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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 **Commentary on Rule 9**

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



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  
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 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 **Commentary on Rule 17**

19  
20 This Rule is adapted from the Illustrative Rules and is  
21 self-explanatory. The provision for sending a copy of the  
22 special-committee report and accompanying statement to the  
23 Judicial Conference Committee is new.  
24  
25

## 26 **ARTICLE V. JUDICIAL-COUNCIL REVIEW**

### 27 **18. Petitions for Review of Chief Judge**

#### 28 **Dispositions Under Rule 11(c), (d), or (e)**

- 29 (a) Petitions for Review. After the chief judge issues an  
30 order under Rule 11(c), (d), or (e), a complainant or  
31 subject judge may petition the judicial council of the  
32 circuit to review the order. By rules promulgated under  
33 28 U.S.C. § 358, the judicial council may refer a  
34 petition for review filed under this Rule to a panel of  
35 no fewer than five members of the council, at least two  
36 of whom must be district judges.  
37  
38 (b) When to File; Form; Where to File. A petition for  
39 review must be filed in the office of the circuit clerk  
40 within 35 days of the date on the clerk's letter  
41 informing the parties of the chief judge's order. The  
42 petition should be in letter form, addressed to the  
43 circuit clerk, and in an envelope marked "Misconduct  
44 Petition" or "Disability Petition." The name of the  
45 subject judge must not be shown on the envelope. The  
46 letter should be typewritten or otherwise legible. It  
47 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 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 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.**  
29  
30

## 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