judge or the judge authorized to act as chief judge
15 under Rule 25(f), and copies of complaints filed under
16 Rule 5 or 6 to each subject judge. The clerk must also
17 send copies of these complaints to the Judicial
18 Conference Committee on Judicial Conduct and
19 Disability. The clerk must retain the original
20 complaint. Any further distribution should be as
21 provided by local rule.
- 22 (c) **Complaints Against Noncovered Persons.** If the clerk
23 receives a complaint about a person not holding an
24 office described in Rule 4, the clerk must not accept
25 the complaint for filing under these Rules.
- 26 (d) **Receipt of Complaint about a Judge and Another**
27 **Noncovered Person.** If a complaint is received about a
28 judge described in Rule 4 and a person not holding an
29 office described in Rule 4, the clerk must accept the
30 complaint for filing under these Rules only with regard
31 to the judge and must inform the complainant of the
32 limitation.
33

34 **Commentary on Rule 8**

35
36 This Rule is adapted from the Illustrative Rules and is
37 largely self-explanatory.
38

39 The uniform docketing scheme described in subsection (a)
40 should take into account potential problems associated with
41 a complaint that names multiple judges. One solution may be
42 to provide separate docket numbers for each subject judge.
43 Separate docket numbers would help avoid difficulties in
44 tracking cases, particularly if a complaint is dismissed
45 with respect to some, but not all of the named judges.
46

1 The provision requiring circuit clerks to send copies of
2 all complaints to the Judicial Conference Committee on
3 Judicial Conduct and Disability is new. It is necessary to
4 enable the Committee to monitor administration of the Act,
5 to anticipate upcoming issues, and to carry out its new
6 jurisdictional responsibilities under Article VI.
7

8 Complaints against noncovered persons are not to be
9 accepted for processing under these Rules but may, of
10 course, be accepted under other circuit rules or procedures
11 for grievances.
12
13

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

15 **A complaint may be filed or identified at any time. If the**
16 **passage of time has made an accurate and fair investigation**
17 **of a complaint impractical, the complaint must be dismissed**
18 **under Rule 11(c) (1) (E).**
19
20

21 **Commentary on Rule 9**

22
23 This Rule is adapted from the Act, 28 U.S.C. §§ 351,
24 352(b) (1) (A) (iii), and the Illustrative Rules.
25
26

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

28 **(a) Abusive Complaints.** A complainant who has filed
29 **repetitive, harassing, or frivolous complaints, or has**
30 **otherwise abused the complaint procedure, may be**
31 **restricted from filing further complaints. After giving**
32 **the complainant an opportunity to show cause in writing**
33 **why his or her right to file further complaints should**
34 **not be limited, a judicial council may prohibit,**
35 **restrict, or impose conditions on the complainant's use**
36 **of the complaint procedure. Upon written request of the**
37 **complainant, the judicial council may revise or**
38 **withdraw any prohibition, restriction, or condition**
39 **previously imposed.**

40 **(b) Orchestrated Complaints.** When many essentially
41 **identical complaints from different complainants are**
42 **received and appear to be part of an orchestrated**
43 **campaign, the chief judge may recommend that the**
44 **judicial council issue a written order instructing the**
45 **circuit clerk to accept only a certain number of such**
46 **complaints for filing and to refuse to accept further**

ones. The clerk must send a copy of any such order to anyone whose complaint was not accepted.

Commentary on Rule 10

This Rule is adapted from the Illustrative Rules.

Rule 10(a) provides a mechanism for a judicial council to restrict the filing of further complaints by a single complainant who has abused the complaint procedure. In some instances, however, the complaint procedure may be abused in a manner for which the remedy provided in Rule 10(a) may not be appropriate. For example, some circuits have been inundated with submissions of dozens or hundreds of essentially identical complaints against the same judge or judges, all submitted by different complainants. In many of these instances, persons with grievances against a particular judge or judges used the Internet or other technology to orchestrate mass complaint-filing campaigns against them. 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.

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

ARTICLE III. REVIEW OF A COMPLAINT BY THE CHIEF JUDGE

11. Review by the Chief Judge

- (a) **Purpose of Chief Judge's Review. When a complaint is identified by the chief judge or is filed, the chief judge must review it unless the chief judge is**

1 disqualified under Rule 25. If the complaint contains
2 information constituting evidence of misconduct or
3 disability, but the complainant does not claim it as
4 such, the chief judge must treat the complaint as if it
5 did allege misconduct or disability and give notice to
6 the subject judge. After reviewing the complaint, the
7 chief judge must determine whether it should be:

- 8 (1) dismissed;
- 9 (2) concluded on the ground that voluntary corrective
10 action has been taken;
- 11 (3) concluded because intervening events have made
12 action on the complaint no longer necessary; or
- 13 (4) referred to a special committee.

14 (b) Inquiry by Chief Judge. In determining what action to
15 take under Rule 11(a), the chief judge may conduct a
16 limited inquiry. The chief judge, or a designee, may
17 communicate orally or in writing with the complainant,
18 the subject judge, and any others who may have
19 knowledge of the matter, and may review transcripts or
20 other relevant documents. In conducting the inquiry,
21 the chief judge must not determine any reasonably
22 disputed issue.

23 (c) Dismissal.

24 (1) Allowable grounds. A complaint must be dismissed in
25 whole or in part to the extent that the chief judge
26 concludes that the complaint:

- 27 (A) alleges conduct that, even if true, is not
28 prejudicial to the effective and expeditious
29 administration of the business of the courts and
30 does not indicate a mental or physical disability
31 resulting in inability to discharge the duties of
32 judicial office;
- 33 (B) is directly related to the merits of a decision
34 or procedural ruling;
- 35 (C) is frivolous;
- 36 (D) is based on allegations lacking sufficient
37 evidence to raise an inference that misconduct
38 has occurred or that a disability exists;
- 39 (E) is based on allegations which are incapable of
40 being established through investigation;
- 41 (F) has been filed in the wrong circuit under Rule 7;
42 or
- 43 (G) is otherwise not appropriate for consideration
44 under the Act.

45 (2) Disallowed grounds. A complaint must not be
46 dismissed solely because it repeats allegations of
47 a previously dismissed complaint if it also
48 contains material information not previously

- 1 considered and does not constitute harassment of
2 the subject judge.
- 3 (d) Corrective Action. The chief judge may conclude the
4 complaint proceeding in whole or in part if:
5 (1) an informal resolution under Rule 5 satisfactory to
6 the chief judge was reached before the complaint
7 was filed under Rule 6, or
8 (2) the chief judge determines that the subject judge
9 has taken appropriate voluntary corrective action
10 that acknowledges and remedies the problems raised
11 by the complaint.
- 12 (e) Intervening Events. The chief judge may conclude the
13 complaint proceeding in whole or in part upon
14 determining that intervening events render some or all
15 of the allegations moot or make remedial action
16 impossible.
- 17 (f) Appointment of Special Committee. If some or all of the
18 complaint is not dismissed or concluded, the chief
19 judge must promptly appoint a special committee to
20 investigate the complaint or any relevant portion of it
21 and to make recommendations to the judicial council.
22 Before appointing a special committee, the chief judge
23 must invite the subject judge to respond to the
24 complaint either orally or in writing if the judge was
25 not given an opportunity during the limited inquiry. In
26 the chief judge's discretion, separate complaints may
27 be joined and assigned to a single special committee.
28 Similarly, a single complaint about more than one judge
29 may be severed and more than one special committee
30 appointed.
- 31 (g) Notice of Chief Judge's Action; Petitions for Review.
32 (1) When special committee is appointed. If a special
33 committee is appointed, the chief judge must notify
34 the complainant and the subject judge that the
35 matter has been referred to a special committee and
36 identify the members of the committee. A copy of
37 the order appointing the special committee must be
38 sent to the Judicial Conference Committee on
39 Judicial Conduct and Disability.
- 40 (2) When chief judge disposes of complaint without
41 appointing special committee. If the chief judge
42 disposes of the complaint under Rule 11(c), (d), or
43 (e), the chief judge must prepare a supporting
44 memorandum that sets forth the reasons for the
45 disposition. Except as authorized by 28 U.S.C. §
46 360, the memorandum must not include the name of
47 the complainant or of the subject judge. The order
48 and the supporting memorandum, which may be one

1 document, must be provided to the complainant, the
2 subject judge, and the Judicial Conference
3 Committee on Judicial Conduct and Disability.

4 (3) Right of petition for review. If the chief judge
5 disposes of a complaint under Rule 11(c), (d), or
6 (e), the complainant and subject judge must be
7 notified of the right to petition the judicial
8 council for review of the disposition, as provided
9 in Rule 18. If a petition for review is filed, the
10 chief judge must promptly transmit all materials
11 obtained in connection with the inquiry under Rule
12 11(b) to the circuit clerk for transmittal to the
13 judicial council.

14 (h) Public Availability of Chief Judge's Decision. The
15 chief judge's decision must be made public to the
16 extent, at the time, and in the manner provided in Rule
17 24.
18
19

20 Commentary on Rule 11
21

22 Subsection (a) lists the actions available to a chief
23 judge in reviewing a complaint. This subsection provides
24 that where a complaint has been filed under Rule 6, the
25 ordinary doctrines of waiver do not apply. A chief judge
26 must identify as a complaint any misconduct or disability
27 issues raised by the factual allegations of the complaint
28 even if the complainant makes no such claim with regard to
29 those issues. For example, an allegation limited to
30 misconduct in fact-finding that mentions periods during a
31 trial when the judge was asleep must be treated as a
32 complaint regarding disability. Some formal order giving
33 notice of the expanded scope of the proceeding must be given
34 to the subject judge.
35

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

1 they lack any reliable factual foundation, or that they are
2 conclusively refuted by objective evidence.
3

4 In conducting a limited inquiry under subsection (b), the
5 chief judge must avoid determinations of reasonably disputed
6 issues, including reasonably disputed issues as to whether
7 the facts alleged constitute misconduct or disability, which
8 are ordinarily left to a special committee and the judicial
9 council. An allegation of fact is ordinarily not "refuted"
10 simply because the subject judge denies it. The limited
11 inquiry must reveal something more in the way of refutation
12 before it is appropriate to dismiss a complaint that is
13 otherwise cognizable. If it is the complainant's word
14 against the subject judge's -- in other words, there is
15 simply no other significant evidence of what happened or of
16 the complainant's unreliability -- then there must be a
17 special-committee investigation. Such a credibility issue
18 is a matter "reasonably in dispute" within the meaning of
19 the Act.
20

21 However, dismissal following a limited inquiry may occur
22 when the complaint refers to transcripts or to witnesses and
23 the chief judge determines that the transcripts and
24 witnesses all support the subject judge. Breyer Committee
25 Report, 239 F.R.D. at 243. For example, consider a
26 complaint alleging that the subject judge said X, and the
27 complaint mentions, or it is independently clear, that five
28 people may have heard what the judge said. Id. The chief
29 judge is told by the subject judge and one witness that the
30 judge did not say X, and the chief judge dismisses the
31 complaint without questioning the other four possible
32 witnesses. Id. In this example, the matter remains
33 reasonably in dispute. If all five witnesses say the judge
34 did not say X, dismissal is appropriate, but if potential
35 witnesses who are reasonably accessible have not been
36 questioned, then the matter remains reasonably in dispute.
37 Id.
38

39 Similarly, under (c)(1)(A), if it is clear that the
40 conduct or disability alleged, even if true, is not
41 cognizable under these Rules, the complaint should be
42 dismissed. If that issue is reasonably in dispute, however,
43 dismissal under (c)(1)(A) is inappropriate.
44

45 Essentially, the standard articulated in subsection (b)
46 is that used to decide motions for summary judgment pursuant
47 to Fed. R. Civ. P. 56. Genuine issues of material fact are
48 not resolved at the summary judgment stage. A material fact

1 is one that "might affect the outcome of the suit under the
2 governing law," and a dispute is "genuine" if "the evidence
3 is such that a reasonable jury could return a verdict for
4 the nonmoving party." Anderson v. Liberty Lobby, 477 U.S.
5 242, 248 (1986). Similarly, the chief judge may not resolve
6 a genuine issue concerning a material fact or the existence
7 of misconduct or a disability when conducting a limited
8 inquiry pursuant to subsection (b).
9

10 Subsection (c) describes the grounds on which a complaint
11 may be dismissed. These are adapted from the Act, 28 U.S.C.
12 § 352(b), and the Breyer Committee Report, 239 F.R.D. at
13 239-45. Subsection (c)(1)(A) permits dismissal of an
14 allegation that, even if true, does not constitute
15 misconduct or disability under the statutory standard. The
16 proper standards are set out in Rule 3 and discussed in the
17 Commentary on that Rule. Subsection (c)(1)(B) permits
18 dismissal of complaints related to the merits of a decision
19 by a subject judge; this standard is also governed by Rule 3
20 and its accompanying Commentary.
21

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

29 Dismissal of a complaint as "frivolous," under Rule
30 11(c)(1)(C), will generally occur without any inquiry beyond
31 the face of the complaint. For instance, when the
32 allegations are facially incredible or so lacking in indicia
33 of reliability that no further inquiry is warranted,
34 dismissal under this subsection is appropriate.
35

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

1 On the other hand, if the complaint quoted a disinterested
2 third party and that disinterested party denied that the
3 statement had been made, there would be no value in opening
4 a formal investigation. In such a case, it would be
5 appropriate to dismiss the complaint under Rule 11(c)(1)(D).
6

7 Rule 11(c)(1)(E) is intended, among other things, to
8 cover situations when no evidence is offered or identified,
9 or when the only identified source is unavailable. Breyer
10 Committee Report, 239 F.R.D. at 243. For example, a
11 complaint alleges that an unnamed attorney told the
12 complainant that the judge did X. Id. The subject judge
13 denies it. The chief judge requests that the complainant
14 (who does not purport to have observed the judge do X)
15 identify the unnamed witness, or that the unnamed witness
16 come forward so that the chief judge can learn the unnamed
17 witness's account. Id. The complainant responds that he
18 has spoken with the unnamed witness, that the unnamed
19 witness is an attorney who practices in federal court, and
20 that the unnamed witness is unwilling to be identified or to
21 come forward. Id. at 243-44. The allegation is then
22 properly dismissed as containing allegations that are
23 incapable of being established through investigation. Id.
24

25 If, however, the situation involves a reasonable dispute
26 over credibility, the matter should proceed. For example,
27 the complainant alleges an impropriety and alleges that he
28 or she observed it and that there were no other witnesses;
29 the subject judge denies that the event occurred. Unless
30 the complainant's allegations are facially incredible or so
31 lacking indicia of reliability warranting dismissal under
32 Rule 11(c)(1)(C), a special committee must be appointed
33 because there is a material factual question that is
34 reasonably in dispute.
35

36 Dismissal is also appropriate when a complaint is filed
37 so long after an alleged event that memory loss, death, or
38 changes to unknown residences prevent a proper
39 investigation.
40

41 Subsection (c)(2) indicates that the investigative nature
42 of the process prevents the application of claim preclusion
43 principles where new and material evidence becomes
44 available. However, it also recognizes that at some point a
45 renewed investigation may constitute harassment of the
46 subject judge and should be foregone, depending of course on
47 the seriousness of the issues and the weight of the new
48 evidence.

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

24
25 "Corrective action" must be voluntary action taken by the
26 subject judge. Breyer Committee Report, 239 F.R.D. at 244.
27 A remedial action directed by the chief judge or by an
28 appellate court without the participation of the subject
29 judge in formulating the directive or without the subject
30 judge's subsequent agreement to such action does not
31 constitute the requisite voluntary corrective action. Id.
32 Neither the chief judge nor an appellate court has authority
33 under the Act to impose a formal remedy or sanction; only
34 the judicial council can impose a formal remedy or sanction
35 under 28 U.S.C. § 354(a)(2). Id. Compliance with a
36 previous council order may serve as corrective action
37 allowing conclusion of a later complaint about the same
38 behavior. Id.

39
40 Where a judge's conduct has resulted in identifiable,
41 particularized harm to the complainant or another
42 individual, appropriate corrective action should include
43 steps taken by that judge to acknowledge and redress the
44 harm, if possible, such as by an apology, recusal from a
45 case, or a pledge to refrain from similar conduct in the
46 future. Id. While the Act is generally forward-looking,
47 any corrective action should, to the extent possible, serve
48 to correct a specific harm to an individual, if such harm

1 can reasonably be remedied. Id. In some cases, corrective
2 action may not be "appropriate" to justify conclusion of a
3 complaint unless the complainant or other individual harmed
4 is meaningfully apprised of the nature of the corrective
5 action in the chief judge's order, in a direct communication
6 from the subject judge, or otherwise. Id.
7

8 Voluntary corrective action should be proportionate to
9 any plausible allegations of misconduct in the complaint.
10 The form of corrective action should also be proportionate
11 to any sanctions that a judicial council might impose under
12 Rule 20(b), such as a private or public reprimand or a
13 change in case assignments. Breyer Committee Report, 239
14 F.R.D at 244-45. In other words, minor corrective action
15 will not suffice to dispose of a serious matter. Id.
16

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

30 If a complaint is not disposed of pursuant to Rule 11(c),
31 (d), or (e), a special committee must be appointed. Rule
32 11(f) states that a subject judge must be invited to respond
33 to the complaint before a special committee is appointed, if
34 no earlier response was invited.
35

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

45 The Act requires that the order dismissing a complaint or
46 concluding the proceeding contain a statement of reasons and
47 that a copy of the order be sent to the complainant. 28
48 U.S.C. § 352(b). Rule 24, dealing with availability of

1 information to the public, contemplates that the order will
2 be made public, usually without disclosing the names of the
3 complainant or the subject judge. If desired for
4 administrative purposes, more identifying information can be
5 included in a non-public version of the order.

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

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

21 22 23 **ARTICLE IV. INVESTIGATION AND REPORT BY SPECIAL** 24 **COMMITTEE**

25 26 **12. Composition of Special Committee**

- 27 (a) **Membership.** Except as provided in (e), a special
28 committee appointed under Rule 11(f) must consist of
29 the chief judge and equal numbers of circuit and
30 district judges. If the complaint is about a district
31 judge, bankruptcy judge, or magistrate judge, then,
32 when possible, the district-judge members of the
33 committee must be from districts other than the
34 district of the subject judge. For the courts named in
35 28 U.S.C. § 363, the committee must be selected from
36 the judges serving on the subject judge's court.
- 37 (b) **Presiding Officer.** When appointing the committee, the
38 chief judge may serve as the presiding officer or else
39 must designate a committee member as the presiding
40 officer.
- 41 (c) **Bankruptcy Judge or Magistrate Judge as Adviser.** If the
42 subject judge is a bankruptcy judge or magistrate
43 judge, he or she may, within 14 days after being
44 notified of the committee's appointment, ask the chief
45 judge to designate as a committee adviser another
46 bankruptcy judge or magistrate judge, as the case may
47 be. The chief judge must grant such a request but may

1 otherwise use discretion in naming the adviser. Unless
2 the adviser is a Court of Federal Claims special master
3 appointed under 42 U.S.C. § 300aa-12(c), the adviser
4 must be from a district other than the district of the
5 subject bankruptcy judge or subject magistrate judge.
6 The adviser cannot vote but has the other privileges of
7 a committee member.

8 (d) Provision of Documents. The chief judge must certify to
9 each other member of the committee and to any adviser
10 copies of the complaint and statement of facts in whole
11 or relevant part, and any other relevant documents on
12 file.

13 (e) Continuing Qualification of Committee Members. A member
14 of a special committee who was qualified to serve when
15 appointed may continue to serve on the committee even
16 though the member relinquishes the position of chief
17 judge, active circuit judge, or active district judge,
18 as the case may be, but only if the member continues to
19 hold office under Article III, Section 1, of the
20 Constitution of the United States, or under 28 U.S.C.
21 § 171.

22 (f) Inability of Committee Member to Complete Service. If a
23 member of a special committee can no longer serve
24 because of death, disability, disqualification,
25 resignation, retirement from office, or other reason,
26 the chief judge must decide whether to appoint a
27 replacement member, either a circuit or district judge
28 as needed under (a). No special committee appointed
29 under these Rules may function with only a single
30 member, and the votes of a two-member committee must be
31 unanimous.

32 (g) Voting. All actions by a committee must be by vote of a
33 majority of all members of the committee.
34
35

36 Commentary on Rule 12

37
38 This Rule is adapted from the Act and the Illustrative
39 Rules.
40

41 Rule 12 leaves the size of a special committee flexible,
42 to be determined on a case-by-case basis. The question of
43 committee size is one that should be weighed with care in
44 view of the potential for consuming the members' time; a
45 large committee should be appointed only if there is a
46 special reason to do so.
47

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

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

13 Subsection (c) also provides that the adviser will have
14 all the privileges of a committee member except a vote. The
15 adviser, therefore, may participate in all deliberations of
16 the committee, question witnesses at hearings, and write a
17 separate statement to accompany the special committee's
18 report to the judicial council.
19

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

31 Stability of membership is also the principal concern
32 animating Rule 12(f), which deals with the case in which a
33 special committee loses a member before its work is
34 complete. The Rule permits the chief judge to determine
35 whether a replacement member should be appointed.
36 Generally, appointment of a replacement member is desirable
37 in these situations unless the committee has conducted
38 evidentiary hearings before the vacancy occurs. However,
39 cases may arise in which a committee is in the late stages
40 of its work, and in which it would be difficult for a new
41 member to play a meaningful role. The Rule also preserves
42 the collegial character of the committee process by
43 prohibiting a single surviving member from serving as a
44 committee and by providing that a committee of two surviving
45 members will, in essence, operate under a unanimity rule.
46

47 Rule 12(g) provides that actions of a special committee
48 must be by vote of a majority of all the members. All the

1 members of a committee should participate in committee
2 decisions. In that circumstance, it seems reasonable to
3 require that committee decisions be made by a majority of
4 the membership, rather than a majority of some smaller
5 quorum.
6
7

8 **13. Conduct of an Investigation**

- 9 **(a) Extent and Methods of Special-Committee Investigation.**
10 Each special committee must determine the appropriate
11 extent and methods of the investigation in light of the
12 allegations of the complaint. If, in the course of the
13 investigation, the committee has cause to believe that
14 the subject judge may have engaged in misconduct or has
15 a disability that is beyond the scope of the complaint,
16 the committee must refer the new matter to the chief
17 judge for action under Rule 5 or Rule 11.
- 18 **(b) Criminal Conduct.** If the committee's investigation
19 concerns conduct that may be a crime, the committee
20 must consult with the appropriate prosecutorial
21 authorities to the extent permitted by the Act to avoid
22 compromising any criminal investigation. The committee
23 has final authority over the timing and extent of its
24 investigation and the formulation of its
25 recommendations.
- 26 **(c) Staff.** The committee may arrange for staff assistance
27 to conduct the investigation. It may use existing staff
28 of the judicial branch or may hire special staff
29 through the Director of the Administrative Office of
30 the United States Courts.
- 31 **(d) Delegation of Subpoena Power; Contempt.** The chief judge
32 may delegate the authority to exercise the committee's
33 subpoena powers. The judicial council or special
34 committee may institute a contempt proceeding under 28
35 U.S.C. § 332(d) against anyone who fails to comply with
36 a subpoena.
37
38

39 **Commentary on Rule 13**

40 This Rule is adapted from the Illustrative Rules.
41

42
43 Rule 13, as well as Rules 14, 15, and 16, are concerned
44 with the way in which a special committee carries out its
45 mission. They reflect the view that a special committee has
46 two roles that are separated in ordinary litigation. First,
47 the committee has an investigative role of the kind that is

1 characteristically left to executive branch agencies or
2 discovery by civil litigants. 28 U.S.C. § 353(c). Second,
3 it has a formalized fact-finding and
4 recommendation-of-disposition role that is
5 characteristically left to juries, judges, or arbitrators.
6 Id. Rule 13 generally governs the investigative stage.
7 Even though the same body has responsibility for both roles
8 under the Act, it is important to distinguish between them
9 in order to ensure that appropriate rights are afforded at
10 appropriate times to the subject judge.

11
12 One of the difficult questions that can arise is the
13 relationship between proceedings under the Act and criminal
14 investigations. Rule 13(b) assigns responsibility for
15 coordination to the special committee in cases in which
16 criminal conduct is suspected, but gives the committee the
17 authority to determine the appropriate pace of its activity
18 in light of any criminal investigation.

19
20 Title 28 U.S.C. § 356(a) provides that a special
21 committee will have full subpoena powers as provided in 28
22 U.S.C. § 332(d). Section 332(d)(1) provides that subpoenas
23 will be issued on behalf of judicial councils by the circuit
24 clerk "at the direction of the chief judge of the circuit or
25 his designee." Rule 13(d) contemplates that, where the
26 chief judge designates someone else as presiding officer of
27 a special committee, the presiding officer also be delegated
28 the authority to direct the circuit clerk to issue subpoenas
29 related to committee proceedings. That is not intended to
30 imply, however, that the decision to use the subpoena power
31 is exercisable by the presiding officer alone. See Rule
32 12(g).

33 34 35 **14. Conduct of Hearings by Special Committee**

- 36 (a) **Purpose of Hearings.** The committee may hold hearings to
37 take testimony and receive other evidence, to hear
38 argument, or both. If the committee is investigating
39 allegations against more than one judge, it may hold
40 joint or separate hearings.
- 41 (b) **Committee Evidence.** Subject to Rule 15, the committee
42 must obtain material, nonredundant evidence in the form
43 it considers appropriate. In the committee's
44 discretion, evidence may be obtained by committee
45 members, staff, or both. Witnesses offering testimonial
46 evidence may include the complainant and the subject
47 judge.

- 1 **(c) Counsel for Witnesses.** The subject judge has the right
2 to counsel. The special committee has discretion to
3 decide whether other witnesses may have counsel present
4 when they testify.
5 **(d) Witness Fees.** Witness fees must be paid as provided in
6 28 U.S.C. § 1821.
7 **(e) Oath.** All testimony taken at a hearing must be given
8 under oath or affirmation.
9 **(f) Rules of Evidence.** The Federal Rules of Evidence do not
10 apply to special-committee hearings.
11 **(g) Record and Transcript.** A record and transcript must be
12 made of all hearings.
13
14

15 Commentary on Rule 14
16

17 This Rule is adapted from Section 353 of the Act and the
18 Illustrative Rules.
19

20 Rule 14 is concerned with the conduct of fact-finding
21 hearings. Special-committee hearings will normally be held
22 only after the investigative work has been completed and the
23 committee has concluded that there is sufficient evidence to
24 warrant a formal fact-finding proceeding. Special-committee
25 proceedings are primarily inquisitorial rather than
26 adversarial. Accordingly, the Federal Rules of Evidence do
27 not apply to such hearings. Inevitably, a hearing will have
28 something of an adversary character. Nevertheless, that
29 tendency should be moderated to the extent possible. Even
30 though a proceeding will commonly have investigative and
31 hearing stages, committee members should not regard
32 themselves as prosecutors one day and judges the next.
33 Their duty -- and that of their staff -- is at all times to
34 be impartial seekers of the truth.
35

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

1
2 **15. Rights of Subject Judge**

3 (a) Notice.

4 (1) Generally. The subject judge must receive written
5 notice of:

6 (A) the appointment of a special committee under Rule
7 11(f);

8 (B) the expansion of the scope of an investigation
9 under Rule 13(a);

10 (C) any hearing under Rule 14, including its
11 purposes, the names of any witnesses the
12 committee intends to call, and the text of any
13 statements that have been taken from those
14 witnesses.

15 (2) Suggestion of additional witnesses. The subject
16 judge may suggest additional witnesses to the
17 committee.

18 (b) Report of the Special Committee. The subject judge must
19 be sent a copy of the special committee's report when
20 it is filed with the judicial council.

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

30 (d) Presentation of Argument. The subject judge may submit
31 written argument to the special committee and must be
32 given a reasonable opportunity to present oral argument
33 at an appropriate stage of the investigation.

34 (e) Attendance at Hearings. The subject judge has the right
35 to attend any hearing held under Rule 14 and to receive
36 copies of the transcript, of any documents introduced,
37 and of any written arguments submitted by the
38 complainant to the committee.

39 (f) Representation by Counsel. The subject judge may choose
40 to be represented by counsel in the exercise of any
41 right enumerated in this Rule. As provided in Rule
42 20(e), the United States may bear the costs of the
43 representation.
44
45
46
47

Commentary on Rule 15

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

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

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

16. Rights of Complainant in Investigation

- (a) **Notice.** The complainant must receive written notice of the investigation as provided in Rule 11(g)(1). When the special committee's report to the judicial council is filed, the complainant must be notified of the filing. The judicial council may, in its discretion, provide a copy of the report of a special committee to the complainant.
- (b) **Opportunity to Provide Evidence.** If the committee determines that the complainant may have evidence that does not already exist in writing, a representative of the committee must interview the complainant.
- (c) **Presentation of Argument.** The complainant may submit written argument to the special committee. In its discretion, the special committee may permit the complainant to offer oral argument.

- 1 **(d) Representation by Counsel. A complainant may submit**
2 **written argument through counsel and, if permitted to**
3 **offer oral argument, may do so through counsel.**
4 **(e) Cooperation. In exercising its discretion under this**
5 **Rule, a special committee may take into account the**
6 **degree of the complainant's cooperation in preserving**
7 **the confidentiality of the proceedings, including the**
8 **identity of the subject judge.**
9

10
11 Commentary on Rule 16
12

13 This Rule is adapted from the Act and the Illustrative
14 Rules.
15

16 In accordance with the view of the process as
17 fundamentally administrative and inquisitorial, these Rules
18 do not give the complainant the rights of a party to
19 litigation, and leave the complainant's role largely to the
20 discretion of the special committee. However, Rule 16(b)
21 provides that, where a special committee has been appointed
22 and it determines that the complainant may have additional
23 evidence, the complainant must be interviewed by a
24 representative of the committee. Such an interview may be
25 in person or by telephone, and the representative of the
26 committee may be either a member or staff.
27

28 Rule 16 does not contemplate that the complainant will
29 ordinarily be permitted to attend proceedings of the special
30 committee except when testifying or presenting oral
31 argument. A special committee may exercise its discretion
32 to permit the complainant to be present at its proceedings,
33 or to permit the complainant, individually or through
34 counsel, to participate in the examination or
35 cross-examination of witnesses.
36

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

44 In exercising their discretion regarding the role of the
45 complainant, the special committee and the judicial council
46 should protect the confidentiality of the complaint process.
47 As a consequence, subsection (e) provides that a special
48 committee may consider the degree to which a complainant has

1 cooperated in preserving the confidentiality of the
2 proceedings in determining what role beyond the minimum
3 required by these Rules should be given to that complainant.
4
5

6 **17. Special-Committee Report**

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

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

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

ARTICLE V. JUDICIAL-COUNCIL REVIEW

18. Petitions for Review of Chief Judge

Dispositions Under Rule 11(c), (d), or (e)

- (a) Petitions for Review. After the chief judge issues an order under Rule 11(c), (d), or (e), a complainant or subject judge may petition the judicial council of the circuit to review the order. By rules promulgated under 28 U.S.C. § 358, the judicial council may refer a petition for review filed under this Rule to a panel of no fewer than five members of the council, at least two of whom must be district judges.
- (b) When to File; Form; Where to File. A petition for review must be filed in the office of the circuit clerk within 35 days of the date on the clerk's letter informing the parties of the chief judge's order. The petition should be in letter form, addressed to the circuit clerk, and in an envelope marked "Misconduct Petition" or "Disability Petition." The name of the subject judge must not be shown on the envelope. The letter should be typewritten or otherwise legible. It should begin with "I hereby petition the judicial

- 1 council for review of . . . " and state the reasons why
2 the petition should be granted. It must be signed.
- 3 (c) Receipt and Distribution of Petition. A circuit clerk
4 who receives a petition for review filed within the
5 time allowed and in proper form must:
- 6 (1) acknowledge its receipt and send a copy to the
7 complainant or subject judge, as the case may be;
8 (2) promptly distribute to each member of the judicial
9 council, or its relevant panel, except for any
10 member disqualified under Rule 25, or make
11 available in the manner provided by local rule, the
12 following materials:
- 13 (A) copies of the complaint;
14 (B) all materials obtained by the chief judge in
15 connection with the inquiry;
16 (C) the chief judge's order disposing of the
17 complaint;
18 (D) any memorandum in support of the chief judge's
19 order;
20 (E) the petition for review; and
21 (F) an appropriate ballot;
- 22 (3) send the petition for review to the Judicial
23 Conference Committee on Judicial Conduct and
24 Disability. Unless the Judicial Conference
25 Committee requests them, the clerk will not send
26 copies of the materials obtained by the chief
27 judge.
- 28 (d) Untimely Petition. The clerk must refuse to accept a
29 petition that is received after the deadline in (b).
- 30 (e) Timely Petition Not in Proper Form. When the clerk
31 receives a petition filed within the time allowed but
32 in a form that is improper to a degree that would
33 substantially impair its consideration by the judicial
34 council – such as a document that is ambiguous about
35 whether it is intended to be a petition for review –
36 the clerk must acknowledge its receipt, call the
37 filer's attention to the deficiencies, and give the
38 filer the opportunity to correct the deficiencies
39 within 21 days of the date of the clerk's letter about
40 the deficiencies or within the original deadline for
41 filing the petition, whichever is later. If the
42 deficiencies are corrected within the time allowed, the
43 clerk will proceed according to paragraphs (a) and (c)
44 of this Rule. If the deficiencies are not corrected,
45 the clerk must reject the petition.
- 46
47
48

Commentary on Rule 18

Rule 18 is adapted largely from the Illustrative Rules.

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

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

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

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

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

- (a) **Rights of Subject Judge. At any time after a complainant files a petition for review, the subject judge may file a written response with the circuit clerk. The clerk must promptly distribute copies of the response to each member of the judicial council or of the relevant panel, unless that member is disqualified under Rule 25. Copies must also be distributed to the chief judge, to the complainant, and to the Judicial**

1 **Conference Committee on Judicial Conduct and**
2 **Disability. The subject judge must not otherwise**
3 **communicate with individual council members about the**
4 **matter. The subject judge must be given copies of any**
5 **communications to the judicial council from the**
6 **complainant.**

7 **(b) Judicial-Council Action. After considering a petition**
8 **for review and the materials before it, a judicial**
9 **council may:**

- 10 **(1) affirm the chief judge's disposition by denying the**
11 **petition;**
- 12 **(2) return the matter to the chief judge with**
13 **directions to conduct a further inquiry under Rule**
14 **11(b) or to identify a complaint under Rule 5;**
- 15 **(3) return the matter to the chief judge with**
16 **directions to appoint a special committee under**
17 **Rule 11(f); or**
- 18 **(4) in exceptional circumstances, take other**
19 **appropriate action.**

20 **(c) Notice of Council Decision. Copies of the judicial**
21 **council's order, together with any accompanying**
22 **memorandum in support of the order or separate**
23 **concurring or dissenting statements, must be given to**
24 **the complainant, the subject judge, and the Judicial**
25 **Conference Committee on Judicial Conduct and**
26 **Disability.**

27 **(d) Memorandum of Council Decision. If the council's order**
28 **affirms the chief judge's disposition, a supporting**
29 **memorandum must be prepared only if the judicial**
30 **council concludes that there is a need to supplement**
31 **the chief judge's explanation. A memorandum supporting**
32 **a council order must not include the name of the**
33 **complainant or the subject judge.**

34 **(e) Review of Judicial-Council Decision. If the judicial**
35 **council's decision is adverse to the petitioner, and if**
36 **no member of the council dissented on the ground that a**
37 **special committee should be appointed under Rule 11(f),**
38 **the complainant must be notified that he or she has no**
39 **right to seek review of the decision. If there was a**
40 **dissent, the petitioner must be informed that he or she**
41 **can file a petition for review under Rule 21(b) solely**
42 **on the issue of whether a special committee should be**
43 **appointed.**

44 **(f) Public Availability of Judicial-Council Decision.**
45 **Materials related to the council's decision must be**
46 **made public to the extent, at the time, and in the**
47 **manner set forth in Rule 24.**
48

Commentary on Rule 19

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

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

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

- (a) **Rights of Subject Judge.** Within 21 days after the filing of the report of a special committee, the subject judge may send a written response to the members of the judicial council. The judge must also be given an opportunity to present argument through counsel, written or oral, as determined by the council. The judge must not otherwise communicate with council members about the matter.
- (b) **Judicial-Council Action.**
- (1) **Discretionary actions.** Subject to the judge's rights set forth in subsection (a), the judicial council may:
- (A) **dismiss the complaint because:**
- (i) even if the claim is true, the claimed conduct is not conduct prejudicial to the effective and expeditious administration of the business of the courts and does not indicate a mental or physical disability resulting in inability to discharge the duties of office;
- (ii) the complaint is directly related to the merits of a decision or procedural ruling;
- (iii) the facts on which the complaint is based have not been established; or
- (iv) the complaint is otherwise not appropriate for consideration under 28 U.S.C. §§ 351-364.
- (B) **conclude the proceeding because appropriate corrective action has been taken or intervening events have made the proceeding unnecessary.**
- (C) **refer the complaint to the Judicial Conference of the United States with the council's recommendations for action.**

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

1 Rules 13 through 16 for the conduct of an investigation
2 by a special committee.

3 (d) Council Vote. Council action must be taken by a
4 majority of those members of the council who are not
5 disqualified. A decision to remove a bankruptcy judge
6 from office requires a majority vote of all the members
7 of the council.

8 (e) Recommendation for Fee Reimbursement. If the complaint
9 has been finally dismissed or concluded under (b) (1) (A)
10 or (B) of this Rule, and if the subject judge so
11 requests, the judicial council may recommend that the
12 Director of the Administrative Office of the United
13 States Courts use funds appropriated to the Judiciary
14 to reimburse the judge for reasonable expenses incurred
15 during the investigation, when those expenses would not
16 have been incurred but for the requirements of the Act
17 and these Rules. Reasonable expenses include attorneys'
18 fees and expenses related to a successful defense or
19 prosecution of a proceeding under Rule 21(a) or (b).

20 (f) Council Action. Council action must be by written
21 order. Unless the council finds that extraordinary
22 reasons would make it contrary to the interests of
23 justice, the order must be accompanied by a memorandum
24 setting forth the factual determinations on which it is
25 based and the reasons for the council action. The order
26 and the supporting memorandum must be provided to the
27 complainant, the subject judge, and the Judicial
28 Conference Committee on Judicial Conduct and
29 Disability. The complainant and the subject judge must
30 be notified of any right to review of the judicial
31 council's decision as provided in Rule 21(b).
32

33
34 Commentary on Rule 20
35

36 This Rule is largely adapted from the Illustrative Rules.
37

38 Rule 20(a) provides that within twenty-one days after the
39 filing of the report of a special committee, the subject
40 judge may address a written response to all of the members
41 of the judicial council. The subject judge must also be
42 given an opportunity to present oral argument to the
43 council, personally or through counsel. The subject judge
44 may not otherwise communicate with council members about the
45 matter.
46

47 Rule 20(c) provides that if the judicial council decides
48 to conduct an additional investigation, the subject judge

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

10
11 Rule 20(d) provides that council action must be taken by
12 a majority of those members of the council who are not
13 disqualified, except that a decision to remove a bankruptcy
14 judge from office requires a majority of all the members of
15 the council as required by 28 U.S.C. § 152(e). However, it
16 is inappropriate to apply a similar rule to the less severe
17 actions that a judicial council may take under the Act. If
18 some members of the council are disqualified in the matter,
19 their disqualification should not be given the effect of a
20 vote against council action.

21
22 With regard to Rule 20(e), the judicial council, on the
23 request of the subject judge, may recommend to the Director
24 of the Administrative Office of the United States Courts
25 that the subject judge be reimbursed for reasonable
26 expenses, including attorneys' fees, incurred. The judicial
27 council has the authority to recommend such reimbursement
28 where, after investigation by a special committee, the
29 complaint has been finally dismissed or concluded under
30 subsection (b)(1)(A) or (B) of this Rule. It is
31 contemplated that such reimbursement may be provided for the
32 successful prosecution or defense of a proceeding under Rule
33 21(a) or (b), in other words, one that results in a Rule
34 20(b)(1)(A) or (B) dismissal or conclusion.

35
36 Rule 20(f) requires that council action normally be
37 supported with a memorandum of factual determinations and
38 reasons and that notice of the action be given to the
39 complainant and the subject judge. Rule 20(f) also requires
40 that the notification to the complainant and the subject
41 judge include notice of any right to petition for review of
42 the council's decision under Rule 21(b).

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

21. Committee on Judicial Conduct and Disability

- (a) Review by Committee. The Committee on Judicial Conduct and Disability, consisting of seven members, considers and disposes of all petitions for review under (b) of this Rule, in conformity with the Committee's jurisdictional statement. Its disposition of petitions for review is ordinarily final. The Judicial Conference of the United States may, in its sole discretion, review any such Committee decision, but a complainant or subject judge does not have a right to this review.
- (b) Reviewable Matters.
- (1) Upon petition. A complainant or subject judge may petition the Committee for review of a judicial-council order entered in accordance with:
- (A) Rule 20(b)(1)(A), (B), (D), or (E); or
- (B) Rule 19(b)(1) or (4) if one or more members of the judicial council dissented from the order on the ground that a special committee should be appointed under Rule 11(f); in that event, the Committee's review will be limited to the issue of whether a special committee should be appointed.
- (2) Upon Committee's initiative. At its initiative and in its sole discretion, the Committee may review any judicial-council order entered under Rule 19(b)(1) or (4), but only to determine whether a special committee should be appointed. Before undertaking the review, the Committee must invite that judicial council to explain why it believes the appointment of a special committee is unnecessary, unless the reasons are clearly stated in the judicial council's order denying the petition for review. If the Committee believes that it would benefit from a submission by the subject judge, it may issue an appropriate request. If the Committee determines that a special committee should be appointed, the Committee must issue a written decision giving its reasons.
- (c) Committee Vote. Any member of the Committee from the same circuit as the subject judge is disqualified from considering or voting on a petition for review. Committee decisions under (b) of this Rule must be by majority vote of the qualified Committee members. If only six members are qualified to vote on a petition

1 for review, the decision must be made by a majority of
2 a panel of five members drawn from a randomly selected
3 list that rotates after each decision by a panel drawn
4 from the list. The members who will determine the
5 petition must be selected based on committee membership
6 as of the date on which the petition is received. Those
7 members selected to hear the petition should serve in
8 that capacity until final disposition of the petition,
9 whether or not their term of committee membership has
10 ended. If only four members are qualified to vote, the
11 Chief Justice must appoint, if available, an ex-member
12 of the Committee or, if not, another United States
13 judge to consider the petition.

- 14 (d) Additional Investigation. Except in extraordinary
15 circumstances, the Committee will not conduct an
16 additional investigation. The Committee may return the
17 matter to the judicial council with directions to
18 undertake an additional investigation. If the Committee
19 conducts an additional investigation, it will exercise
20 the powers of the Judicial Conference under 28 U.S.C.
21 § 331.
- 22 (e) Oral Argument; Personal Appearance. There is ordinarily
23 no oral argument or personal appearance before the
24 Committee. In its discretion, the Committee may permit
25 written submissions from the complainant or subject
26 judge.
- 27 (f) Committee Decisions. Committee decisions under this
28 Rule must be transmitted promptly to the Judicial
29 Conference of the United States. Other distribution
30 will be by the Administrative Office at the direction
31 of the Committee chair.
- 32 (g) Finality. All orders of the Judicial Conference or of
33 the Committee (when the Conference does not exercise
34 its power of review) are final.

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Commentary on Rule 21

This Rule is largely self-explanatory.

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

Rules 21(b)(1)(B) and (b)(2) are intended to fill a jurisdictional gap as to review of dismissals or conclusions

1 of complaints under Rule 19(b)(1) or (4). Where one or more
2 members of a judicial council reviewing a petition have
3 dissented on the ground that a special committee should have
4 been appointed, the complainant or subject judge has the
5 right to petition for review by the Committee but only as to
6 that issue. Under Rule 21(b)(2), the Judicial Conference
7 Committee on Judicial Conduct and Disability may review such
8 a dismissal or conclusion in its sole discretion, whether or
9 not such a dissent occurred, and only as to the appointment
10 of a special committee. No party has a right to such
11 review, and such review will be rare.
12

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

21 Under this Rule, all Committee decisions are final in
22 that they are unreviewable unless the Judicial Conference,
23 in its discretion, decides to review a decision. Committee
24 decisions, however, do not necessarily constitute final
25 action on a complaint for purposes of Rule 24.
26
27

28 **22. Procedures for Review**

29 **(a) Filing a Petition for Review.** A petition for review of
30 a judicial-council decision may be filed by sending a
31 brief written statement to the Judicial Conference
32 Committee on Judicial Conduct and Disability, addressed
33 to:

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

36 **Attn: Office of General Counsel**

37 **Administrative Office of the United States Courts**

38 **One Columbus Circle, NE**

39 **Washington, D.C. 20544**

40 **The Administrative Office will send a copy of the**
41 **petition to the complainant or subject judge, as the**
42 **case may be.**

43 **(b) Form and Contents of Petition for Review.** No particular
44 form is required. The petition must contain a short
45 statement of the basic facts underlying the complaint,
46 the history of its consideration before the appropriate
47 judicial council, a copy of the judicial council's

1 decision, and the grounds on which the petitioner seeks
2 review. The petition for review must specify the date
3 and docket number of the judicial-council order for
4 which review is sought. The petitioner may attach any
5 documents or correspondence arising in the course of
6 the proceeding before the judicial council or its
7 special committee. A petition should not normally
8 exceed 20 pages plus necessary attachments.

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

11 (d) Copies. Seven copies of the petition for review must be
12 submitted, at least one of which must be signed by the
13 petitioner or his or her attorney. If the petitioner
14 submits a signed declaration of inability to pay the
15 expense of duplicating the petition, the Administrative
16 Office must accept the original petition and must
17 reproduce copies at its expense.

18 (e) Action on Receipt of Petition for Review. The
19 Administrative Office must acknowledge receipt of a
20 petition for review submitted under this Rule, notify
21 the chair of the Judicial Conference Committee on
22 Judicial Conduct and Disability, and distribute the
23 petition to the members of the Committee for their
24 deliberation.

25
26
27 Commentary on Rule 22

28
29 Rule 22 is self-explanatory.

30
31
32 **ARTICLE VII. MISCELLANEOUS RULES**

33
34 **23. Confidentiality**

35 (a) General Rule. The consideration of a complaint by the
36 chief judge, a special committee, the judicial council,
37 or the Judicial Conference Committee on Judicial
38 Conduct and Disability is confidential. Information
39 about this consideration must not be disclosed by any
40 judge or employee of the judicial branch or by any
41 person who records or transcribes testimony except as
42 allowed by these Rules. In extraordinary circumstances,
43 a chief judge may disclose the existence of a
44 proceeding under these Rules when necessary to maintain
45 public confidence in the federal judiciary's ability to
46 redress misconduct or disability.

- 1 (b) Files. All files related to complaints must be
2 separately maintained with appropriate security
3 precautions to ensure confidentiality.
- 4 (c) Disclosure in Decisions. Except as otherwise provided
5 in Rule 24, written decisions of the chief judge, the
6 judicial council, or the Judicial Conference Committee
7 on Judicial Conduct and Disability, and dissenting
8 opinions or separate statements of members of the
9 council or Committee may contain information and
10 exhibits that the authors consider appropriate for
11 inclusion, and the information and exhibits may be made
12 public.
- 13 (d) Availability to Judicial Conference. On request of the
14 Judicial Conference or its Committee on Judicial
15 Conduct and Disability, the circuit clerk must furnish
16 any requested records related to a complaint.
- 17 (e) Availability to District Court. If the judicial council
18 directs the initiation of proceedings for removal of a
19 magistrate judge under Rule 20(b)(1)(D)(iii), the
20 circuit clerk must provide to the chief judge of the
21 district court copies of the report of the special
22 committee and any other documents and records that were
23 before the judicial council at the time of its
24 decision. On request of the chief judge of the district
25 court, the judicial council may authorize release to
26 that chief judge of any other records relating to the
27 investigation.
- 28 (f) Impeachment Proceedings. If the Judicial Conference
29 determines that consideration of impeachment may be
30 warranted, it must transmit the record of all relevant
31 proceedings to the Speaker of the House of
32 Representatives.
- 33 (g) Subject Judge's Consent. If both the subject judge and
34 the chief judge consent in writing, any materials from
35 the files may be disclosed to any person. In any such
36 disclosure, the chief judge may require that the
37 identity of the complainant, or of witnesses in an
38 investigation conducted by a chief judge, a special
39 committee, or the judicial council, not be revealed.
- 40 (h) Disclosure in Special Circumstances. The Judicial
41 Conference, its Committee on Judicial Conduct and
42 Disability, or a judicial council may authorize
43 disclosure of information about the consideration of a
44 complaint, including the papers, documents, and
45 transcripts relating to the investigation, to the
46 extent that disclosure is justified by special
47 circumstances and is not prohibited by the Act.
48 Disclosure may be made to judicial researchers engaged

1 in the study or evaluation of experience under the Act
2 and related modes of judicial discipline, but only
3 where the study or evaluation has been specifically
4 approved by the Judicial Conference or by the Judicial
5 Conference Committee on Judicial Conduct and
6 Disability. Appropriate steps must be taken to protect
7 the identities of the subject judge, the complainant,
8 and witnesses from public disclosure. Other appropriate
9 safeguards to protect against the dissemination of
10 confidential information may be imposed.

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

15 (j) Assistance and Consultation. Nothing in this Rule
16 precludes the chief judge or judicial council acting on
17 a complaint filed under the Act from seeking the help
18 of qualified staff or from consulting other judges who
19 may be helpful in the disposition of the complaint.
20

21
22 Commentary on Rule 23
23

24 Rule 23 was adapted from the Illustrative Rules.
25

26 The Act applies a rule of confidentiality to "papers,
27 documents, and records of proceedings related to
28 investigations conducted under this chapter" and states that
29 they may not be disclosed "by any person in any proceeding,"
30 with enumerated exceptions. 28 U.S.C. § 360(a). Three
31 questions arise: Who is bound by the confidentiality rule,
32 what proceedings are subject to the rule, and who is within
33 the circle of people who may have access to information
34 without breaching the rule?
35

36 With regard to the first question, Rule 23(a) provides
37 that judges, employees of the judicial branch, and those
38 persons involved in recording proceedings and preparing
39 transcripts are obliged to respect the confidentiality
40 requirement. This of course includes subject judges who do
41 not consent to identification under Rule 23(i).
42

43 With regard to the second question, Rule 23(a) applies
44 the rule of confidentiality broadly to consideration of a
45 complaint at any stage.
46

47 With regard to the third question, there is no barrier of
48 confidentiality among a chief judge, judicial council, the

1 Judicial Conference, and the Judicial Conference Committee
2 on Judicial Conduct and Disability. Each may have access to
3 any of the confidential records for use in their
4 consideration of a referred matter, a petition for review,
5 or monitoring the administration of the Act. A district
6 court may have similar access if the judicial council orders
7 the district court to initiate proceedings to remove a
8 magistrate judge from office, and Rule 23(e) so provides.
9

10 In extraordinary circumstances, a chief judge may
11 disclose the existence of a proceeding under these Rules.
12 The disclosure of such information in high-visibility or
13 controversial cases is to reassure the public that the
14 federal judiciary is capable of redressing judicial
15 misconduct or disability. Moreover, the confidentiality
16 requirement does not prevent the chief judge from
17 "communicat[ing] orally or in writing with . . . [persons]
18 who may have knowledge of the matter," as part of a limited
19 inquiry conducted by the chief judge under Rule 11(b).
20

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

35 The Act makes clear that there is a barrier of
36 confidentiality between the judicial branch and the
37 legislative. It provides that material may be disclosed to
38 Congress only if it is believed necessary to an impeachment
39 investigation or trial of a judge. 28 U.S.C. § 360(a)(2).
40 Accordingly, Section 355(b) of the Act requires the Judicial
41 Conference to transmit the record of the proceeding to the
42 House of Representatives if the Conference believes that
43 impeachment of a subject judge may be appropriate. Rule
44 23(f) implements this requirement.
45

46 The Act provides that confidential materials may be
47 disclosed if authorized in writing by the subject judge and
48 by the chief judge. 28 U.S.C. § 360(a)(3). Rule 23(g)

1 implements this requirement. Once the subject judge has
2 consented to the disclosure of confidential materials
3 related to a complaint, the chief judge ordinarily will
4 refuse consent only to the extent necessary to protect the
5 confidentiality interests of the complainant or of witnesses
6 who have testified in investigatory proceedings or who have
7 provided information in response to a limited inquiry
8 undertaken pursuant to Rule 11. It will generally be
9 necessary, therefore, for the chief judge to require that
10 the identities of the complainant or of such witnesses, as
11 well as any identifying information, be shielded in any
12 materials disclosed, except insofar as the chief judge has
13 secured the consent of the complainant or of a particular
14 witness to disclosure, or there is a demonstrated need for
15 disclosure of the information that, in the judgment of the
16 chief judge, outweighs the confidentiality interest of the
17 complainant or of a particular witness (as may be the case
18 where the complainant is delusional or where the complainant
19 or a particular witness has already demonstrated a lack of
20 concern about maintaining the confidentiality of the
21 proceedings).

22
23 Rule 23(h) permits disclosure of additional information
24 in circumstances not enumerated. For example, disclosure
25 may be appropriate to permit a prosecution for perjury based
26 on testimony given before a special committee. Another
27 example might involve evidence of criminal conduct by a
28 judge discovered by a special committee.

29
30 Subsection (h) also permits the authorization of
31 disclosure of information about the consideration of a
32 complaint, including the papers, documents, and transcripts
33 relating to the investigation, to judicial researchers
34 engaged in the study or evaluation of experience under the
35 Act and related modes of judicial discipline. The Rule
36 envisions disclosure of information from the official record
37 of complaint proceedings to a limited category of persons
38 for appropriately authorized research purposes only, and
39 with appropriate safeguards to protect individual identities
40 in any published research results that ensue. In
41 authorizing disclosure, the judicial council may refuse to
42 release particular materials when such release would be
43 contrary to the interests of justice, or that constitute
44 purely internal communications. The Rule does not envision
45 disclosure of purely internal communications between judges
46 and their colleagues and staff.
47

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

17 **24. Public Availability of Decisions**

- 18 **(a) General Rule; Specific Cases.** When final action has
19 been taken on a complaint and it is no longer subject
20 to review, all orders entered by the chief judge and
21 judicial council, including any supporting memoranda
22 and any dissenting opinions or separate statements by
23 members of the judicial council, must be made public,
24 with the following exceptions:
25 (1) if the complaint is finally dismissed under Rule
26 11(c) without the appointment of a special
27 committee, or if it is concluded under Rule 11(d)
28 because of voluntary corrective action, the
29 publicly available materials must not disclose the
30 name of the subject judge without his or her
31 consent.
32 (2) if the complaint is concluded because of
33 intervening events, or dismissed at any time after
34 a special committee is appointed, the judicial
35 council must determine whether the name of the
36 subject judge should be disclosed.
37 (3) if the complaint is finally disposed of by a
38 privately communicated censure or reprimand, the
39 publicly available materials must not disclose
40 either the name of the subject judge or the text of
41 the reprimand.
42 (4) if the complaint is finally disposed of under Rule
43 20(b) (1) (D) by any action other than private
44 censure or reprimand, the text of the dispositive
45 order must be included in the materials made
46 public, and the name of the subject judge must be
47 disclosed.

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

4 (b) Manner of Making Public. The orders described in (a)
5 must be made public by placing them in a publicly
6 accessible file in the office of the circuit clerk or
7 by placing the orders on the court's public website. If
8 the orders appear to have precedential value, the chief
9 judge may cause them to be published. In addition, the
10 Judicial Conference Committee on Judicial Conduct and
11 Disability will make available on the Federal
12 Judiciary's website, www.uscourts.gov, selected
13 illustrative orders described in paragraph (a),
14 appropriately redacted, to provide additional
15 information to the public on how complaints are
16 addressed under the Act.

17 (c) Orders of Judicial Conference Committee. Orders of this
18 Committee constituting final action in a complaint
19 proceeding arising from a particular circuit will be
20 made available to the public in the office of the clerk
21 of the relevant court of appeals. The Committee will
22 also make such orders available on the Federal
23 Judiciary's website, www.uscourts.gov. When authorized
24 by the Committee, other orders related to complaint
25 proceedings will similarly be made available.

26 (d) Complaints Referred to the Judicial Conference of the
27 United States. If a complaint is referred to the
28 Judicial Conference under Rule 20(b)(1)(C) or 20(b)(2),
29 materials relating to the complaint will be made public
30 only if ordered by the Judicial Conference.

31
32
33 **Commentary on Rule 24**

34
35 Rule 24 is adapted from the Illustrative Rules and the
36 recommendations of the Breyer Committee.

37
38 The Act requires the circuits to make available only
39 written orders of a judicial council or the Judicial
40 Conference imposing some form of sanction. 28 U.S.C. §
41 360(b). The Judicial Conference, however, has long
42 recognized the desirability of public availability of a
43 broader range of orders and other materials. In 1994, the
44 Judicial Conference "urge[d] all circuits and courts covered
45 by the Act to submit to the West Publishing Company, for
46 publication in Federal Reporter 3d, and to Lexis all orders
47 issued pursuant to [the Act] that are deemed by the issuing
48 circuit or court to have significant precedential value to

1 other circuits and courts covered by the Act." Report of
2 the Proceedings of the Judicial Conference of the United
3 States, Mar. 1994, at 28. Following this recommendation,
4 the 2000 revision of the Illustrative Rules contained a
5 public availability provision very similar to Rule 24. In
6 2002, the Judicial Conference again voted to encourage the
7 circuits "to submit non-routine public orders disposing of
8 complaints of judicial misconduct or disability for
9 publication by on-line and print services." Report of the
10 Proceedings of the Judicial Conference of the United States,
11 Sept. 2002, at 58. The Breyer Committee Report further
12 emphasized that "[p]osting such orders on the judicial
13 branch's public website would not only benefit judges
14 directly, it would also encourage scholarly commentary and
15 analysis of the orders." Breyer Committee Report, 239
16 F.R.D. at 216. With these considerations in mind, Rule 24
17 provides for public availability of a wide range of
18 materials.
19

20 Rule 24 provides for public availability of orders of the
21 chief judge, the judicial council, and the Judicial
22 Conference Committee on Judicial Conduct and Disability and
23 the texts of any memoranda supporting their orders, together
24 with any dissenting opinions or separate statements by
25 members of the judicial council. However, these orders and
26 memoranda are to be made public only when final action on
27 the complaint has been taken and any right of review has
28 been exhausted. The provision that decisions will be made
29 public only after final action has been taken is designed in
30 part to avoid public disclosure of the existence of pending
31 proceedings. Whether the name of the subject judge is
32 disclosed will then depend on the nature of the final
33 action. If the final action is an order predicated on a
34 finding of misconduct or disability (other than a privately
35 communicated censure or reprimand) the name of the judge
36 must be made public. If the final action is dismissal of
37 the complaint, the name of the subject judge must not be
38 disclosed. Rule 24(a)(1) provides that where a proceeding
39 is concluded under Rule 11(d) by the chief judge on the
40 basis of voluntary corrective action, the name of the
41 subject judge must not be disclosed. Shielding the name of
42 the subject judge in this circumstance should encourage
43 informal disposition.
44

45 If a complaint is dismissed as moot, or because
46 intervening events have made action on the complaint
47 unnecessary, after appointment of a special committee, Rule
48 24(a)(2) allows the judicial council to determine whether

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

6
7 Once a special committee has been appointed, and a
8 proceeding is concluded by the full council on the basis of
9 a remedial order of the council, Rule 24(a)(4) provides for
10 disclosure of the name of the subject judge.

11
12 Finally, Rule 24(a)(5) provides that the identity of the
13 complainant will be disclosed only if the chief judge so
14 orders. Identifying the complainant when the subject judge
15 is not identified would increase the likelihood that the
16 identity of the subject judge would become publicly known,
17 thus circumventing the policy of nondisclosure. It may not
18 always be practicable to shield the complainant's identity
19 while making public disclosure of the judicial council's
20 order and supporting memoranda; in some circumstances,
21 moreover, the complainant may consent to public
22 identification.

23 24 25 **25. Disqualification**

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

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

- 1 **judicial administration that one or more subject**
2 **judges be eligible to act.**
3 **(2) otherwise disqualified members may participate in**
4 **votes taken under (g) (1) (B) and (g) (1) (C).**
5 **(h) Disqualification of Members of the Judicial Conference**
6 **Committee. No member of the Judicial Conference**
7 **Committee on Judicial Conduct and Disability is**
8 **disqualified from participating in any proceeding under**
9 **the Act or these Rules because of consultations with a**
10 **chief judge, a member of a special committee, or a**
11 **member of a judicial council about the interpretation**
12 **or application of the Act or these Rules, unless the**
13 **member believes that the consultation would prevent**
14 **fair-minded participation.**
15
16

17 Commentary on Rule 25
18

19 Rule 25 is adapted from the Illustrative Rules.
20

21 Subsection (a) provides the general rule for
22 disqualification. Of course, a judge is not disqualified
23 simply because the subject judge is on the same court.
24 However, this subsection recognizes that there may be cases
25 in which an appearance of bias or prejudice is created by
26 circumstances other than an association with the subject
27 judge as a colleague. For example, a judge may have a
28 familial relationship with a complainant or subject judge.
29 When such circumstances exist, a judge may, in his or her
30 discretion, conclude that disqualification is warranted.
31

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

1 While a subject judge is barred by Rule 25(b) from
2 participating in the disposition of the complaint in which
3 he or she is named, Rule 25(e) recognizes that participation
4 in proceedings arising under the Act or these Rules by a
5 judge who is the subject of a special committee
6 investigation may lead to an appearance of self-interest in
7 creating substantive and procedural precedents governing
8 such proceedings; Rule 25(e) bars such participation.
9

10 Under the Act, a complaint against the chief judge is to
11 be handled by "that circuit judge in regular active service
12 next senior in date of commission." 28 U.S.C. § 351(c).
13 Rule 25(f) provides that seniority among judges other than
14 the chief judge is to be determined by date of commission,
15 with the result that complaints against the chief judge may
16 be routed to a former chief judge or other judge who was
17 appointed earlier than the chief judge. The Rules do not
18 purport to prescribe who is to preside over meetings of the
19 judicial council. Consequently, where the presiding member
20 of the judicial council is disqualified from participating
21 under these Rules, the order of precedence prescribed by
22 Rule 25(f) for performing "the duties and responsibilities
23 of the chief circuit judge under these Rules" does not apply
24 to determine the acting presiding member of the judicial
25 council. That is a matter left to the internal rules or
26 operating practices of each judicial council. In most cases
27 the most senior active circuit judge who is a member of the
28 judicial council and who is not disqualified will preside.
29

30 Sometimes a single complaint is filed against a large
31 group of judges. If the normal disqualification rules are
32 observed in such a case, no court of appeals judge can serve
33 as acting chief judge of the circuit, and the judicial
34 council will be without appellate members. Where the
35 complaint is against all circuit and district judges, under
36 normal rules no member of the judicial council can perform
37 the duties assigned to the council under the statute.
38

39 A similar problem is created by successive complaints
40 arising out of the same underlying grievance. For example,
41 a complainant files a complaint against a district judge
42 based on alleged misconduct, and the complaint is dismissed
43 by the chief judge under the statute. The complainant may
44 then file a complaint against the chief judge for dismissing
45 the first complaint, and when that complaint is dismissed by
46 the next senior judge, still a third complaint may be filed.
47 The threat is that the complainant will bump down the
48 seniority ladder until, once again, there is no member of

1 the court of appeals who can serve as acting chief judge for
2 the purpose of the next complaint. Similarly, complaints
3 involving the merits of litigation may involve a series of
4 decisions in which many judges participated or in which a
5 rehearing en banc was denied by the court of appeals, and
6 the complaint may name a majority of the judicial council as
7 subject judges.

8
9 In recognition that these multiple-judge complaints are
10 virtually always meritless, the judicial council is given
11 discretion to determine: (1) whether it is necessary,
12 appropriate, and in the interest of sound judicial
13 administration to permit the chief judge to dispose of a
14 complaint where it would otherwise be impossible for any
15 active circuit judge in the circuit to act, and (2) whether
16 it is necessary, appropriate, and in the interest of sound
17 judicial administration, after appropriate findings as to
18 need and justification are made, to permit subject judges of
19 the judicial council to participate in the disposition of a
20 petition for review where it would otherwise be impossible
21 to obtain a quorum.

22
23 Applying a rule of necessity in these situations is
24 consistent with the appearance of justice. See, e.g., In re
25 Complaint of Doe, 2 F.3d 308 (8th Cir. Jud. Council 1993)
26 (invoking the rule of necessity); In re Complaint of
27 Judicial Misconduct, No. 91-80464 (9th Cir. Jud. Council
28 1992) (same). There is no unfairness in permitting the
29 chief judge to dispose of a patently insubstantial complaint
30 that names all active circuit judges in the circuit.

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

42
43 In the unlikely event that a quorum of the judicial
44 council cannot be obtained to consider the report of a
45 special committee, it would normally be necessary to request
46 a transfer under Rule 26.

1 Rule 25(h) recognizes that the jurisdictional statement
2 of the Judicial Conference Committee contemplates
3 consultation between members of the Committee and judicial
4 participants in proceedings under the Act and these Rules.
5 Such consultation should not automatically preclude
6 participation by a member in that proceeding.
7
8

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

10 **In exceptional circumstances, a chief judge or a judicial**
11 **council may ask the Chief Justice to transfer a proceeding**
12 **based on a complaint identified under Rule 5 or filed under**
13 **Rule 6 to the judicial council of another circuit. The**
14 **request for a transfer may be made at any stage of the**
15 **proceeding before a reference to the Judicial Conference**
16 **under Rule 20(b)(1)(C) or 20(b)(2) or a petition for review**
17 **is filed under Rule 22. Upon receiving such a request, the**
18 **Chief Justice may refuse the request or select the**
19 **transferee judicial council, which may then exercise the**
20 **powers of a judicial council under these Rules.**
21
22

23 **Commentary on Rule 26**

24
25 Rule 26 is new; it implements the Breyer Committee's
26 recommended use of transfers. Breyer Committee Report, 239
27 F.R.D. at 214-15.
28

29 Rule 26 authorizes the transfer of a complaint proceeding
30 to another judicial council selected by the Chief Justice.
31 Such transfers may be appropriate, for example, in the case
32 of a serious complaint where there are multiple
33 disqualifications among the original council, where the
34 issues are highly visible and a local disposition may weaken
35 public confidence in the process, where internal tensions
36 arising in the council as a result of the complaint render
37 disposition by a less involved council appropriate, or where
38 a complaint calls into question policies or governance of
39 the home court of appeals. The power to effect a transfer
40 is lodged in the Chief Justice to avoid disputes in a
41 council over where to transfer a sensitive matter and to
42 ensure that the transferee council accepts the matter.
43

44 Upon receipt of a transferred proceeding, the transferee
45 council shall determine the proper stage at which to begin
46 consideration of the complaint -- for example, reference to

1 the transferee chief judge, appointment of a special
2 committee, etc.
3
4

5 **27. Withdrawal of Complaints and Petitions for**
6 **Review**

- 7 (a) **Complaint Pending Before Chief Judge.** With the chief
8 judge's consent, a complainant may withdraw a complaint
9 that is before the chief judge for a decision under
10 Rule 11. The withdrawal of a complaint will not prevent
11 a chief judge from identifying or having to identify a
12 complaint under Rule 5 based on the withdrawn
13 complaint.
14 (b) **Complaint Pending before Special Committee or Judicial**
15 **Council.** After a complaint has been referred to a
16 special committee for investigation and before the
17 committee files its report, the complainant may
18 withdraw the complaint only with the consent of both
19 the subject judge and either the special committee or
20 the judicial council.
21 (c) **Petition for Review.** A petition for review addressed to
22 a judicial council under Rule 18, or the Judicial
23 Conference Committee on Judicial Conduct and Disability
24 under Rule 22 may be withdrawn if no action on the
25 petition has been taken.
26
27

28 **Commentary on Rule 27**
29

30 Rule 27 is adapted from the Illustrative Rules and treats
31 the complaint proceeding, once begun, as a matter of public
32 business rather than as the property of the complainant.
33 Accordingly, the chief judge or the judicial council remains
34 responsible for addressing any complaint under the Act, even
35 a complaint that has been formally withdrawn by the
36 complainant.
37

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

46 If the chief judge appoints a special committee, Rule
47 27(b) provides that the complaint may be withdrawn only with

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

10
11 With regard to all petitions for review, Rule 27(c)
12 grants the petitioner unrestricted authority to withdraw the
13 petition. It is thought that the public's interest in the
14 proceeding is adequately protected, because there will
15 necessarily have been a decision by the chief judge and
16 often by the judicial council as well in such a case.
17
18

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

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

31 **29. Effective Date**

32 **These Rules will become effective 30 days after promulgation**
33 **by the Judicial Conference of the United States.**
34
35